40/pt. 1-51/990

code of federal regulations

Protection of Environment

40

PARTS 1 TO 51

Revised as of July 1, 1990

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Protection of Environment

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PARTS 1 TO 51

Revised as of July 1, 1990

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OF GENERAL APPLICABILITY
AND FUTURE EFFECT

AS OF JULY 1, 1990

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National Archives and Records
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Cite this Code: **CFR**

To cite the regulations in this volume use title, part and section number. Thus, **40 CFR 1.1** *refers to title 40, part 1, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16.....as of January 1
Title 17 through Title 27.....as of April 1
Title 28 through Title 41.....as of July 1
Title 42 through Title 50.....as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule.

To determine whether a Code volume has been amended since its revision date (in this case, July 1, 1990), consult the "List of CFR Sections Affected (LSA)," which is issued monthly, and the "Cumulative List of Parts Affected," which appears in the Reader Aids section of the daily Federal Register. These two lists will identify the Federal Register page number of the latest amendment of any given rule.

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Each volume of the Code contains amendments published in the Federal Register since the last revision of that volume of the Code. Source citations for the regulations are referred to by volume number and page number of the Federal Register and date of publication. Publication dates and effective dates are usually not the same and care must be exercised by the user in determining the actual effective date. In instances where the effective date is beyond the cut-off date for the Code a note has been inserted to reflect the future effective date. In those instances where a regulation published in the Federal Register states a

date certain for expiration, an appropriate note will be inserted following the text.

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The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

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Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1973, consult either the List of CFR Sections Affected, 1949-1963, or 1964-1972, published in three separate volumes. For the period beginning January 1, 1973, a "List of CFR Sections Affected" is published at the end of each CFR volume.

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What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR Part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR Part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 523-4534.

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III). A list of CFR Titles, Chapters, and Parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

A List of CFR Sections Affected (LSA) is published monthly, keyed to the revision dates of the 50 CFR titles.

REPUBLICATION OF MATERIAL

There are no restrictions on the republication of material appearing in the Code of Federal Regulations.

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MARTHA L. GIRARD,
Director,
Office of the Federal Register.

July 2, 1990.

THIS TITLE

Title 40—PROTECTION OF ENVIRONMENT is composed of fifteen volumes. The parts in these volumes are arranged in the following order: Parts 1–51, Part 52, Parts 53–60, Parts 61–80, Parts 81–85, Parts 86–99, Parts 100–149, Parts 150–189, Parts 190–259, Parts 260–299, Parts 300–399, Parts 400–424, Parts 425–699, Parts 700–789 and Part 790 to End. A derivation table appears in the volume containing Parts 1–51. The contents of these volumes represent all current regulations codified under this title of the CFR as of July 1, 1990.

Chapter I—Environmental Protection Agency appears in all fifteen volumes. A Pesticide Tolerance Commodity/Chemical Index appears in Parts 150–189. A Toxic Substances Chemical—CAS Number Index appears in Parts 700–789 and Part 790 to End. Distribution Tables appear in the volumes containing Parts 100–149 and Parts 190–299. Redesignation Tables appear in the volumes containing Parts 1–51, Parts 81–85, Parts 86–99, Parts 150–189, and Parts 700–789. Regulations issued by the Council on Environmental Quality appear in the volume containing Part 790 to End.

For this volume, Jacquelyn J. Demsky was Chief Editor. The Code of Federal Regulations publication program is under the direction of Richard L. Claypoole, assisted by Alomha S. Morris.

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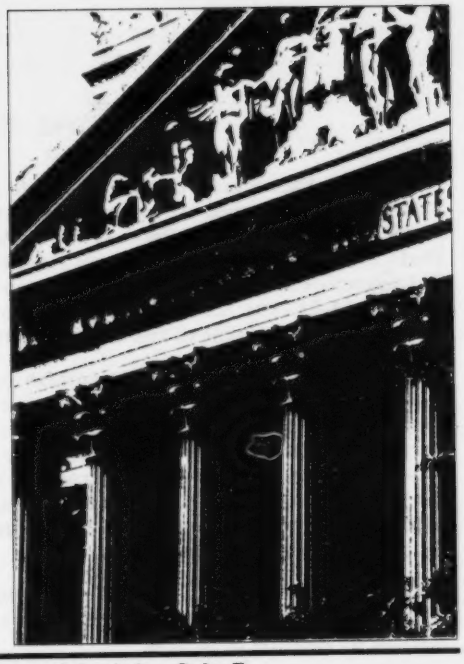

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Title 40—Protection of Environment

(This book contains parts 1 to 51)

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CHAPTER I—Environmental Protection Agency 1

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

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AUTHORITY: 5 U.S.C. 552.

SOURCE: 50 FR 26721, June 28, 1985, unless otherwise noted.

Subpart A—Introduction

§ 1.1 Creation and authority.

Reorganization Plan 3 of 1970, established the U.S. Environmental Protection Agency (EPA) in the Executive branch as an independent Agency, effective December 2, 1970.

§ 1.3 Purpose and functions.

The U.S. Environmental Protection Agency permits coordinated and effective governmental action to assure the protection of the environment by abating and controlling pollution on a systematic basis. Reorganization Plan 3 of 1970 transferred to EPA a variety of research, monitoring, standard setting, and enforcement activities related to pollution abatement and control to provide for the treatment of the environment as a single interrelated system. Complementary to these activities are the Agency's coordination and support of research and antipollution activities carried out by State and local governments, private and public groups, individuals, and educational institutions. EPA reinforces efforts among other Federal agencies with respect to the impact of their operations on the environment.

§ 1.5 Organization and general information.

(a) The U.S. Environmental Protection Agency's basic organization consists of Headquarters and 10 Regional Offices. EPA Headquarters in Washington, DC maintains overall planning, coordination and control of EPA programs. Regional Administrators head the Regional Offices and are responsible directly to the Administrator for the execution of the Agency's programs within the boundaries of their Regions.

(b) EPA's Directives System contains definitive statements of EPA's organization, policies, procedures, assignments of responsibility, and delegations of authority. Copies are available for public inspection and copying at the Management and Organization Division, 401 M Street SW., Washington, DC 20460. Information can be obtained from the Office of Public Affairs at all Regional Offices.

(c) EPA conducts procurement pursuant to the Federal Property and Administrative Services Act, the Federal Procurement Regulations, and implementing EPA regulations.

§ 1.7 Location of principal offices.

(a) The EPA Headquarters is in Washington, D.C. The mailing address is 401 M Street SW., Washington, DC 20460.

(b) The addresss of (and States served by) the EPA Regional Offices (see § 1.61) are:

(1) Region I, U.S. Environmental Protection Agency, Room 2203, John F. Kennedy Federal Building, Boston, MA 02203. (Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.)

(2) Region II, U.S. Environmental Protection Agency, Room 900, 26 Federal Plaza, New York, NY 10278. (New Jersey, New York, Puerto Rico, and the Virgin Islands.)

(3) Region III, U.S. Environmental Protection Agency, 841 Chestnut Street, Philadelphia, PA 19107. (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, and the District of Columbia.)

(4) Region IV, U.S. Environmental Protection Agency, 345 Courtland Street NE., Atlanta, GA 30365. (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.)

(5) Region V, U.S. Environmental Protection Agency, 230 South Dearborn Street, Chicago, IL 60604. (Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin.)

(6) Region VI, U.S. Environmental Protection Agency, 1201 Elm Street, Dallas, TX 75270. (Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.)

(7) Region VII, U.S. Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, KS 66101. (Iowa, Kansas, Missouri, and Nebraska.)

(8) Region VIII, U.S. Environmental Protection Agency, 999 18th street, One Denver Place, Denver, CO 80202. (Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.)

(9) Region IX, U.S. Environmental Protection Agency, 215 Fremont Street, San Francisco, CA 94105. (Arizona, California, Hawaii, Nevada, American Samoa, Trust Territories of the Pacific Islands, Guam, Wake Islands, and the Northern Marianas.)

(10) Region X, U.S. Environmental Protection Agency, 1200 Sixth Avenue, Seattle, WA 98101. (Alaska, Idaho, Oregon, and Washington.)

Subpart B—Headquarters

§ 1.21 General.

EPA Headquarters is comprised of:

(a) The Office of the Administrator;

(b) Two Associate Administrators and four staff offices which advise the Administrator on cross-cutting Agency headquarters and regional issues and conduct programs with respect to EPA's interface with other national and international governmental organizations;

(c) The Office of Inspector General;

(d) The Office of General Counsel; and

(e) Nine operational offices, each headed by an Assistant Administrator, responsible for carrying out EPA's major environmental and administrative programs.

§ 1.23 Office of the Administrator.

The Environmental Protection Agency is headed by an Administrator who is appointed by the President, by and with the consent of the Senate. The Administrator is responsible to the President for providing overall supervision to the Agency, and is assisted by a Deputy Administrator also appointed by the President, by and with the consent of the Senate. The Deputy Administrator assists the Administrator in the discharge of Agency duties and responsibilities and serves as Acting Administrator in the absence of the Administrator.

§ 1.25 Staff Offices.

(a) *Office of Administrative Law Judges.* The Office of Administrative Law Judges, under the supervision of the Chief Administrative Law Judge, is responsible for presiding over and conducting formal hearings, and issuance of initial decisions, if appropriate, in such proceedings. The Office provides supervision of the Administrative Law Judges, who operate as a component of the Office of Administrative Law Judges, in certain Agency Regional Offices. The Office provides the Agency Hearing Clerk.

(b) *Office of Civil Rights.* The Office of Civil Rights, under the supervision of a Director, serves as the principal adviser to the Administrator with re-

spect to EPA's civil rights programs. The Office develops policies, procedures, and regulations to implement the Agency's civil rights responsibilities, and provides direction to Regional and field activities in the Office's area of responsibilities. The Office implements and monitors the Agency's equal employment opportunity program; provides advice and guidance to EPA program officials and Regional Administrators on EEO matters; serves as advocate for furthering career opportunities for minorities and women; and processes complaints of discrimination for Agency disposition. The office assures:

(1) Maximum participation of minority business enterprises under EPA contracts and grants; (2) equal employment opportunity under Agency service contracts, construction contracts, and grants; (3) compliance with the Davis-Bacon Act and related acts; (4) compliance with the provisions of laws affecting Agency programs requiring nondiscrimination on account of age and physical handicap and; (5) services or benefits are dispensed under any program or activity receiving Agency financial assistance on a nondiscrimination basis.

(c) *Science Advisory Board.* The Science Advisory Board, under the direction of a Director, provides expert and independent advice to the Administrator on the scientific and technical issues facing the Agency. The Office advises on broad, scientific, technical and policy matters; assesses the results of specific research efforts; assists in identifying emerging environmental problems; and advises the Administrator on the cohesiveness and currency of the Agency's scientific programs.

(d) *Office of Small and Disadvantaged Business Utilization.* The Office of Small and Disadvantaged Business Utilization, under the supervision of a Director, is responsible for developing policy and procedures implementing the Agency's small and disadvantaged business utilization responsibilities. The Office provides information and assistance to components of the Agency's field offices responsible for carrying out related activities. The Office develops and implements a program to provide the maximum utilization of women-owned business enterprises in all aspects of EPA contract work; in collaboration with the Procurement and Contracts Management Division, develops programs to stimulate and improve involvement of small and minority business enterprises; and recommends the assignment of technical advisers to assist designated Procurement Center Representatives of the Small Business Administration in their duties. The Office represents EPA at hearings, interagency meetings, conferences and other appropriate forums on matters related to the advancement of these cited business enterprises in EPA's Federal Contracting Program.

§ 1.27 Offices of the Associate Administrators.

(a) *Office of International Activities.* The Office of International Activities, under the supervision of an Associate Administrator, provides direction to and supervision of the activities, programs, and staff assigned to the Office of International Activities. All of the functions and responsibilities of the Associate Administrator are Agency-wide, and apply to all international activities of the Agency. The Office develops policies and procedures for the direction of the Agency's international programs and activities, subject to U.S. foreign policy, and assures that adequate program, scientific, and legal inputs are provided. It conducts continuing evaluations of the Agency's international activities and makes appropriate recommendations to the Administrator. The Office advises the Administrator and principal Agency officials on the progress and effect of foreign and international programs and issues. The Office serves as the Administrator's representative in contacts with the Department of State and other Federal agencies concerned with international affairs. It negotiates arrangements or understandings relating to international cooperation with foreign organizations. The Office coordinates Agency international contacts and commitments: serves as the focal point for responding to requests for information relating to EPA international activities; and provides an ini-

tial point of contact for all foreign visitors. The Office maintains liaison with all relevant international organizations and provides representation where appropriate. It establishes Agency policy, and approves annual plans and modifications for travel abroad and attendance at international conferences and events. It provides administrative support for the general activities of the Executive Secretary of the U.S. side of the US-USSR/PRC agreements on environmental protection and of the U.S. Coordinator for the NATO Committee on the Challenges of Modern Society. The Office supervises these programs with respect to activities which are completely within the purview of EPA.

(b) *Office of Regional Operations.* The Office of Regional Operations, under the supervision of an Associate Administrator, reports directly to the Administrator and Deputy Administrator. The Office serves as the primary communications link between the Administrator/Deputy Administrator and the Regional Administrators. It provides a Headquarters focus for ensuring the involvement of Regions, or consideration of Regional views and needs, in all aspects of the Agency's work. The Office is responsible for assuring Regional participation in Agency decision-making processes, assessing the impact of Headquarters actions on Regional operations, and acting as ombudsman to resolve Regional problems on behalf of the Administrator. The Associate Administrator coordinates Regional issues, organizes Regional Administrator meetings and work groups; and coordinates Regional responses to specific issues. In addition, the Office is responsible for working with the Regional Offices to further the consistent application of national program policies by reinforcing existing administrative, procedural, and program policy mechanisms as well as through initiation of reviews of significant Regional issues of interest to the Administrator. It continually monitors responsiveness and compliance with established policies and technical needs through formal and informal contact and free dialogue. The Office initiates and conducts on-site field visits to study, analyze, and resolve problems of Regional, sectional, and national scale.

§ 1.29 Office of Inspector General.

The Office of Inspector General assumes overall responsibility for audits and investigations relating to EPA programs and operations. The Office provides leadership and coordination and recommends policies for other Agency activities designed to promote economy and efficiency and to prevent and detect fraud and abuse is such programs and operations. The Office of the Inspector General informs the Administrator, Deputy Administrator, and Congress of serious problems, abuses and deficiencies relating to EPA programs and operations, and of the necessity for and progress of corrective action; and reviews existing and proposed legislation and regulations to assess the impact on the administration of EPA's programs and operations. The Office recommends policies for, and conducts or coordinates relationships between, the Agency and other Federal, State and local government agencies, and nongovernmental entities on all matters relating to the promotion of economy and efficiency in the administration of, or the prevention and detection of fraud and abuse in, programs and operations administered by the Agency

§ 1.31 Office of General Counsel.

The Office of General Counsel is under the supervision of the General Counsel who serves as the primary legal adviser to the Administrator. The office provides legal services to all organizational elements of the Agency with respect to all Agency programs and activities and also provides legal opinions, legal counsel, and litigation support; and assists in the formulation and administration of the Agency's policies and programs as legal adviser.

§ 1.33 Office of Administration and Resources Management.

The Office of Administration and Resources Management is under the supervision of the Assistance Administrator for Administration and Resources Management who provides services to all of the programs and ac-

tivities of the Agency, except as may be specifically noted. In addition, the Assistant Administrator has primary responsibility Agencywide for policy and procedures governing the functional areas outlined below. The major functions of the Office include resources management and systems (including budget and financial management), personnel services, occupational health and safety, administrative services, organization and management analysis and systems development, information management and services, automated data processing systems, procurement through contracts and grants, and human resources management. This Office is the primary point of contact and manages Agencywide internal controls, audit resolution and follow up, and government-wide management improvement initiatives. In the performance of the above functions and responsibilities, the Assistant Administrator for Administration and Resources Management represents the Administrator in communications with the Office of Management and Budget, Office of Personnel Management, General Accounting Office, General Services Administration, Department of the Treasury, and other Federal agencies prescribing requirements for the conduct of Government budget, fiscal management and administrative activities.

(a) *Office of Administration and Resources Management, Research Triangle Park, North Carolina, (RTP).* The Office of Administration and Resources Management (OARM), RTP, under the supervision of a Director, provides services to all of the programs and activities at RTP and certain financial and automated data processing services Agencywide. The major functions of the Office include personnel services, financial management, procurement through contracts, library and other information services, general services (including safety and security, property and supply, printing, distribution, facilities and other administrative services) and providing both local RTP and Agencywide automated data processing systems services. The Director, OARM, RTP, supervises the Office of Administration, Financial Management and Data Processing, RTP.

(b) *Office of Administration, Cincinnati, Ohio.* The Office of Administration at Cincinnati, Ohio, under the supervision of a Director, provides and administers personnel, procurement, safety and security, property and supply, printing, distribution, facilities, and other administrative service programs at Cincinnati and other specified geographic locations.

(c) *Office of the Comptroller.* The Office of the Comptroller, under the supervision of the Comptroller, is responsible for Agencywide budget, resources management and financial management functions, including program analysis and planning; budget formulation, preparation and execution; funding allotments and allocations; and developing and maintaining accounting systems, fiscal controls, and systems for payroll and disbursements. The Assistant Administrator's resource systems responsibilities are administered by this Office.

(d) *Office of Administration.* The Office of Administration, under the supervision of a Director, is responsible for the development and conduct of programs for personnel policies, procedures and operations; organization and management systems, control, and services; facilities, property and space management; personnel and property security; policies, procedures, and operations related to procurement through grants, contracts, and interagency agreements; and occupational health and safety.

(e) *Office of Information Resources Management.* The Office of Information Resources Management (OIRM), under the supervision of a Director, provides for an information resource management program (IRM) consistent with the provisions of Pub. L. 96–511. The Office establishes policy, goals and objectives for implementation of IRM; develops annual and long-range plans and budgets for IRM functions and activities; and promotes IRM concepts throughout the Agency. The Office coordinates IRM activities; plans, develops and operates information systems and services in support of the Agency's management and administrative functions, and other Agency

programs and functions as required. The Office oversees the performance of these activities when carried out by other Agency components. The Office performs liaison for interagency sharing of information and coordinates IRM activities with OMB and GSA. The Office ensures compliance with requirements of Pub. L. 96-511 and other Federal laws, regulations, and guidelines relative to IRM; and chairs the Agency's IRM Steering Committee. The Office develops Agency policies and standards; and administers or oversees Agency programs for library systems and services, internal records management, and the automated collection, processing, storage, retrieval and transmission of data by or for Agency components and programs. The Office provides national program policy and technical guidance for: The acquisition of all information technology, systems and services by or for Agency components and programs, inculding those systems and services acquired by grantees and contractors using Agency funds; the operation of all Agency computers and telecommunications hardware and facilities; and the establishment and/or application of telecommunications and Federal information processing standards. The Office reviews and evaluates information systems and services, including office automation, which are operated by other Agency components; and sets standards for and approves the selection of Agency personnel who are responsible for the technical management of these activities. The Office coordinates its performance of these functions and activities with the Agency's information collection policies and budgets managed by the Office of Policy, Planning and Evaluation.

(f) *The Office of Human Resources Management.* The Office of Human Resources Management (OHRM), under the supervision of a Director, designs strategies, plans, and policies aimedat developing and training all employees, revitalizing EPA organizations, and matching the right people with the right jobs. The Office is responsible for developing and assuring implementation of policies and practices necessary for EPA to meet its present and future workforce needs. This includes consideration of the interrelationships between the environmental protection workforce needs of EPA and State governments. For Senior Executive Service (SES) personnel, SES candidates, Presidential Executive Interchange Participants, and Management Interns, OHRM establishes policies; assesses and projects Agency executive needs and workforce capabilities; creates, establishes, and implements training and development strategies and programs; provides the full range of personnel functions; supports the Performance Review Board (PRB) and the Executive Resources Board (ERB); and reassigns SES personnel with the concurrence of the ERB. For the areas of workforce management and employee and organizational development, OHRM develops strategies, plans, and policies; coordinates Agencywide implementation of those strategies, plans, and policies; and provides technical assistance to operating personnel offices and States. OHRM, in cooperation with the Office of the Comptroller, evaluates problems with previous workyear use, monitors current workyear utilization, and projects future workyear needs in coordination with the Agency's budget process. The Office is the lead office for coordination of human resources management with the Agency's Strategic Planning and Management System. The Office develops methodologies and procedures for evaluations of Agency human resources management activities; conducts evaluations of human resources management activities Agencywide; and carries out human resources management projects of special interest to Agency management. The Office coordinates its efforts with the Office of Administration (specifically the Personnel Management Division and the Management and Organization Division), the Office of the Comptroller, the Office of Information Resources Management, and the Office of Policy, Planning and Evaluation.

§ 1.35 Office of Enforcement and Compliance Monitoring.

The Office of Enforcement and Compliance Monitoring, under the supervision of the Assistant Administrator for Enforcement and Compliance Monitoring, serves as the principal adviser to the Administrator in matters concerning enforcement and compliance; and provides the principal direction and review of civil enforcement activities for air, water, waste, pesticides, toxics, and radiation. The Assistant Administrator reviews the efforts of each Assistant and Regional Administrator to assure that EPA develops and conducts a strong and consistent enforcement and compliance monitoring program. The Office manages the national criminal enforcement program; ensures coordination of media office administrative compliance programs, and civil and criminal enforcement activities; and provides technical expertise for enforcement activities.

§ 1.37 Office of External Affairs.

(a) *Office of Federal Activities.* The Office of Federal Activities is headed by a Director who reports to the Assistant Administrator for External Affairs and supervises all the functions of the Office. The Director acts as national program manager for five major programs that include:

(1) The review of other agency environmental impact statements and other major actions under the authority of Section 309 of the Clean Air Act;

(2) EPA compliance with the National Environmental Policy Act (NEPA) and related laws, directives, and Executive policies concerning special environmental areas and cultural resources;

(3) Compliance with Executive policy on American Indian affairs and the development of programs for environmental protection on Indian lands; and

(4) The development and oversight of national programs and internal policies, strategies, and procedures for implementing Executive Order 12088 and other administrative or statutory provisions concerning compliance with environmental requirements by Federal facilities. The Director chairs the Standing Committee on Implementation of Executive Order 12088. The Office serves as the Environmental Protection Agency's (EPA) principal point of contact and liaison with other Federal agencies and provides consultation and technical assistance to those agencies relating to EPA's areas of expertise and responsibility. The Office administers the filing and information system for all Federal Environmental Impact Statements under agreement with the Council on Environmental Quality (CEQ) and provides liaison with CEQ on this function and related matters of NEPA program administration. The Office provides a central point of information for EPA and the public on environmental impact assessment techniques and methodologies.

(b) *Office of Public Affairs.* The Office of Public Affairs is under the supervision of a Director who serves as chief spokesperson for the Agency and as a principal adviser, along with the Assistant Administrator for External Affairs, to the Adminstrator, Deputy Administrator, and Senior Management Officials, on public affairs aspects of the Agency's activities and programs. The Office of Public Affairs provides to the media adequate and timely information as well as responses to queries from the media on all EPA program activities. It assures that the policy of openness in all information matters, as enunciated by the Administrator, is honored in all respects. Develops publications to inform the general public of major EPA programs and activities; it also develops informational materials for internal EPA use in Headquarters and at the Regions, Labs and Field Offices. It maintains clearance systems and procedures for periodicals and nontechnical information developed by EPA for public distribution, and reviews all publications for public affairs interests. The Office of Public Affairs provides policy direction for, and coordination and oversight of EPA's community relations program. It provides a system for ensuring that EPA educates citizens and responds to their concerns about all environmental issues and assures that there are opportunities for public involvement in the resolution of problems. The Office

supervises the production of audiovisual materials, including graphics, radio and video materials, for the general public and for internal audiences, in support of EPA policies and programs. The Office provides program direction and professional review of the performance of public affairs functions in the Regional Offices of EPA, as well as at laboratories and other field offices. The Office of Public Affairs is responsible for reviewing interagency agreements and Headquarters purchase request requisitions expected to result in contracts in the area of public information and community relations. It develops proposals and reviews Headquarters grant applications under consideration when public affairs goals are involved.

(c) *Office of Legislative Analysis.* The Office of Legislative Analysis, under the supervision of a Director who serves in the capacity of Legislative Counsel, is responsible for legislative drafting and liaison activities relating to the Agency's programs. It exercises responsibility for legislative drafting; reports to the Office of Management and Budget and congressional committees on proposed legislation and pending and enrolled bills, as required by OMB Circular No. A-19 and Bulletin No. 72-6; provides testimony on legislation and other matters before congressional committees; and reviews transcripts of legislative hearings. It maintains liaison with the Office of Congressional Liaison on all Agency activities of interest to the Congress. The Office works closely with the staffs of various Assistant Administrators, Associate Administrators, Regional Administrators, and Staff Office Directors in accordance with established Agency procedures, in the development of the Agency's legislative program. The Office assists the Assistant Administrator for External Affairs and the Agency's senior policy officials in guiding legislative initiatives through the legislative process. It advises the Assistant Administrator for Administration and Resources Management in matters pertaining to appropriations legislation. It works closely with the Office of Federal Activities to assure compliance with Agency procedures for the preparation of environmental impact statements, in relation to proposed legislation and reports on legislation. The Office coordinates with the Office of Management and Budget, other agencies, and congressional staff members on matters within its area of responsibility; and develops suggested State and local environmental legislative proposals, using inputs provided by other Agency components. The Legislative Reference Library provides legislative research services for the Agency. The Library secures and furnishes congressional materials to all EPA employees and, if available, to other Government agencies and private organizations; and it also provides the service of securing, upon request, EPA reports and materials for the Congress.

(d) *Office of Congressional Liaison.* The Office of Congressional Liaison is under the supervision of a Director who serves as the principal adviser to the Administrator with respect to congressional activities. All of the functions and responsibilities of the Director are Agencywide and apply to the provision of services with respect to all of the programs and activities of the Agency. The Office serves as the principal point of congressional contact with the Agency and maintains an effective liaison with the Congress on Agency activities of interest to the Congress and, as necessary, maintains liaison with Agency Regional and field officials, other Government agencies, and public and private groups having an interest in legislative matters affecting the Agency. It assures the provision of prompt response to the Congress on all inquiries relating to activities of the Agency; and monitors and coordinates the continuing operating contacts between the staff of the Office of the Comptroller and staff of the Appropriations Subcommittees of Congress.

(e) *Office of Community and Intergovernmental Relations.* The Office of Community and Intergovernmental Relations is under the supervision of a Director who serves as the principal point of contact with public interest groups representing general purpose State and local governments, and is the principal source of advice and information for the Administrator and

the Assistant Administrator for External Affairs on intergovernmental relations. The Office maintains liaison on intergovernmental issues with the White House and Office of Management and Budget (OMB); identifies and seeks solutions to emerging intergovernmental issues; recommends and coordinates personal involvement by the Administrator and Deputy Administrator in relations with State, county, and local government officials; coordinates and assists Headquarters components in their handling of broad-gauged and issue-oriented intergovernmental problems. It works with the Regional Administrators and the Office of Regional Operations to encourage the adoption of improved methods for dealing effectively with State and local governments on specific EPA program initiatives; works with the Immediate Office of the Administrator, Office of Congressional Liaison, Office of Public Affairs, and the Regional Offices to develop and carry out a comprehensive liaison program; and tracks legislative initiatives which affect the Agency's intergovernmental relations. It advises and supports the Office Director, in implementing the President's Environmental Youth Awards program.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30359, Aug. 14, 1987]

§ 1.39 Office of Policy, Planning and Evaluation.

The Assistant Administrator for Policy, Planning and Evaluation services as principal adviser to the Administrator on Agency policy and planning issues and as such is responsible for supervision and management of the following: Policy analysis; standards and regulations; and management strategy and evaluation. The Assistant Administrator represents the Administrator with Congress and the Office of Management and Budget, and other Federal agencies prescribing requirements for conduct for Government management activities.

(a) *Office of Policy Analysis.* The Office of Policy Analysis is under the supervision of a Director who performs the following functions on an Agencywide basis: economic analysis of Agency programs, policies, standards, and regulations, including the estimation of abatement costs; research into developing new benefits models; benefit-cost analyses; impact assessments; intermediate and long-range strategic studies; consultation and analytical assistance in the areas described above to senior policy and program officials and other offices in the Agency; development and coordination proposals for major new Agency initiatives; liaison with other agencies; universities, and interest groups on major policy issues and development of a coordinated Agency position; and development of integrated pollution control strategies for selected industrial and geographical areas.

(b) *Office of Standards and Regulations.* The Office of Standards and Regulations is under the supervision of a Director who is responsible for: involving the Office of Policy, Planning and Evaluation (OPPE) in regulatory review; conducting technical and statistical analyses of proposed standards, regulations and guidelines; serving as the Agency focal point for identifying, developing and implementing alternatives to conventional "command and control" regulations; conducting analyses of Agency activities related to chemical substances and providing mechanisms for establishing regulatory priorities and resolving scientific issues affecting rulemaking; ensuring Agency compliance with the Paperwork Reduction Act; evaluating and reviewing all Agency information collection requests and activities, and, in cooperation with the Office of Administration and Resources Management and the Office of Management Systems and Evaluation, evaluating Agency management and uses of data for decision-making.

(c) *Office of Management Systems and Evaluation.* The Office of Management Systems and Evaluation is under the supervision of a Director who directs and coordinates the development, implementation and administration of Agencywide systems for planning, tracking, and evaluating the accomplishments of Agency programs. In consultation with other offices, the Office develops a long-range policy framework for Agency goals, and objectives, identifies strategies for

achieving goals, establishes timetables for objectives, and ensures that programs are evaluated against their accomplishments of goals.

§ 1.41 Office of Air and Radiation.

The Office of Air and Radiation is under supervision of the Assistant Administrator for Air and Radiation who serves as principal adviser to the Administrator in matters pertaining to air and radiation programs, and is responsible for the management of these EPA programs: Program policy development and evaluation; environmental and pollution sources' standards development; enforcement of standards; program policy guidance and overview, technical support or conduct of compliance activities and evaluation of Regional air and radiation program activities; development of programs for technical assistance and technology transfer; and selected demonstration programs.

(a) *Office of Mobile Sources.* The Office of Mobile Sources, under the supervision of a Director, is responsible for the mobile source air pollution control functions of the Office of Air and Radiation. The Office is responsible for: Characterizing emissions from mobile sources and related fuels; developing programs for their control, including assessment of the status of control technology and in-use vehicle emissions; for carrying out, in coordination with the Office of Enforcement and Compliance Monitoring as appropriate, a regulatory compliance program to ensure adherence of mobile sources to standards; and for fostering the development of State motor vehicles emission inspection and maintenance programs.

(b) *Office of Air Quality Planning and Standards.* The Office of Air Quality Planning and Standards, under the supervision of a Director, is responsible for the air quality planning and standards functions of the Office of Air and Radiation. The Director for Air Quality Planning and Standards is responsible for emission standards for new stationary sources, and emission standards for hazardous pollutants; for developing national programs, technical policies, regulations, guidelines, and criteria for air pollution control; for assessing the national air pollution control program and the success in achieving air quality goals; for providing assistance to the States, industry and other organizations through personnel training activities and technical information; for providing technical direction and support to Regional Offices and other organizations; for evaluating Regional programs with respect to State implementation plans and strategies, technical assistance, and resource requirements and allocations for air related programs; for developing and maintaining a national air programs data system, including air quality, emissions and other technical data; and for providing effective technology transfer through the translation of technological developments into improved control program procedures.

(c) *Office of Radiation Programs.* The Office of Radiation Programs, under the supervision of a Director, is responsible to the Assistant Administrator for Air and Radiation for the radiation activities of the Agency, including development of radiation protection criteria, standards, and policies; measurement and control of radiation exposure; and research requirements for radiation programs. The Office provides technical assistance to States through EPA Regional Offices and other agencies having radiation protection programs; establishes and directs a national surveillance and investigation program for measuring radiation levels in the environment; evaluates and assesses the impact of radiation on the general public and the environment; and maintains liaison with other public and private organizations involved in environmental radiation protection activities. The Office coordinates with and assists the Office of Enforcement and Compliance Monitoring in enforcement activities where EPA has jurisdiction. The Office provides editorial policy and guidance, and assists in preparing publications.

§ 1.43 Office of Pesticides and Toxic Substances.

The Assistant Administrator serves as the principal adviser to the Administrator in matters pertaining to as-

sessment and regulation of pesticides and toxic substances and is responsible for managing the Agency's pesticides and toxic substances programs under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA); the Federal Food, Drug, and Cosmetic Act; the Toxic Substances Control Act (TSCA); and for promoting coordination of all Agency programs engaged in toxic substances activities. The Assistant Administrator has responsibility for establishing Agency strategies for implementation and integration of the pesticides and the toxic substances programs under applicable Federal statutes; developing and operating Agency programs and policies for assessment and control of pesticides and toxic substances; developing recommendations for Agency priorities for research, monitoring, regulatory, and information-gathering activities relating to pesticides and toxic substances; developing scientific, technical, economic, and social data bases for the conduct of hazard assessments and evaluations in support of toxic substances and pesticides activities; directing pesticides and toxic substances compliance programs; providing toxic substances and pesticides program guidance to EPA Regional Offices; and monitoring, evaluating, and assessing pesticides and toxic substances program operations in EPA Headquarters and Regional Offices.

(a) *Office of Pesticide Programs.* The Office of Pesticide Programs, under the management of a Director and Deputy Director are responsible to the Assistant Administrator for leadership of the overall pesticide activities of the Agency under the authority of the Federal Insecticide, Fungicide, and Rodenticide Act and several provisions of the Federal Food, Drug, and Cosmetic Act, including the development of strategic plans for the control of the national environmental pesticide situation. Such plans are implemented by the Office of Pesticide Programs, other EPA components, other Federal agencies, or by State, local, and private sectors. The Office is also responsible for establishment of tolerance levels for pesticide residues which occur in or on food; registration and reregistration of pesticides; special review of pesticides suspected of posing unreasonable risks to human health or the environment; monitoring of pesticide residue levels in food, humans, and nontarget fish and wildlife; preparation of pesticide registration guidelines; development of standards for the registration and reregistration of pesticide products; provision of program policy direction to technical and manpower training activities in the pesticides area; development of research needs and monitoring requirements for the pesticide program and related areas; review of impact statements dealing with pesticides; and carrying out of assigned international activities.

(b) *Office of Toxic Substances.* The Office of Toxic Substances (OTS), under the management of a Director and Deputy Director is responsible to the Assistant Administrator for those activities of the Agency mandated by the Toxic Substances Control Act. The Director is responsible for developing and operating Agency programs and policies for new and existing chemicals. In each of these areas, the Director is responsible for information collection and coordination; data development; health, environmental and economic assessment; and negotiated or regulatory control actions. The Director provides operational guidance to EPA Regional Offices, reviews and evaluates toxic substances activities at EPA Headquarters and Regional Offices; coordinates TSCA activities with other EPA offices and Federal and State agencies, and conducts the export notification required by TSCA and provides information to importers. The Director is responsible for developing policies and procedures for the coordination and integration of Agency and Federal activities concerning toxic substances. The Director is also responsible for coordinating communication with the industrial community, environmental groups, and other interested parties on matters relating to the implementation of TSCA; providing technical support to international activities managed by the Office of International Activities; and managing the joint planning of toxic research and development under the

auspices of the Pesticides/Toxic Substances Research Committee.

(c) *Office of Compliance Monitoring.* The Office of Compliance Monitoring, under the supervision of a Director, plans, directs, and coordinates the pesticides and toxic substances compliance programs of the Agency. More specifically, the Office provides a national pesticides and toxic substances compliance overview and program policy direction to the Regional Offices and the States, prepares guidance and policy on compliance issues, establishes compliance priorities, provides technical support for litigation activity, concurs on enforcement actions, maintains liaison with the National Enforcement Investigations Center, develops annual fiscal budgets for the national programs, and manages fiscal and personnel resources for the Headquarters programs. The Office directs and manages the Office of Pesticides and Toxic Substances' laboratory data integrity program which conducts laboratory inspections and audits of testing data. The Office issues civil administrative complaints and other administrative orders in cases of first impression, overriding national significance, or violations by any entity located in more than one Region. The office coordinates with the Office of General Counsel and the Office of Enforcement and Compliance Monitoring in an attorney-client relationship, with those Offices providing legal support for informal and formal administrative resolutions of violations; for conducting litigation; for interpreting statutes, regulations and other legal precedents covering EPA's activities; and for advising program managers on the legal implications of alternative courses of action. The Office of Compliance Monitoring coordinates with the Office of Pesticide Programs in the conduct of pesticide enforcement compliance and registration programs under the Federal Insecticide, Fungicide, and Rodenticide Act and participates in decisions involving the cancellation or suspension of registration. The Office establishes policy and operating procedures for pesticide compliance activities including sampling programs, export certification, monitoring programs to assure compliance with experimental use permits, pesticide use restrictions, and recordkeeping requirements, and determines when and whether compliance actions are appropriate. The Office establishes policy and guidance for the State cooperative enforcement agreement program and the applicator training and certification program. The Office of Compliance Monitoring also coordinates with the Office of Toxic Substances in the conduct of regulatory and compliance programs under the Toxic Substances Control Act and participates in regulation development for TSCA. The Office participates in the control of imminent hazards under TSCA, inspects facilities subject to TSCA regulation as a part of investigations which are national in scope or which require specialized expertise, and samples and analyzes chemicals to determine compliance with TSCA. The Office coordinates and provides guidance to other TSCA compliance activities, including the State cooperative enforcement agreement program and the preparation of administrative suits.

§ 1.45 Office of Research and Development.

The Office of Research and Development is under the supervision of the Assistant Administrator for Research and Development who serves as the principal science adviser to the Administrator, and is responsible for the development, direction, and conduct of a national research, development and demonstration program in: Pollution sources, fate, and health and welfare effects; pollution prevention and control, and waste management and utilization technology; environmental sciences; and monitoring systems. The Office participates in the development of Agency policy, standards, and regulations and provides for dissemination of scientific and technical knowledge, including analytical methods, monitoring techniques, and modeling methodologies. The Office serves as coordinator for the Agency's policies and programs concerning carcinogenesis and related problems and assures appropriate quality control and standardization of analytical measurement and

monitoring techniques utilized by the Agency. The Office exercises review and concurrence responsibilities on an Agencywide basis in all budgeting and planning actions involving monitoring which require Heardquarters approval.

(a) *Office of Acid Deposition, Environmental Monitoring and Quality Assurance.* The Office of Acid Deposition, Environmental Monitoring and Quality Assurance (OADEMQA), under the supervision of an Office Director, is responsible for planning, managing and evaluating a comprehensive program for:

(1) Monitoring the cause and effects of acid deposition;

(2) Research and development on the causes, effects and corrective steps for the acid deposition phenomenon;

(3) Research with respect to the transport and fate of pollutants which are released into the atmosphere;

(4) Development and demonstration of techniques and methods to measure exposure and to relate ambient concentrations to exposure by critical receptors;

(5) Research, development and demonstration of new monitoring methods, systems, techniques and equipment for detection, identification and characterization of pollutants at the source and in the ambient environment and for use as reference or standard monitoring methods;

(6) Establishment, direction and coordination of Agencywide Quality Assurance Program; and

(7) Development and provision of quality assurance methods, techniques and material including validation and standardization of analytical methods, sampling techniques, quality control methods, standard reference materials, and techniques for data collection, evaluation and interpretation. The Office identifies specific research, development, demonstration and service needs and priorities; establishes program policies and guidelines; develops program plans including objectives and estimates of resources required to accomplish objectives; administers the approved program and activities; assigns program responsibility and resources to the laboratories assigned by the Assistant Administrator; directs and supervises assigned laboratories in program administration; and conducts reviews of program progress and takes action as necessary to assure timeliness, quality and responsiveness of outputs.

(b) *Office of Environmental Engineering and Technology Demonstration.* The Office of Environmental Engineering and Technology Demonstration (OEETD) under the supervision of a Director, is responsible for planning, managing, and evaluating a comprehensive program of research, development, and demonstration of cost effective methods and technologies to:

(1) Control Environmental impacts associated with the extraction, processing, conversion, and transportation of energy, minerals, and other resources, and with industrial processing and manufacturing facilities;

(2) Control environmental impacts of public sector activities including publicly-owned waste water and solid waste facilities;

(3) Control and manage hazardous waste generation, storage, treatment , and disposal;

(4) Provide innovative technologies for response actions under Superfund and technologies for control of emergency spills of oils and hazardous waste;

(5) Improve drinking water supply and system operations, including improved understanding of water supply technology and water supply criteria;

(6) Characterize, reduce, and mitigate indoor air pollutants including radon; and

(7) Characterize, reduce, and mitigate acid rain precursors from stationary sources. Development of engineering data needed by the Agency in reviewing premanufacturing notices relative to assessing potential release and exposure to chemicals, treatability by waste treatment systems, containment and control of genetically engineered organisms, and development of alternatives to mitigate the likelihood of release and exposure to existing chemicals. In carrying out these responsibilities, the Office develops program plans and manages the resources assigned to it; implements the approved programs and activities; assigns objectives and resources to the OEETD laboratories; conducts appro-

priate reviews to assure the quality, timeliness, and responsiveness of outputs; and conducts analyses of the relative environmental and socioeconomic impacts of engineering methods and control technologies and strategies. The Office of Environmental Engineering and Technology Demonstration is the focal point within the Office of Research and Development for providing liaison with the rest of the Agency and with the Department of Energy on issues associated with energy development. The Office is also the focal point within the Office of Research and Development for liaison with the rest of the Agency on issues related to engineering reseach and development and the control of pollution discharges.

(c) *Office of Environmental Processes and Effects Research.* The Office of Environmental Processes and Effects Research, under the supervision of the Director, is responsible for planning, managing, and evaluating a comprehensive research program to develop the scientific and technological methods and data necessary to understand ecological processes, and predict broad ecosystems impacts, and to manage the entry, movement, and fate of pollutants upon nonhuman organisms and ecosystems. The comprehensive program includes:

(1) The development of organism and ecosystem level effect data needed for the establishment of standards, criteria or guidelines for the protection of nonhuman components of the environment and ecosystems integrity and the prevention of harmful human exposure to pollutants;

(2) The development of methods to determine and predict the fate, transport, and environmental levels which may result in human exposure and exposure of nonhuman components of the environment, resulting from the discharge of pollutants, singly or in combination into the environment, including development of source criteria for protection of environmental quality;

(3) The development and demonstration of methods for the control or management of adverse environmental impacts from agriculture and other rural nonprofit sources;

(4) The development and demonstration of integrated pest management strategies for the management of agriculture and urban pests which utilize alternative biological, cultural and chemical controls;

(5) The development of a laboratory and fieldscale screening tests to provide data that can be used to predict the behavior of pollutants in terms of movement in the environmental, accumulation in the food chain, effects on organisms, and broad escosystem impacts;

(6) Coordination of interagency research activities associated with the health and environmental impacts of energy production and use; and

(7) development and demonstration of methods for restoring degraded ecosystem by means other than source control.

(d) *Office of Health Research.* The Office of Health Research under the supervision of a Director, is responsible for the management of planning, implementing, and evaluating a comprehensive, integrated human health research program which documents acute and chronic adverse effects to man from environmental exposure to pollutants and determines those exposures which have a potentially adverse effect on humans. This documentation is utilized by ORD for criteria development and scientific assessments in support of the Agency's regulating and standard-setting activities. To attain this objective, the program develops tests systems and associated methods and protocols, such as predictive models to determine similarities and differences among test organisms and man; develops methodology and conducts laboratory and field research studies; and develops interagency programs which effectively use pollutants. The Office of Health Research is the Agency's focal point within the Office of Research and Development for providing liaison relative to human health effects and related human exposure issues (excluding issues related to the planning and implementation of research on the human health effects of energy pollutants that is conducted under the Interagency Energy/Environment Program). It responds with recognized authority to changing re-

quirements of the Regions, program offices and other offices for priority technical assistance. In close coordination with Agency research and advisory committees, other agencies and offices, and interaction with academic and other independent scientific bodies, the Office develops health science policy for the Agency. Through these relationships and the scientific capabilities of its laboratories and Headquarters staffs, the Office provides a focal point for matters pertaining to the effects of human exposure to environmental pollutants.

(e) *Office of Health and Environmental Assessment (OHEA).* The Office of Health and Environmental Assessment, under the supervision of a Director, is the principal adviser on matters relating to the development of health criteria, health affects assessment and risk estimation, to the Assistant Administrator for Research and Development. The Director's Office: Develops recommendations on OHEA programs including the identification and development of alternative program goals, priorities, objectives and work plans; develops recommendations on overall office policies and means for their implementation; performs the critical path planning necessary to assure a timely production of OHEA information in response to program office needs; serves as an Agency health assessment advocate for issue resolution and regulatory review in the Agency Steering Committee, Science Advisory Board, and in cooperation with other Federal agencies and the scientific and technical community; and provides administrative support services to the components of OHEA. The Director's Office provides Headquarters coordination for the Environmental Criteria and Assessment Offices.

(f) *Office of Exploratory Research.* The Office of Exploratory Research (OER), under the supervision of a Director, is responsible for overall planning, administering, managing, and evaluating EPA's anticipatory and extramural grant research in response to Agency priorities, as articulated by Agency planning mechanisms and ORD's Research Committees. The Director advises the Assistance Administrator on the direction, scientific quality and effectiveness of ORD's long-term scientific review and evaluation; and research funding assistance efforts. The responsibilities of this office include: Administering ORD's scientific review of extramural requests for research funding assistance; developing research proposal solicitations; managing grant projects; and ensuring project quality and optimum dissemination of results. The OER is responsible for analyzing EPA's long-range environmental research concerns; forecasting emerging and potential environmental problems and manpower needs; identifying Federal workforce training programs to be used by State and local governments; assuring the participation of minority institutions in environmental research and development activities; and conducting special studies in response to high priority national environmental needs and problems. This office serves as an ORD focal point for university relations and other Federal research and development agencies related to EPA's extramural research program.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

§ 1.47 Office of Solid Waste and Emergency Response.

The Office of Solid Waste and Emergency Response (OSWER), under the supervision of the Assistant Administrator for Solid Waste and Emergency Response, provides Agencywide policy, guidance, and direction for the Agency's solid and hazardous wastes and emergency response programs. This Office has primary responsibility for implementing the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA—"Superfund"). In addition to managing those programs, the Assistant Administrator serves as principal adviser to the Administrator in matters pertaining to them. The Assistant Administrator's responsibilities include: Program policy development and evaluation; development of appropriate hazardous waste standards and regulations; ensuring compliance with applicable laws and regulations; pro-

gram policy guidance and overview, technical support, and evaluation of Regional solid and hazardous wastes and emergency response activities; development of programs for technical, programmatic, and compliance assistance to States and local governments; development of guidelines and standards for the land disposal of hazardous wastes; analyses of the recovery of useful energy from solid waste; development and implementation of a program to respond to uncontrolled hazardous waste sites and spills (including oil spills); long-term strategic planning and special studies; economic and long-term environmental analyses; economic impact assessment of RCRA and CERCLA regulations; analyses of alternative technologies and trends; and cost-benefit analyses and development of OSWER environmental criteria.

(a) *Office of Waste Programs Enforcement.* The Office of Waste Programs Enforcement (OWPE), under the supervision of a Director, manages a national program of technical compliance and enforcement under CERCLA and RCRA. The Office provides guidance and support for the implementation of the CERCLA and RCRA compliance and enforcement programs. This includes the development of program strategies, long-term and yearly goals, and the formulation of budgets and plans to support implementation of strategies and goals. The Office provides program guidance through the development and issuance of policies, guidance and other documents and through training and technical assistance. The Office oversees and supports Regions and States in the implementation of the CERCLA and RCRA enforcement programs. The Office may assume responsibility for direct management of a limited number of CERCLA and RCRA enforcement actions which are multi-regional in nature or are cases of national significance. The Office serves as the national technical expert for all matters relating to CERCLA and RCRA compliance and enforcement. It represents the interest of the CERCLA and RCRA enforcement programs to other offices of the Agency. In coordination with the Office of External Affairs (OEA) and IO-OSWER, represents the program to external organizations, including the Office of Management and Budget (OMB), Congress, U.S. Department of Justice and other Federal agencies, the media, public interest and industry groups, State and local governments and their associations and the public.

(b) *Office of Solid Waste.* The Office of Solid Waste, under the supervision of a Director, is responsible for the solid and hazardous waste activities of the Agency. In particular, this Office is responsible for implementing the Resource Conservation and Recovery Act. The Office provides program policy direction to and evaluation of such activities throughout the Agency and establishes solid and hazardous wastes research requirements for EPA.

(c) *Office of Emergency and Remedial Response.* The Office of Emergency and Remedial Response, under the supervision of a Director, is responsible for the emergency and remedial response functions of the Agency (i.e., CERCLA). The Office is specifically responsible for:

(1) Developing national strategy, programs, technical policies, regulations, and guidelines for the control of abandoned hazardous waste sites, and response to and prevention of oil and hazardous substance spills;

(2) Providing direction, guidance, and support to the Environmental Response Teams and overseeing their activities;

(3) Providing direction, guidance, and support to the Agency's non-enforcement emergency and remedial response programs, including emergency and remedial responses to hazardous waste sites;

(4) Developing national accomplishment plans and resources;

(5) Scheduling the guidelines for program plans;

(6) Assisting in the training of personnel;

(7) Monitoring and evaluating the performance, progress, and fiscal status of the Regions in implementing emergency and remedial response program plans;

(8) Maintaining liaison with concerned public and private national organizations for emergency response;

(9) Supporting State emergency response programs; and

(10) Coordinating Office activities with other EPA programs.

(d) *Office of Underground Storage Tanks.* The Office of Underground Storage Tanks, under the supervision of a Director, is responsible for defining, planning, and implementing regulation of underground storage tanks containing petroleum, petroleum products, and chemical products. In particular, this Office is responsible for overseeing implementation of Subtitle I of the Resource Conservation and Recovery Act (RCRA), as amended. The Office develops and promulgates regulations and policies including notification, tank design and installation, corrective action, and State program approvals. It also plans for an oversees utilization of the Underground Storage Tank Trust Fund established by the Superfund Amendments and Reauthorization Act of 1986 (SARA).

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

§ 1.49 Office of Water.

The Office of Water, under the supervision of the Assistant Administrator for Water who serves as the principal adviser to the Administrator in matters pertaining to water programs, is responsible for management of EPA's water programs. Functions of the Office include program policy development and evaluation; environmental and pollution source standards development; program policy guidance and overview; technical support; and evaluation of Regional water activities; the conduct of compliance and permitting activities as they relate to drinking water and water programs; development of programs for technical assistance and technology transfer; development of selected demonstration programs; economic and long-term environmental analysis; and marine and estuarine protection.

(a) *Office of Water Enforcement and Permits.* The Office of Water Enforcement and Permits, under the supervision of a Director, develops policies, strategies, procedures and guidance for EPA and State compliance monitoring, evaluation, and enforcement programs for the Clean Water Act and the Marine Protection Research and Sanctuaries Act. The Office also provides national program direction to the National Pollutant Discharge Elimination System permit program. The office has overview responsibilities and provides technical assistance to the regional activities in both enforcement and permitting programs.

(b) *Office of Water Regulations and Standards.* The Office of Water Regulations and Standards, under the supervision of a Director, is responsible for the Agency's water regulations and standards functions. The Office is responsible for developing an overall program strategy for the achievement of water pollution abatement in cooperation with other appropriate program offices. The Office assures the coordination of all national water-related activities within this water program strategy, and monitors national progress toward the achievement of water quality goals and is responsible for the development of effluent guidelines and water quality standards, and other pollutant standards, regulations, and guidelines within the program responsibilities of the Office. It exercises overall responsibility for the development of effective State and Regional water quality regulatory control programs. The Office is responsible for the development and maintenance of a centralized water programs data system including compatible water quality, discharger, and program data files utilizing, but not displacing, files developed and maintained by other program offices. It is responsible for developing national accomplishment plans and resource and schedule guidelines for monitoring and evaluating the performance, progress, and fiscal status of the organization in implementing program plans. The Office represents EPA in activities with other Federal agencies concerned with water quality regulations and standards.

(c) *Office of Municipal Pollution Control.* The Office of Municipal Pollution Control, under the supervision of a Director, is responsible for the Agency's water program operations functions. The Office is responsible for developing national strategies, program and policy recommendations, regulations and guidelines for munici-

pal water pollution control; for providing technical direction and support to Regional Offices and other organizations; and for evaluating Regional and State programs with respect to municipal point source abatement and control, and manpower development for water-related activities. The Office assures that priority Headquarters and regional activities are planned and carried out in a coordinated and integrated fashion, including developing and implementing data submission systems.

(d) *Office of Drinking Water.* The Office of Drinking Water, under the supervision of a Director, is responsible for water supply activities of the Agency, including the development of an implementation strategy which provides the national policy direction and coordination for the program. This Office develops regulations and guidelines to protect drinking water quality and existing and future underground sources of drinking water, develops program policy and guidance for enforcement and compliance activities, and recommends policy for water supply protection activities. The office provides guidance and technical information to State agencies, local utilities, and Federal facilities through the Regional Offices on program planning and phasing; evaluates the national level of compliance with the regulations; plans and develops policy guidance for response to national, Regional, and local emergencies; reviews and evaluates, with Regional Offices, technical data for the designation of sole-source aquifers; designs a national program of public information; provides program policy direction for technical assistance and manpower training activities in the water supply area; identifies research needs and develops monitoring requirements for the national water supply program; develops national accomplishments' plans and resource schedule guidelines for monitoring and evaluating the program plans, and program performance, and fiscal status; develops program plans, and budget and program status reports for the water supply program; coordinates water supply activities with other Federal agencies as necessary; and serves as liaison with the National Drinking Water Advisory Council.

(e) *Office of Ground-Water Protection.* The Office of Ground-Water Protection, under the supervision of a Director, oversees implementation of the Agency's Ground-water Protection Strategy. This Office coordinates support of Headquarters and regional activities to develop stronger State government organizations and programs which foster ground-water protection. The Office directs and coordinates Agency analysis and approaches to unaddressed problems of ground-water contamination; is principally responsible of restablishing and implementing a framework for decision-making at EPA on ground-water protection issues; and serves as the focus of internal EPA policy coordination for ground-water.

(f) *Office of Marine and Estuarine Protection.* The Office of Marine and Estuarine Protection, under the supervision of a Director, is responsible for the development of policies and strategies and implementation of a program to protect the marine/estuarine environment, including ocean dumping. The Office provides national direction for the Chesapeake Bay and other estuarine programs, and policy oversight of the Great Lakes Program.

(g) *Office of Wetlands Protection.* The Office of Wetlands Protection, under the supervision of a Director, administers the 404/Wetlands Program and develops policies, procedures, regulations, and strategies addressing the maintenance, enhancement, and protection of the Nations Wetlands. The Office coordinates Agency issues related to wetlands.

[50 FR 26721, June 28, 1985, as amended at 52 FR 30360, Aug. 14, 1987]

Subpart C—Field Installations

§ 1.61 Regional Offices.

Regional Administrators are responsible to the Administrator, within the boundaries of their Regions, for the execution of the Regional Programs of the Agency and such other responsibilities as may be assigned. They serve as the Administrator's prinicipal representatives in their Regions in con-

tacts and relationships with Federal, State, interstate and local agencies, industry, academic institutions, and other public and private groups. Regional Administrators are responsible for:

(a) Accomplishing national program objectives within the Regions as established by the Administrator, Deputy Administrator, Assistant Administrators, Associate Administrators, and Heads of Headquarters Staff Offices;

(b) Developing, proposing, and implementing approved Regional programs for comprehensive and integrated environmental protection activities;

(c) Total resource management in their Regions within guidelines provided by Headquarters;

(d) Conducting effective Regional enforcement and compliance programs;

(e) Translating technical program direction and evaluation provided by the various Assistant Administrators, Associate Administrators and Heads of Headquarters Staff Offices, into effective operating programs at the Regional level, and assuring that such programs are executed efficiently;

(f) Exercising approval authority for proposed State standards and implementation plans; and

(g) Providing for overall and specific evaluations of Regional programs, both internal Agency and State activities.

PART 2—PUBLIC INFORMATION

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AUTHORITY: 5 U.S.C. 301, 552 (as amended), 553; secs. 114, 206, 208, 301, and 307, Clean Air Act, as amended (42 U.S.C. 7414, 7525, 7542, 7601, 7607); secs. 308, 501 and 509(a), Clean Water Act, as amended (33 U.S.C. 1318, 1361, 1369(a)); sec. 13, Noise Control Act of 1972 (42 U.S.C. 4912); secs. 1445 and 1450, Safe Drinking Water Act (42 U.S.C. 300j-4, 300j-9); secs. 2002, 3007, and 9005, Solid Waste Disposal Act, as amended (42 U.S.C. 6912, 6927, 6995); secs. 8(c), 11, and 14, Toxic Substances Control Act (15 U.S.C. 2607(c), 2610, 2613); secs. 10, 12, and 25, Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136h, 136j, 136w); sec. 408(f), Federal Food, Drug and Cosmetic Act, as amended (21 U.S.C. 346(f)); secs. 104(f) and 108, Marine Protection Research and Sanctuaries Act of 1972 (33 U.S.C. 1414(f), 1418); sec. 104, Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9604); sec. 505, Motor Vehicle Information and Cost Savings Act, as amended (15 U.S.C. 2005).

SOURCE: 41 FR 36902, Sept. 1, 1976, unless otherwise noted.

Subpart A—Requests for Information

§ 2.100 Definitions.

For the purposes of this part:

(a) *EPA* means the United States Environmental Protection Agency.

(b) *EPA Record* or, simply *record* means any document, writing, photograph, sound or magnetic recording, drawing, or other similar thing by which information has been preserved, from which the information can be retrieved and copied, and over which EPA has possession or control. It may include copies of the records of other Federal agencies (see § 2.111(d)). The term includes informal writings (such as drafts and the like), and also includes information preserved in a form which must be translated or deciphered by machine in order to be intelligible to humans. The term includes documents and the like which were created or acquired by EPA, its predecessors, its officers, and its employees by use of Government funds or in the course of transacting official business. However, the term does not include materials which are the personal records of an EPA officer or employee. Nor does the term include materials published by non-Federal organizations which are readily available to the public, such as books, journals, and periodicals available through reference libraries, even if such materials are in EPA's possession.

(c) *Request* means a request to inspect or obtain a copy of one or more records.

(d) *Requestor* means any person who has submitted a request to EPA.

(e) The term *'commercial use request* refers to a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade or profit interests of the requestor or the person on whose behalf the request is made. In determining whether a requestor properly belongs in this category, EPA must determine the use to which a requestor will put the documents requested.

Moreover, where EPA has reasonable cause to doubt the use to which a requestor will put the records sought, or where that use is not clear from the request itself, EPA may seek additional clarification before assigning the request to a specific category.

(f) The term *non-commercial scientific institution* refers to an institution that is not operated on a *commercial* basis as that term is referenced in paragraph (e) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(g) The term *educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution or professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(h) The term *representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of *news*) who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. Moreover, as traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. In the case of *freelance* journalists, they may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but EPA may also look to the past publication record of a requestor in making this determination.

(i) The term *search* includes all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Searching for material must be done in the most efficient and least expensive manner so as to minimize costs for both the EPA and the requestor. For example, EPA will not engage in line-by-line search when merely duplicating an entire document would prove the less expensive and quicker method of complying with a request. *Search* will be distinguished, moreover, from *review* of material in order to determine whether the material is exempt from disclosure (see paragraph (j) of this section). Searches may be done manually or by computer using existing programming.

(j) The term *review* refers to the process of examining documents located in response to a request that is for a commercial use (see paragraph (e) of this section) to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving legal or policy issues regarding the application of exemptions. (Documents must be reviewed in responding to all requests; however, review time may only be charged to Commercial Use Requesters.)

(k) The term *duplication* refers to the process of making a copy of a document necessary to respond to an FOIA request. Such copies can take the form of paper copy, microform, audio-visual materials, or machine readable documentation (e.g., magnetic tape or disk), among others. The copy provided must be in a form that is reasonably usable by requesters.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51658, Dec. 18, 1985; 53 FR 216, Jan. 5, 1988]

§ 2.101 Policy on disclosure of EPA records.

(a) EPA will make the fullest possible disclosure of records to the public, consistent with the rights of individuals to privacy, the rights of persons in business information entitled to confidential treatment, and the need for EPA to promote frank internal policy deliberations and to pursue its official activities without undue disruption.

(b) All EPA records shall be available to the public unless they are exempt from the disclosure requirements of 5 U.S.C 552.

(c) All nonexempt EPA records shall be available to the public upon request regardless of whether any justification or need for such records has been shown by the requestor.

(d) When documents responsive to a request are maintained for distribution by agencies operating statutory-based fee schedule programs, such as, but not limited to, the Government Printing Office or the National Technical Information Service, EPA will inform the requester of the steps necessary to obtain records from the sources.

[41 FR 36902, Sept. 1, 1976, as amended at 53 FR 216, Jan. 5, 1988]

§ 2.102 [Reserved]

§ 2.103 Partial disclosure of records.

If a requested record contains both exempt and nonexempt material, the nonexempt material shall be disclosed, after the exempt material has been deleted in accordance with § 2.119.

§ 2.104 Requests to which this subpart applies.

(a) This subpart applies to any written request (other than a request made by another Federal agency) received by any EPA office, whether or not the request cites the Freedom of Information Act, 5 U.S.C. 552. See §§ 2.107(a) and 2.112(b) regarding the treatment of requests which are directed by the requestor to offices other than those listed in § 2.106.

(b) Any written request to EPA for existing records prepared by EPA for routine public distribution, e.g., pamphlets, copies of speeches, press releases, and educational materials, shall be honored. No individual determination under § 2.111 is necessary in such cases, since preparation of the records for routine public distribution itself constitutes a determination that the records are available to the public.

§ 2.105 Existing records.

(a) The Freedom of Information Act, 5 U.S.C. 552, does not require the creation of new records in response to a request, nor does it require EPA to place a requestor's name on a distribution list for automatic receipt of certain kinds of records as they come into existence. The Act establishes requirements for disclosure of existing records.

(b) All existing EPA records are subject to routine destruction according to standard record retention schedules.

§ 2.106 Where requests for agency records shall be filed.

(a) A request for records may be filed with the EPA Freedom of Information Officer, A-101, 401 M Street, SW., Washington, DC 20460.

(b) Should the requestor have reason to believe that the records sought may be located in an EPA regional office, he may transmit his request to the appropriate regional Freedom of Information Office indicated below:

(1) Region I (Massachusetts, Connecticut, Maine, New Hampshire, Rhode Island, Vermont):

U.S. Environmental Protection Agency, Freedom of Information Officer, Room 2303, John F. Kennedy Federal Building, Boston, MA 02203.

(2) Region II (New Jersey, New York, Puerto Rico, Virgin Islands):

U.S. Environmental Protection Agency, Freedom of Information Officer, Room 1005, 26 Federal Plaza, New York, NY 10007.

(3) Region III (Delaware, Maryland, Pennsylvania, Virginia, West Virginia, District of Columbia):

U.S. Environmental Protection Agency, Freedom of Information Officer, 841 Chestnut Street, Philadelphia, PA 19107.

(4) Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee):

U.S. Environmental Protection Agency, Freedom of Information Officer, 345 Courtland Street, N.E., Atlanta, GA 30365.

(5) Region V (Illinois, Indiana, Michigan, Minnesota, Ohio, Wisconsin);

U.S. Environmental Protection Agency, Freedom of Information Officer, 230 Dearborn Street, Chicago, IL 60604.

(6) Region VI (Arkansas, Louisiana, New Mexico, Oklahoma, Texas):

U.S. Environmental Protection Agency, Freedom of Information Officer (6M-MC), 1201 Elm Street, Dallas, TX 75270.

(7) Region VII (Iowa, Kansas, Missouri, Nebraska):

U.S. Environmental Protection Agency, Freedom of Information Officer, 726 Minnesota Avenue, Kansas City, KS 66101.

(8) Region VIII (Colorado, Montana, North Dakota, South Dakota, Utah, Wyoming):

U.S. Environmental Protection Agency, Freedom of Information Officer, One Denver Place, 999 18th Street, Suite 1300, Denver, CO 80202-2413.

(9) Region IX (Arizona, California, Hawaii, Nevada, American Samoa, Guam, Trust Territory of Pacific Islands):

U.S. Environmental Protection Agency, Freedom of Information Officer, 215 Fremont Street, San Francisco, CA 94105.

(10) Region X (Alaska, Idaho, Oregon, Washington):

U.S. Environmental Protection Agency Freedom of Information Officer, 1200 Sixth Avenue, Seattle, WA 98101.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.107 Misdirected written requests; oral requests.

(a) EPA cannot assure that a timely or satisfactory response under this subpart will be given to written requests that are addressed to EPA offices, officers, or employees other than the Freedom of Information Officers listed in § 2.106. Any EPA officer or employee who receives a written request for inspection or disclosure of EPA records shall promptly forward a copy of the request to the appropriate Freedom of Information Officer, by the fastest practicable means, and shall, if appropriate, commence action under § 2.111. For purposes of § 2.112, the time allowed with respect to initial determinations shall be computed from the day on which the appropriate Freedom of Information Officer receives the request.

(b) While EPA officers and employees will attempt in good faith to comply with requests for inspection or disclosure of EPA records made orally, by telephone or otherwise, such oral requests are not required to be processed in accordance with this subpart.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.108 Form of request.

A request shall be made in writing, shall reasonably describe the records sought in a way that will permit their identification and location, and should be addressed to one of the addresses set forth in § 2.106, but otherwise need not be in any particular form.

§ 2.109 Requests which do not reasonably describe records sought.

(a) If the description of the records sought in the request is not sufficient to allow EPA to identify and locate the requested records, the EPA office taking action under § 2.111 will notify the requestor (by telephone when practicable) that the request cannot be further processed until additional information is furnished.

(b) EPA will make every reasonable effort to assist in the identification and description of records sought and to assist the requestor in formulating his request. If a request is described in general terms (e.g., all records having to do with a certain area), the EPA office taking action under § 2.111 may communicate with the requestor (by telephone when practicable) with a view toward reducing the administrative burden of processing a broad request and minimizing the fees payable by the requestor. Such attempts will not be used as a means to discourage requests, but rather as a means to help

identify with more specificity the records actually sought.

§ 2.110 Responsibilities of Freedom of Information Officers.

(a) Upon receipt of a written request, the Freedom of information Officer (whether at EPA Headquarters or at an EPA region) shall mark the request with the date of receipt, and shall attach to the request a control slip indicating the date of receipt, the date by which response is due, a unique Request Identification Number, and other pertinent administrative information. The request and control slip shall then be forwarded immediately to the EPA office believed to be responsible for maintaining the records requested. (If the records requested are believed to be located at two or more EPA offices, each such office shall be furnished a copy of the request and control slip, with instructions concerning which office shall serve as the lead office for coordinating the response.) The Freedom of Information Officer shall retain a file copy of the request and control slip, and shall monitor the handling of the request to ensure a timely response.

(b) The Freedom of Information Officer shall maintain a file concerning each request received, which shall contain a copy of the request, initial and appeal determinations, and other pertinent correspondence and records.

(c) The Freedom of Information officer shall collect and maintain the information necessary to compile the reports required by 5 U.S.C. 552(d).

§ 2.111 Action by office responsible for responding to request.

(a) Whenever an EPA office becomes aware that it is responsible for responding to a request, the office shall:

(1) Take action under § 2.109, if required, to obtain a better description of the records requested;

(2) Locate the records as promptly as possible, or determine that the records are not known to exist, or that they are located at another EPA office, or that they are located at another Federal agency and not possessed by EPA;

(3) When appropriate, take action under § 2.120(c) to obtain payment or assurance of payment;

(4) If any located records contain business information, as defined in § 2.201(c), comply with subpart B of this part;

(5) Determine which of the requested records legally must be withheld, and why (see § 2.119(b));

(6) Of the requested records which are exempt from mandatory disclosure but which legally may be disclosed (see § 2.119(a)), determine which records will be withheld, and why;

(7) Issue all initial determination within the allowed period (see § 2.112), specifying (individually or by category) which records will be disclosed and which will be withheld, and signed by a person authorized to issue the determination under § 2.113(b). Denials of requests shall comply with § 2.113; and

(8) Furnish the appropriate Freedom of Information Officer a copy of the determination. If the determination denied a request for one or more existing, located records, the responding office shall also furnish the Freedom of Information officer the name, address, and telephone number of the EPA employee(s) having custody of the records, and shall maintain the records in a manner permitting their prompt forwarding to the General Counsel upon request if an appeal from the initial denial is filed. See also § 2.204(f).

(b) If it appears that some or all of the requested records are not in the possession of the EPA office which has been assigned responsibility for responding to the request but may be in the possession of some other EPA office, the Freedom of Information officer who is monitoring the request shall be so informed immediately.

(c) In determining which records are responsive to a request, the EPA office responding shall ordinarily include those records within the Agency's possession as of the date of the Agency's receipt of the request.

(d) When a request for EPA records encompasses records of another Federal agency, the EPA office shall either: (1) Respond to the request after consulting with the originating agency when appropriate or; (2) promptly

transfer responsibility for responding to the request to the originating agency provided that the other agency is subject to the FOIA. Whenever the EPA office refers a request to another agency, it shall notify the requestor of the referral.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.112 Time allowed for issuance of initial determination.

(a) Except as otherwise provided in this section, not later than the tenth working day after the date of receipt by a Freedom of Information Office of a request for records, the EPA office responsible for responding to the request shall issue a written determination to the requestor stating which of the requested records will, and which will not, be released and the reason for any denial of a request. If the records are not known to exist or are not in EPA's possession, the EPA office shall so inform the requestor. To the extent requested records which are in EPA's possession are published by the Federal government, the response may inform the requestor that the records are available for inspection and where copies can be obtained.

(b) The period of 10 working days shall be measured from the date the request is first received and logged in by the Headquarters or regional Freedom of Information Office.

(c) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.109 that his request does not reasonably identify the records sought, and the date that the requestor furnishes a reasonable identification.

(d) There shall be excluded from the period of 10 working days (or any extension thereof) any time which elapses between the date that a requestor is notified by EPA under § 2.120 that prepayment or assurance of payment of fees is required, and the date that the requestor pays (or makes suitable arrangements to pay) such charges.

(e) The EPA office taking action under § 2.111, after notifying the appropriate Freedom of Information Office, may extend the basic 10-day period established under subsection (a) of this section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 10-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

(1) There is a need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request:

(2) There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) There is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of EPA.

(f) Failure of EPA to issue a determination within the 10-day period or any authorized extension shall constitute final agency action which authorizes the requestor to commence an action in an appropriate Federal district court to obtain the records.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.113 Initial denials of requests.

(a) An initial denial of a request may be issued only for the following reasons:

(1) A statutory provision, provision of this part, or court order requires that the information not be disclosed;

(2) The record is exempt from mandatory disclosure under 5 U.S.C. 552(b) and EPA has decided that the public interest would not be served by disclosure; or

(3) Section 2.204(d)(1) requires initial denial because a third person must be consulted in connection with a business confidentiality claim.

(b) The Deputy Administrator, Assistant Administrators, Regional Ad-

ministrators, the General Counsel, the Inspector General, Associate Administrators, and heads of headquarters staff offices are delegated the authority to issue initial determinations This authority may be redelegated; *Provided,* That the authority to issue initial denials of requests for existing, located records (other than denials based solely on § 2.204(d)(1)) may be redelegated only to persons occupying positions not lower than division director or equivalent.

(c) [Reserved]

(d)(1) Each initial determination to deny a request shall be written, signed, and dated, and, except as provided in paragraph (d)(2), shall contain a reference to the Request Identification Number, shall identify the records that are being withheld (individually, or, if the denial covers a large number of similar records, by described category), and shall state the basis for denial for each record or category of records being withheld.

(2) No initial determination shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the initial determination shall state that the request is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b). No such determination shall be made without the concurrence of the General Counsel or his designee. The General Counsel has designated the Contracts and Information Law Branch to act on these requests for concurrence. See § 2.121 for guidance on initial determinations denying, in limited circumstances, the existence of certain law enforcement records or information.

(e) If the decision to deny a request is made by an authorized EPA employee other than the person signing the determination letter, that other person's identity and position shall be stated in the determination letter.

(f) Each initial determination which denies, in whole or in part, a request for one or more existing, located EPA records (including determinations described in § 2.113(d)(2) of this section) shall state that the requester may appeal the initial denial by sending a written appeal to the address shown in § 2.106(a) within 30 days after receipt of the determination. An initial determination which only denies the existence of records, however, will not include a notice of appeal rights.

(g) A determination shall be deemed issued on the date the determination letter is placed in EPA mailing channels for first class mailing to the requestor, delivered to the U.S. Postal Service for mailing, or personally delivered to the requestor, whichever date first occurs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985; 53 FR 216, Jan. 5, 1988]

§ 2.114 Appeals from initial denials; manner of making.

(a) Any person whose request for one or more existing, located EPA records has been denied in whole or in part by an initial determination may appeal that denial by addressing a written appeal to the address shown in § 2.106(a).

(b) An appeal should be mailed no later than 30 calendar days after the date the requestor received the initial determination on the request. An untimely appeal may be treated either as a timely appeal or as a new request, at the option of the Freedom of Information Officer.

(c) The appeal letter shall contain a reference to the Request Identification Number (RIN), the date of the initial determination, and the name and address of the person who issued the initial denial. The appeal letter shall also indicate which of the records to which access was denied are the subjects of the appeal.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.115 Appeal determinations; by whom made.

(a) The General Counsel shall make one of the following legal determinations in connection with every appeal

from the initial denial of a request for an existing, located record:

(1) The record must be disclosed;

(2) The record must not be disclosed, because a statute or a provision of this part so requires; or

(3) The record is exempt from mandatory disclosure but legally may be disclosed as a matter of Agency discretion.

(b) Whenever the General Counsel has determined under paragraph (a)(3) of this section that a record is exempt from mandatory disclosure but legally may be disclosed, and the record has not been disclosed by EPA under 5 U.S.C. 552, the matter shall be referred to the Assistant Administrator for External Affairs. If the Assistant Administant Administrator determines that the public interest would not be served by disclosure, a determination denying the appeal shall be issued by the General Counsel. If the Assistant Administrator determines that the public interest would be served by disclosure, the record shall be disclosed unless the Administrator (upon a review of the matter requested by the appropriate Assistant Administrator, Associate Administrator, Regional Administrator, the General Counsel, or the head of a headquarters staff office) determines that the public interest would not be served by disclosure, in which case the General Counsel shall issue a determination denying the appeal. This review by the Assistant Administrator for External Affairs shall not apply to appeals from inital determinations by the Office of Inspector General to deny requests.

(c) The General Counsel may delegate his authority under paragraph (a) of this section to a Regional Counsel, or to any other attorney employed on a full-time basis by EPA, in connection with any category of appeals or any individual appeal.

(d) The Assistant Administrator for External Affairs may delegate the authority under paragraph (b) of this section to the Deputy Assistant Administrator for External Affairs.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51659, Dec. 18, 1985]

§ 2.116 Contents of determination denying appeal.

(a) Except as provided in paragraph (b) of this section, each determination denying an appeal from an initial denial shall be in writing, shall state which of the exemptions in 5 U.S.C. 552(b) apply to each requested existing record, and shall state the reason(s) for denial of the appeal. A denial determination shall also state the name and position of each EPA officer or employee who directed that the appeal be denied. Such a determination shall further state that the person whose request was denied may obtain de novo judicial review of the denial by complaint filed with the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the Agency records are situated, or in the District of Columbia, pursuant to 5 U.S.C. 552(a)(4).

(b) No determination denying an appeal shall reveal the existence or nonexistence of records if identifying the mere fact of the existence or nonexistence of those records would reveal confidential business information, confidential personal information or classified national security information. Instead of identifying the existence or nonexistence of the records, the determination shall state that the appeal is denied because either the records do not exist or they are exempt from mandatory disclosure under the applicable provision of 5 U.S.C. 552(b).

[53 FR 217, Jan. 5, 1988]

§ 2.117 Time allowed for issuance of appeal determination.

(a) Except as otherwise provided in this section, not later than the twentieth working day after the date of receipt by the Freedom of Information Officer at EPA Headquarters of an appeal from an initial denial of a request for records, the General Counsel shall issue a written determination stating which of the requested records (as to which an appeal was made) shall be disclosed and which shall not be disclosed.

(b) The period of 20 working days shall be measured from the date an appeal is first received by the Freedom of Information Officer at EPA Headquarters, except as otherwise provided in § 2.205(a).

(c) The Office of General Counsel, after notifying the Freedom of Information Officer at EPA Headquarters, may extend the basic 20-day period established under subsection (a) of this section by a period not to exceed 10 additional working days, by furnishing written notice to the requestor within the basic 20-day period stating the reasons for such extension and the date by which the office expects to be able to issue a determination. The period may be so extended only when absolutely necessary, only for the period required, and only when one or more of the following unusual circumstances require the extension:

(1) There is a need to search for and collect the records from field facilities or other establishments that are separate from the office processing the appeal;

(2) There is a need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) There is a need for consultation, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or among two or more components of EPA.

(d) No extension of the 20-day period shall be issued under subsection (c) of this section which would cause the total of all such extensions and of any extensions issued under § 2.112(e) to exceed 10 working days.

§ 2.118 Exemption categories.

(a) 5 U.S.C. 552(b) establishes nine exclusive categories of matters which are exempt from the mandatory disclosure requirements of 5 U.S.C. 552(a). No request under 5 U.S.C. 552 for an existing, located record in EPA's possession shall be denied by any EPA office or employee unless the record contains (or its disclosure would reveal) matters that are—

(1) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order;

(2) Related solely to the internal personnel rules and practices of an agency;

(3) Specifically exempted from disclosure by statute (other than 5 U.S.C. 552(b)): *Provided,* That such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) Trade secrets and commercial or financial information obtained from a person and privileged or confidential (see Subpart B);

(5) Interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7)(i) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information:

(A) Could reasonably be expected to interfere with enforcement proceedings;

(B) Would deprive a person of a right to a fair trial or an impartial adjudication;

(C) Could reasonably be expected to constitute an unwarranted invasion of personal privacy;

(D) Could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source;

(E) Would disclose techniques and procedures for law enforcement inves-

tigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or

(F) Could reasonably be expected to endanger the life or physical safety of any individual.

(ii) [Reserved]

(8) Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of finanical institutions; or

(9) Geological and geophysical information and data, including maps, concerning wells.

(b) The fact that the applicability of an exemption permits the withholding of a requested record (or portion thereof) does not necessarily mean that the record must or should be withheld. See § 2.119.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 53 FR 217, Jan. 5, 1988]

§ 2.119 Discretionary release of exempt documents.

(a) An EPA office may, in its discretion, release requested records despite the applicability of one or more of the exemptions listed in § 2.118 (a)(2), (a)(5), or (a)(7). Disclosure of such records is encouraged if no important purpose would be served by withholding the records.

(b) As a matter of policy, EPA will not release a requested record if EPA has determined that one or more of the exemptions listed in § 2.118(a) (1), (3), (4), (6), (8), or (9), applies to the record, except when ordered to do so by a Federal court or in exceptional circumstances under appropriate restrictions with the approval of the Office of General Counsel or a Regional Counsel.

§ 2.120 Fees; payment; waiver.

(a) *Fee schedule.* Requesters shall be charged the full allowable direct costs incurred by the Agency in responding to a FOIA request. However, if EPA uses a contractor to search for, reproduce or disseminate records responsive to a request, the cost to the requester shall not exceed the cost of the Agency itself performing the service.

(1) There are four categories of requests. Fees for each of the categories will be charged as follows:

(i) Commercial use requests. If the request seeks disclosure of records for a commercial use, the requester shall be charged for the time spent searching for the requested record, reviewing the record to determine whether it should be disclosed and for the cost of each page of duplication. Commercial use requesters should note that EPA also may charge fees to them for time spent searching for and/or reviewing records, even if EPA fails to locate the records or if the records located are determined to be exempt from disclosure.

(ii) Requests from an educational or non-commercial scientific institution whose purpose is scholarly or scientific research, involving a request which is not for a commercial use and seeks disclosure of records. In the case of such a request, the requester shall be charged only for the duplication cost of the records, except that the first 100 pages of duplication shall be furnished without charge.

(iii) Requests from a representative of the news media, involving a request which is not for a commercial use and seeks disclosure of records. In the case of such a request, the requester shall be charged only for the duplication cost of the records, except that the first 100 pages of duplication shall be furnished without charge.

(iv) All other requests. If the request seeks disclosure of records other than as described in paragraphs (a)(1) (i), (ii), and (iii) of this section, the requester shall be charged the full cost of search and duplication. However, the first two hours of search time (or its cost equivalent) and the first 100 pages of duplication (or their cost equivalent) shall be furnished without charge. Requesters in the "all other requests" category should note that EPA also may charge fees to them for time spent searching for records, even if EPA fails to locate the records or if the records located are determined to be exempt from disclosure.

(2) The determination of a requester's fee category will be based on the following:

(i) Commercial use requesters: The use to which the requester will put the documents requested;

(ii) Educational and non-commercial scientific institution requestors: Identity of the requester and the use to which the requestor will put the documents requested;

(iii) Representatives of the news media requesters: The identity of the requester and the use to which the requestor will put the documents requested.

(3) Fees will be charged to requesters, as appropriate, for search, duplication and review of requested records in accordance with the following schedule:

(i) Manual search for records.

(A) EPA Employees: For each ½ hour or portion thereof:

(*1*) GS–8 and below: $4.00.

(*2*) GS–9 and above: $10.00.

(B) Contractor employees: The requestor will be charged for actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search.

(ii) Computer search for records charges will consist of:

(A) EPA employee operators: For each ½ hour or portion thereof:

(*1*) GS–8 and below: $4.00.

(*2*) GS–9 and above: $10.00, plus.

(B) Contractor operators: Requestors will be charged for the actual charges up to but not exceeding the rate which would have been charged had EPA employees conducted the search (see paragraph (a)(3)(i)(A) of this section), plus.

(C) Actual computer resource usage charges for this search.

(iii) Review of records. For each ½ hour or portion thereof (EPA employees):

(A) GS–8 and below: $4.00.

(B) GS–9 and above: $10.00.

(iv) Duplication or reproduction of records.

(A) Duplication or reproduction of documents by EPA employees (paper copy of paper original): $.15 per page.

(B) Computer printouts (other than those calculated in a direct-cost billing—see paragraph (a)(3)(ii) of this section "Computer search for records") $.15 per page.

(C) Other methods of duplication or reproduction, including, but not limited to, duplication of photographs, microfilm and magnetic tape, will be charged at the actual direct cost to EPA.

(4) Other charges.

(i) Other charges incurred in responding to a request including but not limited to, special handling or transportation of records, will be charged at the actual direct cost to EPA.

(ii) Certification or authentication of records: $25.00 per certification or authentication.

(5) No charge shall be made—

(i) For the cost of preparing or reviewing letters of response to a request or appeal;

(ii) For time spent resolving legal or policy issues concerning the application of exemptions;

(iii) For search time and the first 100 pages of duplication for requests described in § 2.120(a)(1) (ii) and (iii) of this section;

(iv) For the first two hours of search time (or its cost equivalent) and for the first 100 pages of duplication for requests described in § 2.120(a)(1)(iv) of this section;

(v) If the total fee in connection with a request is less than $25.00, or if the costs of collecting the fee would otherwise exceed the amount of the fee. However, when EPA reasonably believes that a requester or group of requesters is attempting to break a request down into a series of requests for the purpose of avoiding the assessment of fees, EPA will aggregate such requests to determine the total fee, and will charge accordingly;

(vi) For responding to a request by an individual for one copy of a record retrievable by the requesting individual's name or personal identifier from a Privacy Act system of records;

(vii) For furnishing records requested by either House of Congress, or by a duly authorized committee or subcommittee of Congress, unless the records are requested for the benefit of an individual Member of Congress or for a constituent;

(viii) For furnishing records requested by and for the official use of other Federal agencies; or

(ix) For furnishing records needed by an EPA contractor, subcontractor, or grantee to perform the work required by the EPA contract or grant.

(b) *Method of payment.* All fee payments shall be in the form of a check or money order payable to the "U.S. Environmental Protection Agency" and shall be sent (accompanied by a reference to the pertinent Request Identification Number(s)) to the appropriate Headquarters or Regional Office lock box address:

(1) EPA—Washington Headquarters, P.O. Box 360277M, Pittsburgh, PA 15251;

(2) EPA—Region 1, P.O. Box 360197M, Pittsburgh, PA 15251;

(3) EPA—Region 2, P.O. Box 360188M, Pittsburgh, PA 15251;

(4) EPA—Region 3, P.O. Box 360515M, Pittsburgh, PA 15251;

(5) EPA—Region 4, P.O. Box 100142, Atlanta, GA. 30384;

(6) EPA—Region 5, P.O. Box 70753, Chicago, IL 60673;

(7) EPA—Region 6, P.O. Box 360582M, Pittsburgh, PA 15251;

(8) EPA—Region 7, P.O. Box 360748M, Pittsburgh, PA 15251;

(9) EPA—Region 8, P.O. Box 360859M, Pittsburgh, PA 15251;

(10) EPA—Region 9, P.O. Box 360863M, Pittsburgh, PA 15251;

(11) EPA—Region 10, P.O. Box 360903M, Pittsburgh, PA 15251;

Under the Debt Collection Act of 1982 (Pub. L. 97-365), payment (except for prepayment) shall be due within thirty (30) calendar days after the date of billing. If payment is not received at the end of thirty calendar days, interest and a late payment handling charge will be assessed. In addition, under this Act, a penalty charge will be applied on any principal amount not paid within ninety (90) calendar days after the due date for payment. By the authority of the Debt Collection Act of 1982, delinquent amounts due may be collected through administrative offset or referred to private collection agencies. Information related to delinquent accounts may also be reported to the appropriate credit agencies.

(c) *Assurance of payment.* (1) If an EPA office estimates that the fees for processing a request (or aggregated requests as described in § 2.120(a)(5)(vi) of this section) will exceed $25.00, that office need not search for, duplicate or disclose records in response to the request(s) until the requester assures payment of the total amount of fees estimated to become due under this section. In such cases, the EPA office will promptly inform the requester (by telephone it practicable) of the need to make assurance of payment.

(2) An EPA office may not require a requester to make an advance payment, i.e. payment before work is commenced or continued on a request, unless:

(i) A requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days after the date of the billing), or

(ii) The EPA office estimates or determines that the allowable charges that a requester may be required to pay are likely to exceed $250.00. Then the EPA office will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment. If such advance payment is not received within 30 days after EPA's billing, the request will not be processed and the request will be closed. See also § 2.112(d).

(d) *Reduction or waiver of fee.* (1) The fee chargeable under this section shall be reduced or waived by EPA if the Agency determines that disclosure of the information:

(i) Is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(ii) Is not primarily in the commercial interest of the requestor.

(2) Both of these requirements must be satisfied before fees properly assessable can be waived or reduced.

(3) The Agency will employ the following four factors in determining whether the first requirement has been met:

(i) The subject of the request: Whether the subject of the requested records concerns "the operations or activities of the government";

(ii) The informative value of the information to be disclosed: Whether the disclosure is "likely to contribute to an understanding of government operations or activities";

(iii) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to "public understanding"; and

(iv) The significance of the contribution to public understanding: Whether disclosure is likely to contribute "significantly" to public understanding of government operations or activities.

(4) The Agency will employ the following factors in determining whether the second requirement has been met:

(i) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(ii) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is "primarily in the commercial interest of the requester."

(5) In all cases, the burden shall be on the requester to present information in support of a request for a waiver of fees. A request for reduction or waiver of fees should include:

(i) A clear statement of the requester's interest in the requested documents;

(ii) The use proposed for the documents and whether the requester will derive income or other benefit from such use;

(iii) A statement of how the public will benefit from such use and from the release of the requested documents; and

(iv) If specialized use of the documents or information is contemplated, a statement of the requester's qualifications that are relevant to the specialized use.

(6) A request for reduction or waiver of fees shall be addressed to the appropriate Freedom of Information Officer. The requester shall be informed in writing of the Agency's decision whether to grant or deny the fee waiver or fee reduction request. This decision may be appealed by letter addressed to the EPA Freedom of Information Officer. The General Counsel shall decide such appeals. The General Counsel may redelegate this authority only to the Deputy General Counsel or the Associate General Counsel for Grants, Contracts and General Law.

(e) The Financial Management Office shall maintain a record of all fees charged requesters for searching for, reviewing and reproducing requested records under this section. If after the end of 60 calendar days from the date on which request for payment was made the requester has not submitted payment to the appropriate EPA billing address (as listed in § 2.120(b)), the Financial Management Division shall place the requester's name on a delinquent list which is sent to the EPA Freedom of Information Officer. If a requester whose name appears on the delinquent list makes a request under this part, the EPA Freedom of Information Officer shall inform the requester that EPA will not process the request until the requester submits payment of the overdue fee from the earlier request. Any request made by an individual who specifies an affiliation with or representation of a corporation, association, law firm, or other organization shall be deemed to be a request by the corporation, association, law firm, or other organization. If an organization placed on the delinquent list can show that the person who made the request for which payment was overdue did not make the request on behalf of the organization the organization will be removed from the delinquent list but the name of the individual shall remain on the list. A requester shall not be placed on the delinquent list if a request for a reduction or for a waiver is pending under paragraph (d) of this section.

[53 FR 217, Jan. 5, 1988]

§ 2.121 Exclusions.

(a) Whenever a request is made which involves access to records described in § 2.118(a)(7)(i)(A), and

(1) The investigation or proceeding involves a possible violation of criminal law; and

(2) There is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of such records could reasonably be expected to interfere with enforcement proceedings, EPA shall, during only such time as the circumstances continue, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

(b) Whenever informant records maintained by the Agency under an informant's name or personal identifier are requested by a third party according to the informant's name or personal identifier and the informant's status as an informant has not been officially confirmed, EPA shall treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

(c) No determination relying on this section shall be issued without the concurrence of the General Counsel or his designee. The General Counsel has designated the Contracts and Information Law Branch to act on these requests for concurrence.

(d) An initial determination which only relies on this section will not include notice of appeal rights.

[53 FR 219, Jan. 5, 1988]

Subpart B—Confidentiality of Business Information

§ 2.201 Definitions.

For the purposes of this subpart:

(a) *Person* means an individual, partnership, corporation, association, or other public or private organization or legal entity, including Federal, State or local governmental bodies and agencies and their employees.

(b) *Business* means any person engaged in a business, trade, employment, calling or profession, whether or not all or any part of the net earnings derived from such engagement by such person inure (or may lawfully inure) to the benefit of any private shareholder or individual.

(c) *Business information* (sometimes referred to simply as *information*) means any information which pertains to the interests of any business, which was developed or acquired by that business, and (except where the context otherwise requires) which is possessed by EPA in recorded form.

(d) *Affected business* means, with reference to an item of business information, a business which has asserted (and not waived or withdrawn) a business confidentiality claim covering the information, or a business which could be expected to make such a claim if it were aware that disclosure of the information to the public was proposed.

(e) *Reasons of business confidentiality* include the concept of trade secrecy and other related legal concepts which give (or may give) a business the right to preserve the confidentiality of business information and to limit its use or disclosure by others in order that the business may obtain or retain business advantages it derives from its rights in the information. The definition is meant to encompass any concept which authorizes a Federal agency to withhold business information under 5 U.S.C. 552(b)(4), as well as any concept which requires EPA to withhold information from the public for the benefit of a business under 18 U.S.C. 1905 or any of the various statutes cited in § 2.301 through § 2.309.

(f) [Reserved]

(g) Information which is *available to the public* is information in EPA's possession which EPA will furnish to any member of the public upon request and which EPA may make public, release or otherwise make available to any person whether or not its disclosure has been requested.

(h) *Business confidentiality claim* (or, simply, *claim*) means a claim or allegation that business information is entitled to confidential treatment for reasons of business confidentiality, or a request for a determination that such information is entitled to such treatment.

(i) *Voluntarily submitted information* means business information in EPA's possession—

(1) The submission of which EPA had no statutory or contractual authority to require; and

(2) The submission of which was not prescribed by statute or regulation as a condition of obtaining some benefit (or avoiding some disadvantage) under a regulatory program of general applicability, including such regulatory programs as permit, licensing, registration, or certification programs, but excluding programs concerned solely or primarily with the award or administration by EPA of contracts or grants.

(j) *Recorded* means written or otherwise registered in some form for preserving information, including such forms as drawings, photographs, videotape, sound recordings, punched cards, and computer tape or disk.

(k) [Reserved]

(l) *Administrator, Regional Administrator, General Counsel, Regional Counsel, and Freedom of Information Officer* mean the EPA officers or employees occupying the positions so titled.

(m) *EPA office* means any organizational element of EPA, at any level or location. (The terms *EPA office* and *EPA legal office* are used in this subpart for the sake of brevity and ease of reference. When this subpart requires that an action be taken by an *EPA office* or by an *EPA legal office*, it is the responsibility of the officer or employee in charge of that office to take the action or ensure that it is taken.)

(n) *EPA legal office* means the EPA General Counsel and any EPA office over which the General Counsel exercises supervisory authority, including the various Offices of Regional Counsel. (See paragraph (m) of this section.)

(o) A *working day* is any day on which Federal government offices are open for normal business. Saturdays, Sundays, and official Federal holidays are not working days; all other days are.

§ 2.202 Applicability of subpart; priority where provisions conflict; records containing more than one kind of information.

(a) Sections 2.201 through 2.215 establish basic rules governing business confidentiality claims, the handling by EPA of business information which is or may be entitled to confidential treatment, and determinations by EPA of whether information is entitled to confidential treatment for reasons of business confidentiality.

(b) Various statutes (other than 5 U.S.C. 552) under which EPA operates contain special provisions concerning the entitlement to confidential treatment of information gathered under such statutes. Sections 2.301 through 2.311 prescribe rules for treatment of certain categories of business information obtained under the various statutory provisions. Paragraph (b) of each of those sections should be consulted to determine whether any of those sections applies to the particular information in question.

(c) The basic rules of §§ 2.201 through 2.215 govern except to the extent that they are modified or supplanted by the special rules of §§ 2.301 through 2.311. In the event of a conflict between the provisions of the basic rules and those of a special rule which is applicable to the particular information in question, the provision of the special rule shall govern.

(d) If two or more of the sections containing special rules apply to the particular information in question, and the applicable sections prescribe conflicting special rules for the treatment of the information, the rule which provides greater or wider availability to the public of the information shall govern.

(e) For most purposes, a document or other record may usefully be treated as a single unit of *information*, even though in fact the document or record is comprised of a collection of individual items of information. However, in applying the provisions of this subpart, it will often be necessary to separate the individual items of information into two or more categories, and to afford different treatment to the information in each such category. The need for differentiation of this type may arise, e.g., because a business confidentiality claim covers only a portion of a record, or because only a portion of the record is eligible for confidential treatment. EPA offices taking action under this subpart must be alert to this problem.

(f) In taking actions under this subpart, EPA offices should consider whether it is possible to obtain the affected business's consent to disclosure of useful portions of records while protecting the information which is or may be entitled to confidentiality (e.g., by withholding such portions of a record as would identify a business, or by disclosing data in the form of industry-wide aggregates, multi-year averages or totals, or some similar form).

(g) This subpart does not apply to questions concerning entitlement to confidential treatment or information which concerns an individual solely in his personal, as opposed to business, capacity.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.203 Notice to be included in EPA requests, demands, and forms; method of asserting business confidentiality claim; effect of failure to assert claim at time of submission.

(a) *Notice to be included in certain requests and demands for information, and in certain forms.* Whenever an EPA office makes a written request or demand that a business furnish information which, in the office's opinion, is likely to be regarded by the business as entitled to confidential treatment under this subpart, or whenever an EPA office prescribes a form for use by businesses in furnishing such information, the request, demand, or form shall include or enclose a notice which—

(1) States that the business may, if it desires, assert a business confidentiality claim covering part or all of the information, in the manner described by paragraph (b) of this section, and that information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in this subpart;

(2) States that if no such claim accompanies the information when it is received by EPA, it may be made available to the public by EPA without further notice to the business; and

(3) Furnishes a citation of the location of this subpart in the Code of Federal Regulations and the FEDERAL REGISTER.

(b) *Method and time of asserting business confidentiality claim.* A business which is submitting information to EPA may assert a business confidentiality claim covering the information by placing on (or attaching to) the information, at the time it is submitted to EPA, a cover sheet, stamped or typed legend, or other suitable form of notice employing language such as *trade secret, proprietary,* or *company confidential.* Allegedly confidential portions of otherwise non-confidential documents should be clearly identified by the business, and may be submitted separately to facilitate identification and handling by EPA. If the business desires confidential treatment only until a certain date or until the occurrence of a certain event, the notice should so state.

(c) *Effect of failure to assert claim at time of submission of information.* If information was submitted by a business to EPA on or after October 1, 1976, in response to an EPA request or demand (or on an EPA-prescribed form) which contained the substance of the notice required by paragraph (a) of this section, and if no business confidentiality claim accompanied the information when it was received by EPA, the inquiry to the business normally required by § 2.204(c)(2) need not be made. If a claim covering the information is received after the information itself is received, EPA will make such efforts as are administratively practicable to associate the late claim with copies of the previously-submitted information in EPA files (see § 2.204(c)(1)). However, EPA cannot assure that such efforts will be effective, in light of the possibility of prior disclosure or widespread prior dissemination of the information.

§ 2.204 Initial action by EPA office.

(a) *Situations requiring action.* This section prescribes procedures to be used by EPA offices in making initial determinations of whether business information is entitled to confidential treatment for reasons of business confidentiality. Action shall be taken

under this section whenever an EPA office:

(1) Learns that it is responsible for responding to a request under 5 U.S.C. 552 for the release of business information; in such a case, the office shall issue an initial determination within the period specified in § 2.112;

(2) Desires to determine whether business information in its possession is entitled to confidential treatment, even though no request for release of the information has been received; or

(3) Determines that it is likely that EPA eventually will be requested to disclose the information at some future date and thus will have to determine whether the information is entitled to confidential treatment. In such a case this section's procedures should be initiated at the earliest practicable time, in order to increase the time available for preparation and submission of comments and for issuance of determinations, and to make easier the task of meeting response deadlines if a request for release of the information is later received under 5 U.S.C. 552.

(b) *Previous confidentiality determination.* The EPA office shall first ascertain whether there has been a previous determination, issued by a Federal court or by an EPA legal office acting under this subpart, holding that the information in question is entitled to confidential treatment for reasons of business confidentiality.

(1) If such a determination holds that the information is entitled to confidential treatment, the EPA Office shall furnish any person whose request for the information is pending under 5 U.S.C. 552 an initial determination (see § 2.111 and § 2.113) that the information has previously been determined to be entitled to confidential treatment, and that the request is therefore denied. The office shall furnish such person the appropriate case citation or EPA determination. If the EPA office believes that a previous determination which was issued by an EPA legal office may be improper or no longer valid, the office shall so inform the EPA legal office, which shall consider taking action under § 2.205(h).

(2) With respect to all information not known to be covered by such a previous determination, the EPA office shall take action under paragraph (c) of this section.

(c) *Determining existence of business confidentiality claims.* (1) Whenever action under this paragraph is required by paragraph (b)(2) of this section, the EPA office shall examine the information and the office's records to determine which businesses, if any, are affected businesses (see § 2.201(d)), and to determine which businesses if any, have asserted business confidentiality claims which remain applicable to the information. If any business is found to have asserted an applicable claim, the office shall take action under paragraph (d) of this section with respect to each such claim.

(2)(i) If the examination conducted under paragraph (c)(1) of this section discloses the existence of any business which, although it has not asserted a claim, might be expected to assert a claim if it knew EPA proposed to disclose the information, the EPA office shall contact a responsible official of each such business to learn whether the business asserts a claim covering the information. However, no such inquiry need be made to any business—

(A) Which failed to assert a claim covering the information when responding to an EPA request or demand, or supplying information on an EPA form, which contained the substance of the statements prescribed by § 2.203(a);

(B) Which otherwise failed to assert a claim covering the information after being informed by EPA that such failure could result in disclosure of the information to the public; or

(C) Which has otherwise waived or withdrawn a claim covering the information.

(ii) If a request for release of the information under 5 U.S.C. 552 is pending at the time inquiry is made under this paragraph (c)(2), the inquiry shall be made by telephone or equally prompt means, and the responsible official contacted shall be informed that any claim the business wishes to assert must be brought to the EPA office's attention no later than the close of

business on the third working day after such inquiry.

(iii) A record shall be kept of the results of any inquiry under this paragraph (c)(2). If any business makes a claim covering the information, the EPA office shall take further action under paragraph (d) of this section.

(3) If, after the examination under paragraph (c)(1) of this section, and after any inquiry made under paragraph (c)(2) of this section, the EPA office knows of no claim covering the information and the time for response to any inquiry has passed, the information shall be treated for purposes of this subpart as not entitled to confidential treatment.

(d) *Preliminary determination.* Whenever action under this paragraph is required by paragraph (c)(1) or (2) of this section on any business's claim, the EPA Office shall make a determination with respect to each such claim. Each determination shall be made after consideration of the provisions of § 2.203, the applicable substantive criteria in § 2.208 or elsewhere in this subpart, and any previously-issued determinations under this subpart which are applicable.

(1) If, in connection with any business's claim, the office determines that the information may be entitled to confidential treatment, the office shall—

(i) Furnish the notice of opportunity to submit comments prescribed by paragraph (e) of this section to each business which is known to have asserted an applicable claim and which has not previously been furnished such notice with regard to the information in question;

(ii) Furnish, to any person whose request for release of the information is pending under 5 U.S.C. 552, a determination (in accordance with § 2.113) that the information may be entitled to confidential treatment under this subpart and 5 U.S.C. 552(b)(4), that further inquiry by EPA pursuant to this subpart is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final detemination will be issued by an EPA legal office; and

(iii) Refer the matter to the appropriate EPA legal office, furnishing the information required by paragraph (f) of this section after the time has elapsed for receipt of comments from the affected business.

(2) If, in connection with all applicable claims, the office determines that the information clearly is not entitled to confidential treatment, the office shall take the actions required by § 2.205(f). However, if a business has previously been furnished notice under § 2.205(f) with respect to the same information, no further notice need be furnished to that business. A copy of each notice furnished to a business under this paragraph (d)(2) and § 2.205(f) shall be forwarded promptly to the appropriate EPA legal office.

(e) *Notice to affected businesses; opportunity to comment.* (1) Whenever required by paragraph (d)(1) of this section, the EPA office shall promptly furnish each business a written notice stating that EPA is determining under this subpart whether the information is entitled to confidential treatment, and affording the business an opportunity to comment. The notice shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact and date of receipt. The notice shall state the address of the office to which the business's comments shall be addressed (the EPA office furnishing the notice, unless the General Counsel has directed otherwise), the time allowed for comments, and the method for requesting a time extension under § 2.205(b)(2). The notice shall further state that EPA will construe a business's failure to furnish timely comments as a waiver of the business's claim.

(2) If action under this section is occasioned by a request for the information under 5 U.S.C. 552, the period for comments shall be 15 working days after the date of the business's receipt of the written notice. In other cases, the EPA office shall establish a reasonable period for comments (not less than 15 working days after the business's receipt of the written notice). The time period for comments shall be considered met if the business's com-

ments are postmarked or hand delivered to the office designated in the notice by the date specified. In all cases, the notice shall call the business's attention to the provisions of § 2.205(b).

(3) At or about the time the written notice is furnished, the EPA office shall orally inform a responsible representative of the business (by telephone or otherwise) that the business should expect to receive the written notice, and shall request the business to contact the EPA office if the written notice has not been received within a few days, so that EPA may furnish a duplicate notice.

(4) The written notice required by paragraph (e)(1) of this section shall invite the business's comments on the following points (subject to paragraph (e)(5) of this section):

(i) The portions of the information which are alleged to be entitled to confidential treatment;

(ii) The period of time for which confidential treatment is desired by the business (e.g., until a certain date, until the occurrence of a specified event, or permanently);

(iii) The purpose for which the information was furnished to EPA and the approximate date of submission, if known;

(iv) Whether a business confidentiality claim accompanied the information when it was received by EPA;

(v) Measures taken by the business to guard against undesired disclosure of the information to others;

(vi) The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;

(vii) Pertinent confidentiality determinations, if any, by EPA or other Federal agencies, and a copy of any such determination, or reference to it, if available;

(viii) Whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on the business' competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and

(ix) Whether the business asserts that the information is voluntarily submitted information as defined in § 2.201(i), and if so, whether and why disclosure of the information would tend to lessen the availability to EPA of similar information in the future.

(5) To the extent that the EPA office already possesses the relevant facts, the notice need not solicit responses to the matters addressed in paragraphs (e)(4) (i) through (ix) of this section, although the notice shall request confirmation of EPA's understanding of such facts where appropriate.

(6) The notice shall refer to § 2.205(c) and shall include the statement prescribed by § 2.203(a).

(f) *Materials to be furnished to EPA legal office.* When a matter is referred to an EPA legal office under paragraph (d)(1) of this section, the EPA office taking action under this section shall forward promptly to the EPA legal office the following items:

(1) A copy of the information in question, or (where the quantity or form of the information makes forwarding a copy of the information impractical) representative samples, a description of the information, or both;

(2) A description of the circumstances and date of EPA's acquisition of the information;

(3) The name, address, and telephone number of the EPA employee(s) most familiar with the information;

(4) The name, address and telephone number of each business which asserts an applicable business confidentiality claim;

(5) A copy of each applicable claim (or the record of the assertion of the claim), and a description of when and how each claim was asserted;

(6) Comments concerning each business's compliance or noncompliance with applicable requirements of § 2.203;

(7) A copy of any request for release of the information pending under 5 U.S.C. 552;

(8) A copy of the business's comments on whether the information is entitled to confidential treatment;

(9) The office's comments concerning the appropriate substantive crite-

ria under this subpart, and information the office possesses concerning the information's entitlement to confidential treatment; and

(10) Copies of other correspondence or memoranda which pertain to the matter.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.205 Final confidentiality determination by EPA legal office.

(a) *Role of EPA legal office.* (1) The appropriate EPA legal office (see paragraph (l) of this section) is responsible for making the final administrative determination of whether or not business information covered by a business confidentiality claim is entitled to confidential treatment under this subpart.

(2) When a request for release of the information under 5 U.S.C. 552 is pending, the EPA legal office's determination shall serve as the final determination on appeal from an initial denial of the request.

(i) If the initial denial was issued under § 2.204(b)(1), a final determination by the EPA legal office is necessary only if the requestor has actually filed an appeal.

(ii) If the initial denial was issued under § 2.204(d)(1), however, the EPA legal office shall issue a final determination in every case, unless the request has been withdrawn. (Initial denials under § 2.204(d)(1) are of a procedural nature, to allow further inquiry into the merits of the matter, and a requestor is entitled to a decision on the merits.) If an appeal from such a denial has not been received by the EPA Freedom of Information Officer on the tenth working day after issuance of the denial, the matter shall be handled as if an appeal had been received on that day, for purposes of establishing a schedule for issuance of an appeal decision under § 2.117 of this part.

(b) *Comment period; extensions; untimeliness as waiver of claim.* (1) Each business which has been furnished the notice and opportunity to comment prescribed by § 2.204(d)(1) and § 2.204(e) shall furnish its comments to the office specified in the notice in time to be postmarked or hand delivered to that office not later than the date specified in the notice (or the date established in lieu thereof under this section).

(2) The period for submission of comments may be extended if, before the comments are due, a request for an extension of the comment period is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(3) The period for submission of comments by a business may be shortened in the manner described in paragraph (g) of this section.

(4) If a business's comments have not been received by the specified EPA office by the date they are due (including any approved extension), that office shall promptly inquire whether the business has complied with paragraph (b)(1) of this section. If the business has complied with paragraph (b)(1) but the comments have been lost in transmission, duplicate comments shall be requested.

(c) *Confidential treatment of comments from business.* If information submitted to EPA by a business as part of its comments under this section pertains to the business's claim, is not otherwise possessed by EPA, and is marked when received in accordance with § 2.203(b), it will be regarded by EPA as entitled to confidential treatment and will not be disclosed by EPA without the business's consent, unless its disclosure is duly ordered by a Federal court, notwithstanding other provisions of this subpart to the contrary.

(d) *Types of final determinations; matters to be considered.* (1) If the EPA legal office finds that a business has failed to furnish comments under paragraph (b) of this section by the specified due date, it shall determine that the business has waived its claim. If, after application of the preceding sentence, no claim applies to the information, the office shall determine that the information is not entitled to confidential treatment under this subpart and, subject to § 2.210, is available to the public.

(2) In all other cases, the EPA legal office shall consider each business's claim and comments, the various provisions of this subpart, any previously-issued determinations under this subpart which are pertinent, the materials furnished it under § 2.204(f), and such other materials as it finds appropriate. With respect to each claim, the office shall determine whether or not the information is entitled to confidential treatment for the benefit of the business that asserted the claim, and the period of any such entitlement (e.g., until a certain date, until the occurrence of a specified event, or permanently), and shall take further action under paragraph (e) or (f) of this section, as appropriate.

(3) Whenever the claims of two or more businesses apply to the same information, the EPA legal office shall take action appropriate under the particular circumstances to protect the interests of all persons concerned (including any person whose request for the information is pending under 5 U.S.C. 552).

(e) *Determination that information is entitled to confidential treatment.* If the EPA legal office determines that the information is entitled to confidential treatment for the full period requested by the business which made the claim, EPA shall maintain the information in confidence for such period, subject to paragraph (h) of this section, § 2.209, and the other provisions of this subpart which authorize disclosure in specified circumstances, and the office shall so inform the business. If any person's request for the release of the information is then pending under 5 U.S.C. 552, the EPA legal office shall issue a final determination denying that request.

(f) *Determination that information is not entitled to confidential treatment; notice; waiting period; release of information.* (1) Notice of denial (or partial denial) of a business confidentiality claim, in the form prescribed by paragraph (f)(2) of this section, shall be furnished—

(i) By the EPA office taking action under § 2.204, to each business on behalf of which a claim has been made, whenever § 2.204(d)(2) requires such notice; and

(ii) By the EPA legal office taking action under this section, to each business which has asserted a claim applicable to the information and which has furnished timely comments under paragraph (b) of this section, whenever the EPA legal office determines that the information is not entitled to confidential treatment under this subpart for the benefit of the business, or determines that the period of any entitlement to confidential treatment is shorter than that requested by the business.

(2) The notice prescribed by paragraph (f)(1) of this section shall be written, and shall be furnished by certified mail (return receipt requested), by personal delivery, or by other means which allows verification of the fact of receipt and the date of receipt. The notice shall state the basis for the determination, that it constitutes final agency action concerning the business confidentiality claim, and that such final agency action may be subject to judicial review under Chapter 7 of Title 5, United States Code. With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the tenth working day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof by the EPA legal office under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination, and to obtain preliminary injunctive relief against disclosure. The notice shall further state that if such an action is timely commenced, EPA may nonetheless make the information available to the public (in the absence of an order by the court to the contrary), once the court has denied a motion for a preliminary injunction in the action or has otherwise upheld the EPA determination, or whenever it appears to the EPA legal office, after reasonable notice to the business, that the business is not taking appropriate measures to obtain a speedy resolution of the action. If the information has been found to be temporarily entitled

to confidential treatment, the notice shall further state that the information will not be disclosed prior to the end of the period of such temporary entitlement to confidential treatment.

(3) The period established in a notice under paragraph (f)(2) of this section for commencement of an action to obtain judicial review may be extended if, before the expiration of such period, a request for an extension is made by the business and approved by the EPA legal office. Except in extraordinary circumstances, the EPA legal office will not approve such an extension without the consent of any person whose request for release of the information under 5 U.S.C. 552 is pending.

(4) After the expiration of any period of temporary entitlement to confidential treatment, a determination under this paragraph (f) shall be implemented by the EPA legal office by making the information available to the public (in the absence of a court order prohibiting disclosure) whenever—

(i) The period provided for commencement by a business of an action to obtain judicial review of the determination has expired without notice to the EPA legal office of commencement of such an action;

(ii) The court, in a timely-commenced action, has denied the business' motion for a preliminary injunction, or has otherwise upheld the EPA determination; or

(iii) The EPA legal office, after reasonable notice has been provided to the business, finds that the business is not taking appropriate measures to obtain a speedy resolution of the timely-commenced action.

(5) Any person whose request for release of the information under 5 U.S.C. 552 is pending at the time notice is given under paragraph (f)(2) of this section shall be furnished a determination under 5 U.S.C. 552 stating the circumstances under which the information will be released.

(g) *Emergency situations.* If the General Counsel finds that disclosure of information covered by a claim would be helpful in alleviating a situation posing an imminent and substantial danger to public health or safety, he may prescribe and make known to interested persons such shorter comment period (paragraph (b) of this section), post-determination waiting period (paragraph (f) of this section), or both, as he finds necessary under the circumstances.

(h) *Modification of prior determinations.* A determination that information is entitled to confidential treatment for the benefit of a business, made under this subpart by an EPA legal office, shall continue in effect in accordance with its terms until an EPA legal office taking action under this section, or under § 2.206 or § 2.207, issues a final determination stating that the earlier determination no longer describes correctly the information's entitlement to confidential treatment because of change in the applicable law, newly-discovered or changed facts, or because the earlier determination was clearly erroneous. If an EPA legal office tentatively concludes that such an earlier determination is of questionable validity, it shall so inform the business, and shall afford the business an opportunity to furnish comments on pertinent issues in the manner described by § 2.204(e) and paragraph (b) of this section. If, after consideration of any timely comments submitted by the business, the EPA legal office makes a revised final determination that the information is not entitled to confidential treatment, or that the period of entitlement to such treatment will end sooner than it would have ended under the earlier determination, the office will follow the procedure described in paragraph (f) of this section. Determinations under this section may be made only by, or with the concurrence of, the General Counsel.

(i) *Delegation and redelegation of authority.* Unless the General Counsel otherwise directs, or this subpart otherwise specifically provides, determinations and actions required by this subpart to be made or taken by an EPA legal office shall be made or taken by the appropriate Regional counsel whenever the EPA office taking action under § 2.204 or § 2.206(b) is under the supervision of a Regional Administrator, and by the General Counsel in all other cases.

The General Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the General Counsel's supervision. A Regional Counsel may redelegate any or all of his authority under this subpart to any attorney employed by EPA on a full-time basis under the Regional counsel's supervision.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51661, Dec. 18, 1985]

§ 2.206 Advance confidentiality determinations.

(a) An advance determination under this section may be issued by an EPA legal office if—

(1) EPA has requested or demanded that a business furnish business information to EPA;

(2) The business asserts that the information, if submitted, would constitute voluntarily submitted information under § 2.201(i);

(3) The business will voluntarily submit the information for use by EPA only if EPA first determines that the information is entitled to confidential treatment under this subpart; and

(4) The EPA office which desires submission of the information has requested that the EPA legal office issue a determination under this section.

(b) The EPA office requesting an advance determination under this section shall—

(1) Arrange to have the business furnish directly to the EPA legal office a copy of the information (or, where feasible, a description of the nature of the information sufficient to allow a determination to be made), as well as the business's comments concerning the matters addressed in § 2.204(e)(4), excluding, however, matters addressed in § 2.204 (e)(4)(iii) and (e)(4)(iv); and

(2) Furnish to the EPA legal office the materials referred to in § 2.204(f)(3), (7), (8), and (9).

(c) In making a determination under this section, the EPA legal office shall first determine whether or not the information would constitute voluntarily submitted information under § 2.201(i). If the information would constitute voluntarily submitted information, the legal office shall further determine whether the information is entitled to confidential treatment.

(d) If the EPA legal office determines that the information would not constitute voluntarily submitted information, or determines that it would constitute voluntarily submitted information but would not be entitled to confidential treatment, it shall so inform the business and the EPA office which requested the determination, stating the basis of the determination, and shall return to the business all copies of the information which it may have received from the business (except that if a request under 5 U.S.C. 552 for release of the information is received while the EPA legal office is in possession of the information, the legal office shall retain a copy of the information, but shall not disclose it unless ordered by a Federal court to do so). The legal office shall not disclose the information to any other EPA office or employee and shall not use the information for any purpose except the determination under this section, unless otherwise directed by a Federal court.

(e) If the EPA legal office determines that the information would constitute voluntarily submitted information and that it is entitled to confidential treatment, it shall so inform the EPA office which requested the determination and the business which submitted it, and shall forward the information to the EPA office which requested the determination.

§ 2.207 Class determinations.

(a) The General Counsel may make and issue a class determination under this section if he finds that—

(1) EPA possesses, or is obtaining, related items of business information;

(2) One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item under one or more of the provisions in this subpart, and that it is therefore proper to treat all such items as a class for one or more purposes under this subpart; and

(3) A class determination would serve a useful purpose.

(b) A class determination shall clearly identify the class of information to which it pertains.

(c) A class determination may state that all of the information in the class—

(1) Is, or is not, voluntarily submitted information under § 2.201(i);

(2) Is, or is not, governed by a particular section of this subpart, or by a particular set of substantive criteria under this subpart;

(3) Fails to satisfy one or more of the applicable substantive criteria, and is therefore ineligible for confidential treatment;

(4) Satisfies one or more of the applicable substantive criteria; or

(5) Satisfies one or more of the applicable substantive criteria during a certain period, but will be ineligible for confidential treatment thereafter.

(d) The purpose of a class determination is simply to make known the Agency's position regarding the manner in which information within the class will be treated under one or more of the provisions of this subpart. Accordingly, the notice of opportunity to submit comments referred to in § 2.204(d)(1)(ii) and § 2.205(b), and the list of materials required to be furnished to the EPA legal office under § 2.204(d)(1)(iii), may be modified to reflect the fact that the class determination has made unnecessary the submission of materials pertinent to one or more issues. Moreover, in appropriate cases, action based on the class determination may be taken under § 2.204(b)(1), § 2.204(d), § 2.205(d), or § 2.206. However, the existence of a class determination shall not, of itself, affect any right a business may have to receive any notice under § 2.204(d)(2) or § 2.205(f).

§ 2.208 Substantive criteria for use in confidentiality determinations.

Determinations issued under §§ 2.204 through 2.207 shall hold that business information is entitled to confidential treatment for the benefit of a particular business if—

(a) The business has asserted a business confidentiality claim which has not expired by its terms, nor been waived nor withdrawn;

(b) The business has satisfactorily shown that it has taken reasonable measures to protect the confidentiality of the information, and that it intends to continue to take such measures;

(c) The information is not, and has not been, reasonably obtainable without the business's consent by other persons (other than governmental bodies) by use of legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);

(d) No statute specifically requires disclosure of the information; and

(e) Either—

(1) The business has satisfactorily shown that disclosure of the information is likely to cause substantial harm to the business's competitive position; or

(2) The information is voluntarily submitted information (see § 2.201(i)), and its disclosure would be likely to impair the Government's ability to obtain necessary information in the future.

§ 2.209 Disclosure in special circumstances.

(a) *General.* Information which, under this subpart, is not available to the public may nonetheless be disclosed to the persons, and in the circumstances, described by paragraphs (b) through (g) of this section. (This section shall not be construed to restrict the disclosure of information which has been determined to be available to the public. However, business information for which a claim of confidentiality has been asserted shall be treated as being entitled to confidential treatment until there has been a determination in accordance with the procedures of this subpart that the information is not entitled to confidential treatment.)

(b) *Disclosure to Congress or the Comptroller General.* (1) Upon receipt of a written request by the Speaker of the House, President of the Senate, chairman of a committee or subcommittee, or the Comptroller General, as appropriate, EPA will disclose business information to either House of Congress, to a committee or subcommittee

of Congress, or to the Comptroller General, unless a statute forbids such disclosure.

(2) If the request is for business information claimed as confidential or determined to be confidential, the EPA office processing the request shall provide notice to each affected business of the type of information disclosed and to whom it is disclosed. Notice shall be given at least ten days prior to disclosure, except where it is not possible to provide notice ten days in advance of any date established by the requesting body for responding to the request. Where ten days advance notice cannot be given, as much advance notice as possible shall be provided. Where notice cannot be given before the date established by the requesting body for responding to the request, notice shall be given as promptly after disclosure as possible. Such notice may be given by notice published in the FEDERAL REGISTER or by letter sent by certified mail, return receipt requested, or telegram. However, if the requesting body asks in writing that no notice under this subsection be given, EPA will give no notice.

(3) At the time EPA discloses the business information, EPA will inform the requesting body of any unresolved business confidentiality claim known to cover the information and of any determination under this subpart that the information is entitled to confidential treatment.

(c) *Disclosure to other Federal agencies.* EPA may disclose business information to another Federal agency if—

(1) EPA receives a written request for disclosures of the information from a duly authorized officer or employee of the other agency or on the initiative of EPA when such disclosure is necessary to enable the other agency to carry out a function on behalf of EPA;

(2) The request, if any, sets forth the official purpose for which the information is needed;

(3) When the information has been claimed as confidential or has been determined to be confidential, the responsible EPA office provides notice to each affected business of the type of information to be disclosed and to whom it is to be disclosed. At the discretion of the office, such notice may be given by notice published in the FEDERAL REGISTER at least 10 days prior to disclosure, or by letter sent by certified mail return receipt requested or telegram either of which must be received by the affected business at least 10 days prior to disclosure. However, no notice shall be required when EPA furnishes business information to another Federal agency to perform a function on behalf of EPA, including but not limited to—

(i) Disclosure to the Department of Justice for purposes of investigation or prosecution of civil or criminal violations of Federal law related to EPA activities;

(ii) Disclosure to the Department of Justice for purposes of representing EPA in any matter; or

(iii) Disclosure to any Federal agency for purposes of performing an EPA statutory function under an interagency agreement.

(4) EPA notifies the other agency of any unresolved business confidentiality claim covering the information and of any determination under this subpart that the information is entitled to confidential treatment, and that further disclosure of the information may be a violation of 18 U.S.C. 1905; and

(5) The other agency agrees in writing not to disclose further any information designated as confidential unless—

(i) The other agency has statutory authority both to compel production of the information and to make the proposed disclosure, and the other agency has, prior to disclosure of the information to anyone other than its officers and employees, furnished to each affected business at least the same notice to which the affected business would be entitled under this subpart;

(ii) The other agency has obtained the consent of each affected business to the proposed disclosure; or

(iii) The other agency has obtained a written statement from the EPA General Counsel or an EPA Regional Counsel that disclosure of the information would be proper under this subpart.

(d) *Court-ordered disclosure.* EPA may disclose any business information

in any manner and to the extent ordered by a Federal court. Where possible, and when not in violation of a specific directive from the court, the EPA office disclosing information claimed as confidential or determined to be confidential shall provide as much advance notice as possible to each affected business of the type of information to be disclosed and to whom it is to be disclosed, unless the affected business has actual notice of the court order. At the discretion of the office, subject to any restrictions by the court, such notice may be given by notice in the FEDERAL REGISTER, letter sent by certified mail return receipt requested, or telegram.

(e) *Disclosure within EPA.* An EPA office, officer, or employee may disclose any business information to another EPA office, officer, or employee with an official need for the information.

(f) *Disclosure with consent of business.* EPA may disclose any business information to any person if EPA has obtained the prior consent of each affected business to such disclosure.

(g) *Record of disclosures to be maintained.* Each EPA office which discloses information to Congress, a committee or subcommittee of Congress, the Comptroller General, or another Federal agency under the authority of paragraph (b) or (c) of this section, shall maintain a record of the fact of such disclosure for a period of not less than 36 months after such disclosure. Such a record, which may be in the form of a log, shall show the name of the affected businesses, the date of disclosure, the person or body to whom disclosure was made, and a description of the information disclosed.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40000, Sept. 8, 1978; 50 FR 51661, Dec. 18, 1985]

§ 2.210 Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.

(a) Information which is not entitled to confidential treatment under this subpart shall be made available to the public (using the procedures set forth in §§ 2.204 and 2.205) if its release is requested under 5 U.S.C. 552, unless EPA determines (under Subpart A of this part) that, for reasons other than reasons of business confidentiality, the information is exempt from mandatory disclosure and cannot or should not be made available to the public. Any such determination under subpart A shall be coordinated with actions taken under this subpart for the purpose of avoiding delay in responding to requests under 5 U.S.C. 552.

(b) Notwithstanding any other provision of this subpart, if any statute not cited in this subpart appears to require EPA to give confidential treatment to any business information for reasons of business confidentiality, the matter shall be referred promptly to an EPA legal office for resolution. Pending resolution, such information shall be treated as if it were entitled to confidential treatment.

§ 2.211 Safeguarding of business information; penalty for wrongful disclosure.

(a) No EPA officer or employee may disclose, or use for his or her private gain or advantage, any business information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position or employment, except as authorized by this subpart.

(b) Each EPA officer or employee who has custody or possession of business information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.

(c) Violation of paragraph (a) or (b) of this section shall constitute grounds for dismissal, suspension, fine, or other adverse personnel action. Willful violation of paragraph (a) of this section may result in criminal prosecution under 18 U.S.C. 1905 or other applicable statute.

(d) Each contractor or subcontractor with EPA, and each employee of such contractor or subcontractor, who is furnished business information by EPA under §§ 2.301(h), § 2.302(h), 2.304(h), 2.305(h), 2.306(j), 2.307(h), 2.308(i), or 2.310(i) shall use or disclose that information only as permitted by the contract or subcontract under which the information was furnished. Contractors or subcontractors shall

take steps to properly safeguard business information including following any security procedures for handling and safeguarding business information which are contained in any manuals, procedures, regulations, or guidelines provided by EPA. Any violation of this paragraph shall constitute grounds for suspension or debarment of the contractor or subcontractor in question. A willful violation of this paragraph may result in criminal prosecution.

[41 FR 36902, Sept. 1, 1976, as amended at 50 FR 51662, Dec. 18, 1985]

§ 2.212 Establishment of control offices for categories of business information.

(a) The Administrator, by order, may establish one or more mutually exclusive categories of business information, and may designate for each such category an EPA office (hereinafter referred to as a *control office*) which shall have responsibility for taking actions (other than actions required to be taken by an EPA legal office) with respect to all information within such category.

(b) If a control office has been assigned responsibility for a category of business information, no other EPA office, officer, or employee may make available to the public (or otherwise disclose to persons other than EPA officers and employees) any information in that category without first obtaining the concurrence of the control office. Requests under 5 U.S.C. 552 for release of such information shall be referred to the control office.

(c) A control office shall take the actions and make the determinations required by § 2.204 with respect to all information in any category for which the control office has been assigned responsibility.

(d) A control office shall maintain a record of the following, with respect to items of business information in categories for which it has been assigned responsibility:

(1) Business confidentiality claims;

(2) Comments submitted in support of claims;

(3) Waivers and withdrawals of claims;

(4) Actions and determinations by EPA under this subpart;

(5) Actions by Federal courts; and

(6) Related information concerning business confidentiality.

§ 2.213 Designation by business of addressee for notices and inquiries.

(a) A business which wishes to designate a person or office as the proper addressee of communications from EPA to the business under this subpart may do so by furnishing in writing to the Freedom of Information Officer (A-101), Environmental Protection Agency, 401 M St. SW., Washington, DC 20460, the following information: The name and address of the business making the designation; the name, address, and telephone number of the designated person or office; and a request that EPA inquiries and communications (oral and written) under this subpart, including inquiries and notices which require reply within deadlines if the business is to avoid waiver of its rights under this subpart, be furnished to the designee pursuant to this section. Only one person or office may serve at any one time as a business's designee under this subpart.

(b) If a business has named a designee under this section, the following EPA inquiries and notices to the business shall be addressed to the designee:

(1) Inquiries concerning a business's desire to assert a business confidentiality claim, under § 2.204(c)(2)(i)(A);

(2) Notices affording opportunity to substantiate confidentiality claims, under § 2.204(d)(1) and § 2.204(e);

(3) Inquires concerning comments, under § 2.205(b)(4);

(4) Notices of denial of confidential treatment and proposed disclosure of information, under § 2.205(f);

(5) Notices concerning shortened comment and/or waiting periods under § 2.205(g);

(6) Notices concerning modifications or overrulings of prior determinations, under § 2.205(h);

(7) Notices to affected businesses under §§ 2.301(g) and 2.301(h) and analogous provisions in §§ 2.302, 2.303, 2.304, 2.305, 2.306, 2.307, and 2.308; and

(8) Notices to affected businesses under § 2.209.

(c) The Freedom of Information Officer shall, as quickly as possible,

notify all EPA offices that may possess information submitted by the business to EPA, the Regional Freedom of Information Offices, the Office of General Counsel, and the offices of Regional Counsel of any designation received under this section. Businesses making designations under this section should bear in mind that several working days may be required for dissemination of this information within EPA and that some EPA offices may not receive notice of such designations.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40001, Sept. 8, 1978]

§ 2.214 Defense of Freedom of Information Act suits; participation by affected business.

(a) In making final confidentiality determinations under this subpart, the EPA legal office relies to a large extent upon the information furnished by the affected business to substantiate its claim of confidentiality. The EPA legal office may be unable to verify the accuracy of much of the information submitted by the affected business.

(b) If the EPA legal office makes a final confidentiality determination under this subpart that certain business information is entitled to confidential treatment, and EPA is sued by a requester under the Freedom of Information Act for disclosure of that information, EPA will:

(1) Notify each affected business of the suit within 10 days after service of the complaint upon EPA;

(2) Where necessary to preparation of EPA's defense, call upon each affected business to furnish assistance; and

(3) Not oppose a motion by any affected business to intervene as a party to the suit under rule 24(b) of the Federal Rules of Civil Procedure.

(c) EPA will defend its final confidentiality determination, but EPA expects the affected business to cooperate to the fullest extent possible in this defense.

[43 FR 40001, Sept. 8, 1978]

§ 2.215 Confidentiality agreements.

(a) No EPA officer, employee, contractor, or subcontractor shall enter into any agreement with any affected business to keep business information confidential unless such agreement is consistent with this subpart. No EPA officer, employee, contractor, or subcontractor shall promise any affected business that business information will be kept confidential unless the promise is consistent with this subpart.

(b) If an EPA office has requested information from a State, local, or Federal agency and the agency refuses to furnish the information to EPA because the information is or may constitute confidential business information, the EPA office may enter into an agreement with the agency to keep the information confidential, notwithstanding the provisions of this subpart. However, no such agreement shall be made unless the General Counsel determines that the agreement is necessary and proper.

(c) To determine that an agreement proposed under paragraph (b) of this section is necessary, the General Counsel must find:

(1) The EPA office requesting the information needs the information to perform its functions;

(2) The agency will not furnish the information to EPA without an agreement by EPA to keep the information confidential; and

(3) Either:

(i) EPA has no statutory power to compel submission of the information directly from the affected business, or

(ii) While EPA has statutory power to compel submission of the information directly from the affected business, compelling submission of the information directly from the business would—

(A) Require time in excess of that available to the EPA office to perform its necessary work with the information,

(B) Duplicate information already collected by the other agency and overly burden the affected business, or

(C) Overly burden the resources of EPA.

(d) To determine that an agreement proposed under paragraph (b) of this section is proper, the General Counsel must find that the agreement states—

(1) The purpose for which the information is required by EPA;

(2) The conditions under which the agency will furnish the information to EPA;

(3) The information subject to the agreement;

(4) That the agreement does not cover information acquired by EPA from another source;

(5) The manner in which EPA will treat the information; and

(6) That EPA will treat the information in accordance with the agreement subject to an order of a Federal court to disclose the information.

(e) EPA will treat any information acquired pursuant to an agreement under paragraph (b) of this section in accordance with the procedures of this subpart except where the agreement specifies otherwise.

[43 FR 40001, Sept. 8, 1978]

§§ 2.216—2.300 [Reserved]

§ 2.301 Special rules governing certain information obtained under the Clean Air Act.

(a) *Definitions.* For the purpose of this section:

(1) *Act* means the Clean Air Act, as amended, 42 U.S.C. 7401 et seq.

(2)(i) *Emission data* means, with reference to any source of emission of any substance into the air—

(A) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of any emission which has been emitted by the source (or of any pollutant resulting from any emission by the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, or other characteristics (to the extent related to air quality) of the emissions which, under an applicable standard or limitation, the source was authorized to emit (including, to the extent necessary for such purposes, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *emission data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any project, method, device or installation (or any component thereof) which was produced, developed, installed, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) *Standard or limitation* means any emission standard or limitation established or publicly proposed pursuant to the Act or pursuant to any regulation under the Act.

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(5) *Manufacturer* has the meaning given it in section 216(1) of the Act, 42 U.S.C. 7550(1).

(b) *Applicability.* (1) This section applies to business information which was—

(i) Provided or obtained under section 114 of the Act, 42 U.S.C. 7414, by the owner or operator of any stationary source, for the purpose (A) of developing or assisting in the development of any implementation plan under section 110 or 111(d) of the Act, 42 U.S.C. 7410, 7411(d), any standard of performance under section 111 of the Act, 42 U.S.C. 7411, or any emission standard under section 112 of the Act, 42 U.S.C. 7412, (B) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (C) of carrying out

any provision of the Act (except a provision of Part II of the Act with respect to a manufacturer of new motor vehicles or new motor vehicle engines);

(ii) Provided or obtained under section 208 of the Act, 42 U.S.C. 7542, for the purpose of enabling the Administrator to determine whether a manufacturer has acted or is acting in compliance with the Act and regulations under the Act, or provided or obtained under section 206(c) of the Act, 42 U.S.C. 7525(c); or

(iii) Provided in response to a subpoena for the production of papers, books, or documents issued under the authority of section 307(a) of the Act, 42 U.S.C. 7607(a).

(2) Information will be considered to have been provided or obtained under section 114 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 114, or if its submission could have been required under section 114, regardless of whether section 114 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 113(a) of the Act, 42 U.S.C. 7413(a), whether an action was brought under section 113(b) of the Act, 42 U.S.C. 7413(b), or whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 208 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 208, or if its submission could have been required under section 208, regardless of whether section 208 was cited as the authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(4) Information will be considered to have been provided or obtained under section 206(c) of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 206(c), or if its submission could have been required under section 206(c) regardless of whether section 206(c) was cited as authority for any request for the information, whether an action was brought under section 204 of the Act, 42 U.S.C. 7523, or whether the information was provided directly to EPA or through some third person.

(5) Information will be considered to have been provided or obtained under section 307(a) of the Act if it was provided in response to a subpoena issued under section 307(a), or if its production could have been required by subpoena under section 307(a), regardless of whether section 307(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(6) This section specifically does not apply to information obtained under section 115(j) or 211(b) of the Act, 42 U.S.C. 7415(j), 7545(b).

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, § 2.209 and §§ 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is emission data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Emission data, standards or limitations, and any other information provided under section 114 or 208 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Emission data and standards or limitations provided in response to a subpoena issued under section 307(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than emission data and standards or limitations) provided in response to a subpoena issued under

section 307(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 114, 208 and 307 of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) In connection with any proceeding other than a proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public under this paragraph (g)(2). No information shall be made available to the public under this paragraph (g)(2) until any affected business has been informed that EPA is considering making the information available to the public under this paragraph (g)(2) in connection with an identified proceeding, and has afforded the business a reasonable period for comment (such notice and opportunity to comment may be afforded in connection with the notice prescribed by § 2.204(d)(1) and § 2.204(e)). Information may be made available to the public under this paragraph (g)(2) only if, after consideration of any timely comments submitted by the business, the General Counsel determines that the information is relevant to the subject of the proceeding and the EPA office conducting the proceeding determines that the public interest would be served by making the information available to the public. Any affected business shall be given at least 5 days' notice by the General Counsel prior to making the information available to the public.

(3) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies which may be entitled to confidential treatment may be made available to the public, or to one or more parties of record to the proceeding, upon EPA's initiative, under this paragraph (g)(3). An EPA office proposing disclosure of information under this paragraph (g)(3), shall so notify the presiding officer in writing. Upon receipt of such a notification, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(3) has been proposed, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed under this paragraph (g)(3) only if, after consideration of any timely comments submitted by the business, the EPA office determines in writing that, for reasons directly associated with the conduct of the proceeding, the contemplated disclosure would serve the public interest, and the presiding officer determines in writing that the information is relevant to a matter in controversy in the proceeding. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information for confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to the public or to one or more of the parties of record to the proceeding.

(4) In connection with any proceeding involving a decision by a presiding officer after an evidentiary or adjudicatory hearing, information to which this section applies may be made available to one or more parties of record to the proceeding, upon request of a party, under this paragraph (g)(4). A party of record seeking disclosure of information shall direct his request to

the presiding officer. Upon receipt of such a request, the presiding officer shall notify each affected business that disclosure under this paragraph (g)(4) has been requested, and shall afford each such business a period for comment found by the presiding officer to be reasonable under the circumstances. Information may be disclosed to a party of record under this paragraph (g)(4) only if, after consideration of any timely comments submitted by the business, the presiding officer determines in writing that (i) the party of record has satisfactorily shown that with respect to a significant matter which is in controversy in the proceeding, the party's ability to participate effectively in the proceeding will be significantly impaired unless the information is disclosed to him, and (ii) any harm to an affected business that would result from the disclosure is likely to be outweighed by the benefit to the proceeding and to the public interest that would result from the disclosure. The presiding officer may condition disclosure of the information to a party of record on the making of such protective arrangements and commitments as he finds to be warranted. Disclosure to one or more parties of record, under protective arrangements or commitments, shall not, of itself, affect the eligibility of information to confidential treatment under the other provisions of this subpart. Any affected business shall be given at least 5 days notice by the presiding officer prior to making the information available to one or more of the parties of record to the proceeding.

(h) *Disclosure to authorized representatives.* (1) Under sections 114, 208 and 307(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h) (2) or (3) of this section.

(2)(i) A person under contract or subcontract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act may be considered an authorized representative of the United States for purposes of this paragraph (h). Subject to the limitations in this paragraph (h)(2), information to which this section applies may be disclosed to such a person if the EPA program office managing the contract or subcontract first determines in writing that such disclosure is necessary in order that the contractor or subcontractor may carry out the work required by the contract or subcontract.

(ii) No information shall be disclosed under this paragraph (h)(2), unless this contract or subcontract in question provides:

(A) That the contractor or subcontractor and the contractor's or subcontractor's employees shall use the information only for the purpose of carrying out the work required by the contract or subcontract, shall refrain from disclosing the information to anyone other than EPA without the prior written approval of each affected business or of an EPA legal office, and shall return to EPA all copies of the information (and any abstracts or extracts therefrom) upon request by the EPA program office, whenever the information is no longer required by the contractor or subcontractor for the performance of the work required under the contract or subcontract, or upon completion of the contract or subcontract;

(B) That the contractor or subcontractor shall obtain a written agreement to honor such terms of the contract or subcontract from each of the contractor's or subcontractor's employees who will have access to the information, before such employee is allowed such access; and

(C) That the contractor or subcontractor acknowledges and agrees that the contract or subcontract provisions concerning the use and disclosure of business information are included for the benefit of, and shall be enforceable by, both EPA and any affected business having an interest in information concerning it supplied to the contractor or subcontractor by EPA under the contract or subcontract.

(iii) No information shall be disclosed under this paragraph (h)(2)

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until each affected business has been furnished notice of the contemplated disclosure by the EPA program office and has been afforded a period found reasonable by that office (not less than 5 working days) to submit its comments. Such notice shall include a description of the information to be disclosed, the identity of the contractor or subcontractor, the contract or subcontract number, if any, and the purposes to be served by the disclosure.

(iv) The EPA program office shall prepare a record of each disclosure under this paragraph (h)(2), showing the contractor or subcontractor, the contract or subcontract number, the information disclosed, the date(s) of disclosure, and each affected business. The EPA program office shall maintain the record of disclosure and the determination of necessity prepared under paragraph (h)(2)(i) of this section for a period of not less than 36 months after the date of the disclosure.

(3) A state or local governmental agency which has duties or responsibilities under the Act, or under regulations which implement the Act, may be considered an authorized representative of the United States for purposes of this paragraph (h). Information to which this section applies may be furnished to such an agency at the agency's written request, but only if—

(i) The agency has first furnished to the EPA office having custody of the information a written opinion from the agency's chief legal officer or counsel stating that under applicable state or local law the agency has the authority to compel a business which possesses such information to disclose it to the agency, or

(ii) Each affected business is informed of those disclosures under this paragraph (h)(3) which pertain to it, and the agency has shown to the satisfaction of an EPA legal office that the agency's use and disclosure of such information will be governed by state or local law and procedures which will provide adequate protection to the interests of affected businesses.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40002, Sept. 8, 1978; 43 FR 42251, Sept. 20, 1978; 50 FR 51662, Dec. 18, 1985]

§ 2.302 Special rules governing certain information obtained under the Clean Water Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

(2)(i) *Effluent data* means, with reference to any source of discharge of any pollutant (as that term is defined in section 502(6) of the Act, 33 U.S.C. 1362 (6))—

(A) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of any pollutant which has been discharged by the source (or of any pollutant resulting from any discharge from the source), or any combination of the foregoing;

(B) Information necessary to determine the identity, amount, frequency, concentration, temperature, or other characteristics (to the extent related to water quality) of the pollutants which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source); and

(C) A general description of the location and/or nature of the source to the extent necessary to identify the source and to distinguish it from other sources (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

(ii) Notwithstanding paragraph (a)(2)(i) of this section, the following information shall be considered to be *effluent data* only to the extent necessary to allow EPA to disclose publicly that a source is (or is not) in compliance with an applicable standard or limitation, or to allow EPA to demonstrate the feasibility, practicability, or attainability (or lack thereof) of an existing or proposed standard or limitation:

(A) Information concerning research, or the results of research, on any product, method, device, or installation (or any component thereof) which was produced, developed, in-

stalled, and used only for research purposes; and

(B) Information concerning any product, method, device, or installation (or any component thereof) designed and intended to be marketed or used commercially but not yet so marketed or used.

(3) *Standard or limitation* means any prohibition, any effluent limitation, or any toxic, pre-treatment or new source performance standard established or publicly proposed pursuant to the Act or pursuant to regulations under the Act, including limitations or prohibitions in a permit issued or proposed by EPA or by a State under section 402 of the Act, 33 U.S.C. 1342.

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this part.

(b) *Applicability.* (1) This section applies only to business information—

(i) Provided to or obtained by EPA under section 308 of the Act, 33 U.S.C. 1318, by or from the owner or operator of any point source, for the purpose of carrying out the objective of the Act (including but not limited to developing or assisting in the development of any standard or limitation under the Act, or determining whether any person is in violation of any such standard or limitation); or

(ii) Provided to or obtained by EPA under section 509(a) of the Act, 33 U.S.C. 1369(a).

(2) Information will be considered to have been provided or obtained under section 308 of the Act if it was provided in response to a request by EPA made for any of the purposes stated in section 308, or if its submission could have been required under section 308, regardless of whether section 308 was cited as the authority for any request for the information, whether an order to provide the information was issued under section 309(a)(3) of the Act, 33 U.S.C. 1319(a)(3), whether a civil action was brought under section 309(b) of the Act, 33 U.S.C. 1319(b), and whether the information was provided directly to EPA or through some third person.

(3) Information will be considered to have been provided or obtained under section 509(a) of the Act if it was provided in response to a subpoena issued under section 509(a), or if its production could have been required by subpoena under section 509(a), regardless of whether section 509(a) was cited as the authority for any request for the information, whether a subpoena was issued by EPA, whether a court issued an order under section 307(a), or whether the information was provided directly to EPA or through some third person.

(4) This section specifically does not apply to information obtained under section 310(d) or 312(g)(3) of the Act, 33 U.S.C. 1320(d), 1322(g)(3).

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which is effluent data or a standard or limitation is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Availability of information not entitled to confidential treatment.* Section 2.210 does not apply to information to which this section applies. Effluent data, standards or limitations, and any other information provided or obtained under section 308 of the Act which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public notwithstanding any other provision of this part. Effluent data and standards or limitations provided in response to a subpoena issued under section 509(a) of the Act shall be available to the public notwithstanding any other provision of this part. Information (other than effluent data and standards or limitations) provided in response to a subpoena issued under section 509(a) of the Act, which is determined under this subpart not to be entitled to confidential treatment, shall be available to the public, unless EPA determines that the information

is exempt from mandatory disclosure under 5 U.S.C. 552(b) for reasons other than reasons of business confidentiality and cannot or should not be made available to the public.

(g) *Disclosure of information relevant to a proceeding.* (1) Under sections 308 and 509(a) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 308 and 509(a) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h) (2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.303 Special rules governing certain information obtained under the Noise Control Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Noise Control Act of 1972, 42 U.S.C. 4901 *et seq.*

(2) *Manufacturer* has the meaning given it in 42 U.S.C. 4902(6).

(3) *Product* has the meaning given it in 42 U.S.C. 4902(3).

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 13 of the Act, 42 U.S.C. 4912, by or from any manufacturer of any product to which regulations under section 6 or 8 of the Act (42 U.S.C. 4905, 4907) apply. Information will be deemed to have been provided or obtained under section 13 of the Act, if it was provided in response to a request by EPA made for the purpose of enabling EPA to determine whether the manufacturer has acted or is acting in compliance with the Act, or if its submission could have been required under section 13 of the Act, regardless of whether section 13 was cited as authority for the request, whether an order to provide such information was issued under section 11(d) of the Act, 42 U.S.C. 4910(d), and whether the information was provided directly to EPA by the manufacturer or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 13 of the Act, any information to which this section applies may be released by EPA because of its relevance to a matter in controversy in a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g) (2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.304 Special rules governing certain information obtained under the Safe Drinking Water Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Safe Drinking Water Act, 42 U.S.C. 300f *et seq.*

(2) *Contaminant* means any physical, chemical, biological, or radiological substance or matter in water.

(3) *Proceeding* means any rulemaking, adjudication, or licensing process conducted by EPA under the Act or under regulations which implement the Act, except for any determination under this part.

(b) *Applicability.* (1) This section applies only to information—

(i) Which was provided to or obtained by EPA pursuant to a requirement of a regulation which was issued by EPA under the Act for the purpose of—

(A) Assisting the Administrator in establishing regulations under the Act;

(B) Determining whether the person providing the information has acted or is acting in compliance with the Act; or

(C) Administering any program of financial assistance under the Act; and

(ii) Which was provided by a person—

(A) Who is a supplier of water, as defined in section 1401(5) of the Act, 42 U.S.C. 300f(5);

(B) Who is or may be subject to a primary drinking water regulation under section 1412 of the Act, 42 U.S.C. 300g-1;

(C) Who is or may be subject to an applicable underground injection control program, as defined in section 1422(d) of the Act, 42 U.S.C.300h-1(d);

(D) Who is or may be subject to the permit requirements of section 1424(b) of the Act, 42 U.S.C. 300h-3(b);

(E) Who is or may be subject to an order issued under section 1441(c) of the Act, 42 U.S.C. 300j(c); or

(F) Who is a grantee, as defined in section 1445(e) of the Act, 42 U.S.C. 300j-4(e).

(2) This section applies to any information which is described by paragraph (b)(1) of this section if it was provided in response to a request by EPA or its authorized representative (or by a State agency administering any program under the Act) made for any purpose stated in paragraph (b)(1) of this section, or if its submission could have been required under section 1445 of the Act, 42 U.S.C. 300j-4, regardless of whether such section was cited in any request for the information, or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207, 2.209, and 2.211 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) *Nondisclosure for reasons other than business confidentiality or where disclosure is prohibited by other statute.* Section 2.210 applies to information to which this section applies, except that information which deals with the existence, absence, or level of contaminants in drinking water shall be available to the public notwithstanding any other provision of this part.

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 1445(d) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2)-(4) The provisions of § 2.301(g) (2), (3), (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 1445(d) of the Act, EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h)(2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40003, Sept. 8, 1978]

§ 2.305 Special rules governing certain information obtained under the Solid Waste Disposal Act, as amended.

(a) *Definitions.* For purposes of this section:

(1) *Act* means the Solid Waste Disposal Act, as amended, including amendments made by the Resource Conservation and Recovery Act of 1976, as amended, 42 U.S.C. 6901 *et seq.*

(2) *Person* has the meaning given it in section 1004(15) of the Act, 42 U.S.C. 6903(15).

(3) *Hazardous waste* has the meaning given it in section 1004(5) of the Act, 42 U.S.C. 6903(5).

(4) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act including the issuance of administrative orders and the approval or disapproval of plans (e.g. closure plans) submitted by persons subject to regulation under the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies to information provided to or obtained by EPA under section 3001(b)(3)(B), 3007, or 9005 of the Act, 42 U.S.C 6921(b)(3)(B), 6927, or 6995. Information will be considered to have been provided or obtained under sections 3001(b)(3)(B), 3007, or 9005 of the Act if it was provided in response to a request from EDA made for any of the purposes stated in the Act or if its submission could have been required under those provisions of the Act regardless of whether a specific section was cited as the authority for any request for the information or whether the information was provide directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant in a proceeding.* (1) Under sections 3007(b) and 9005(b) of the Act (42 U.S.C. 6927(b) and 6995(b)), any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2)–(4) The provisions of § 2.301(g)(2), (3), and (4) are incorporated by reference as paragraphs (g) (2), (3), and (4), respectively, of this section.

(h) *Disclosure to authorized representatives.* (1) Under sections 3001(b)(3)(B), 3007(b), and 9005(b) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), and 6995(b)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2)–(3) The provisions of § 2.301(h)(2) and (3) are incorporated by reference as paragraphs (h) (2) and (3), respectively, of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or state or local government agency under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or state or local government agency shall notify the contractor, subcontractor, or state or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or state or local government agency and its employees to penalties in section 3001(b)(3)(B), 3007(b)(2), or 9005(b)(1) of the Act (42 U.S.C. 6921(b)(3)(B), 6927(b), or 6995(b)).

[43 FR 40003, Sept. 8, 1978, as amended at 50 FR 51662, Dec. 18, 1985]

§ 2.306 Special rules governing certain information obtained under the Toxic Substances Control Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Toxic Substances Control Act, 15 U.S.C. 2601 *et seq.*

(2) *Chemical substance* has the meaning given it in section 3(2) of the Act, 15 U.S.C. 2602(2).

(3)(i) *Health and safety data* means the information described in paragraphs (a)(3)(i) (A), (B), and (C) of this section with respect to any chemical substance or mixture offered for commercial distribution (including for test marketing purposes and for use in research and development), any chemical substance included on the inventory of chemical substances under section 8 of the Act (15 U.S.C. 2607), or any chemical substance or mixture for which testing is required under section 4 of the Act (15 U.S.C. 2603) or for which notification is required under section 5 of the Act (15 U.S.C. 2604).

(A) Any study of any effect of a chemical substance or mixture on health, on the environment, or on both, including underlying data and epidemiological studies; studies of occupational exposure to a chemical substance or mixture; and toxicological, clinical, and ecological studies of a chemical substance or mixture;

(B) Any test performed under the Act; and

(C) Any data reported to, or otherwise obtained by, EPA from a study described in paragraph (a)(3)(i)(A) of this section or a test described in paragraph (a)(3)(i)(B) of this section.

(ii) Notwithstanding paragraph (a)(3)(i) of this section, no information shall be considered to be *health and safety data* if disclosure of the information would—

(A) In the case of a chemical substance or mixture, disclose processes used in the manufacturing or processing the chemical substance or mixture or,

(B) In the case of a mixture, disclose the portion of the mixture comprised by any of the chemical substances in the mixture.

(4) [Reserved]

(5) *Mixture* has the meaning given it in section 3(8) of the Act, 15 U.S.C. 2602(8).

(6) *Proceeding* means any rulemaking, adjudication, or licensing conducted by EPA under the Act or under regulations which implement the Act, except for determinations under this subpart.

(b) *Applicability.* This section applies to all information submitted to EPA for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose and either relied upon to avoid some requirement or condition of the Act or incorporated into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. Information will be considered to have been provided under the Act if the information could have been obtained under authority of the Act, whether the Act was cited as authority or not, and whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e)(3) of

this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel (or his designee), rather than the regional counsel, shall make the determinations and take the actions required by § 2.205;

(2) In addition to the statement prescribed by the second sentence of § 2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 20(a) of the Act, 15 U.S.C. 2619, the business may commence an action in an appropriate Federal district court to prevent disclosure.

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business' receipt of the wirtten notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business' commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that health and safety data are not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* Section 2.209 applies to information to which this section applies, except that the following two additional provisions apply to § 2.209(c):

(1) The official purpose for which the information is needed must be in connection with the agency's duties under any law for protection of health or the environment or for specific law enforcement purposes; and

(2) EPA notifies the other agency that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the officers and employees of the other agency to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(i) *Disclosure of information relevant in a proceeding.* (1) Under section 14(a)(4) of the Act (15 U.S.C. 2613(a)(4)), any information to which this section applies may be disclosed by EPA when the information is relevant in a proceeding under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. However, any such disclosure shall be made in a manner that preserves the confidentiality of the information to the extent practicable without impairing the proceeding. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (i).

(2)–(4) The provisions of § 2.301(g)(2), (3), and (4) are incorporated by reference as paragraphs (i) (2), (3), and (4), respectively, of this section.

(j) *Disclosure of information to contractors and subcontractors.* (1) Under section 14(a)(2) of the Act (15 U.S.C. 2613(a)(2)), any information to which this section applies may be disclosed by EPA to a contractor or subcontractor of the United States performing work under the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Subject to the limitations in this paragraph (j), information to which this section applies may be disclosed to a contractor or subcontractor if the EPA program office managing the contract or subcontract, or (in the case of contractors or subcontractors with agencies other than EPA) the General Counsel,

determines in writing that such disclosure is necessary for the satisfactory performance by the contractor or subcontractor of the contract or subcontract.

(2)-(4) The provisions of § 2.301(h)(2) (ii), (iii), and (iv) are incorporated by reference as paragraphs (j) (2), (3), and (4), respectively, of this section.

(5) At the time any information is furnished to a contractor or subcontractor under this paragraph (j), the EPA office furnishing the information to the contractor or subcontractor shall notify the contractor or subcontractor that the information was acquired under authority of the Act and that any knowing disclosure of the information may subject the contractor or subcontractor and its employees to the penalties in section 14(d) of the Act (15 U.S.C. 2613(d)).

(k) *Disclosure of information when necessary to protect health or the environment against an unreasonable risk of injury.* (1) Under section 14(a)(3) of the Act (15 U.S.C 2613(a)(3)), any information to which this section applies may be disclosed by EPA when disclosure is necessary to protect health or the environment against an unreasonable risk of injury to health or the environment. However, any disclosure shall be made in a manner that preserves the confidentiality of the information to the extent not inconsistent with protecting health or the environment against the unreasonable risk of injury. Disclosure of information to which this section applies because of the need to protect health or the environment against an unreasonable risk of injury shall be made only in accordance with this paragraph (k).

(2) If any EPA office determines that there is an unreasonable risk of injury to health or the environment and that to protect health or the environment against the unreasonable risk of injury it is necessary to disclose information to which this section applies that otherwise might be entitled to confidential treatment under this subpart, the EPA office shall notify the General Counsel in writing of the nature of the unreasonable risk of injury, the extent of the disclosure proposed, how the proposed disclosure will serve to protect health or the environment against the unreasonable risk of injury, and the proposed date of disclosure. Such notification shall be made as soon as practicable after discovery of the unreasonable risk of injury. If the EPA office determines that the risk of injury is so imminent that it is impracticable to furnish written notification to the General Counsel, the EPA office shall notify the General Counsel orally.

(3) Upon receipt of notification under paragraph (k)(2) of this section, the General Counsel shall make a determination in writing whether disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury. The General Counsel shall also determine the extent of disclosure necessary to protect against the unreasonable risk of injury as well as when the disclosure must be made to protect against the unreasonable risk of injury.

(4) If the General Counsel determines that disclosure of information to which this section applies that otherwise might be entitled to confidential treatment is necessary to protect health or the environment against an unreasonable risk of injury, the General Counsel shall furnish notice to each affected business of the contemplated disclosure and of the General Counsel's determination. Such notice shall be made in writing by certified mail, return receipt requested, at least 15 days before the disclosure is to be made. The notice shall state the date upon which disclosure will be made. However, if the General Counsel determines that the risk of injury is so imminent that it is impracticable to furnish such notice 15 days before the proposed date of disclosure, the General Counsel may provide notice by means that will provide receipt of the notice by the affected business at least 24 hours before the disclosure is to be made. This may be done by telegram, telephone, or other reasonably rapid means.

[43 FR 40003, Sept. 8, 1978, as amended at 44 FR 17674, Mar. 23, 1979]

§ 2.307 Special rules governing certain information obtained under the Federal Insecticide, Fungicide and Rodenticide Act.

(a) *Definitions.* For the purposes of this section;

(1) *Act* means the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 *et seq., and its predecessor, 7 U.S.C. 135 et seq.*

(2) *Applicant* means any person who has submitted to EPA (or to a predecessor agency with responsibility for administering the Act) a registration statement or application for registration under the Act of a pesticide or of an establishment.

(3) *Registrant* means any person who has obtained registration under the Act of a pesticide or of an establishment.

(b) *Applicability.* This section applies to all information submitted to EPA by an applicant or registrant for the purpose of satisfying some requirement or condition of the Act or of regulations which implement the Act, including information originally submitted to EPA for some other purpose but incorporated by the applicant or registrant into a submission in order to satisfy some requirement or condition of the Act or of regulations which implement the Act. This section does not apply to information supplied to EPA by a petitioner in support of a petition for a tolerance under 21 U.S.C. 346a(d), unless the information is also described by the first sentence of this paragraph.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.203, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Initial action by EPA office.* Section 2.204 applies to information to which this section applies, except that the provisions of paragraph (e) of this section regarding the time allowed for seeking judicial review shall be reflected in any notice furnished to a business under § 2.204(d)(2).

(e) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel (or his designee), rather than the Regional Counsel, shall make the determinations and take the actions required by § 2.205;

(2) In addition to the statement prescribed by the second sentence of § 2.205(f)(2), the notice of denial of a business confidentiality claim shall state that under section 10(c) of the Act, 7 U.S.C. 136h(c), the business may commence an action in an appropriate Federal district court for a declaratory judgment;

(3) The following sentence is substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the date of the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination or to obtain a declaratory judgment under section 10(c) of the Act and to obtain preliminary injunctive relief against disclosure."; and

(4) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (e)(3) of this section, shall not be shortened without the consent of the business.

(f) [Reserved]

(g) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(h) *Disclosure in special circumstances.* (1) Section 2.209 applies without change to information to which this section applies. In addition, under section 12(a)(2)(D) of the Act, 7 U.S.C. 136j(a)(2)(D), EPA possesses authority to disclose any information to which this section applies to physicians, pharmacists, and other qualified per-

sons needing such information for the performance of their duties, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority under section 12(a)(2)(D) of the Act may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it might otherwise be entitled to confidential treatment under this subpart) to physicians, pharmacists, hospitals, veterinarians, law enforcement personnel, or governmental agencies with responsibilities for protection of public health, and to employees of any such persons or agencies, or to other qualified persons, when and to the extent that disclosure is necessary in order to treat illness or injury or to prevent imminent harm to persons, property, or the environment, in the opinion of the Administrator or his designee.

(3) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act or regulations which implement the Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedure and requirements of § 2.301(h)(2) (ii) through (iv).

(4) Information to which this section applies, and which relates to formulas of products, may be disclosed at any public hearing or in findings of fact issued by the Administrator, to the extent and in the manner authorized by the Administrator or his designee.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.308 Special rules governing certain information obtained under the Federal Food, Drug and Cosmetic Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Federal Food, Drug and Cosmetic Act, as amended, 21 U.S.C. 301 *et seq.*

(2) *Petition* means a petition for the issuance of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, pursuant to section 408(d) of the Act, 21 U.S.C. 346a(d).

(3) *Petitioner* means a person who has submitted a petition to EPA (or to a predecessor agency).

(b) *Applicability.* (1) This section applies only to business information submitted to EPA (or to an advisory committee established under the Act) by a petitioner, solely in support of a petition which has not been acted on by the publication by EPA of a regulation establishing a tolerance for a pesticide chemical or exempting the pesticide chemical from the necessity of a tolerance, as provided in section 408(d) (2) or (3) of the Act, 21 U.S.C. 346a(d) (2) or (3).

(2) Section 2.307, rather than this section, applies to information described by the first sentence of § 2.307(b) (material incorporated into submissions in order to satisfy the requirements of the Federal Insecticide, Fungicide and Rodenticide Act, as amended), even though such information was originally submitted by a petitioner in support of a petition.

(3) This section does not apply to information gathered by EPA under a proceeding initiated by EPA to establish a tolerance under section 408(e) of the Act, 21 U.S.C. 346a(e).

(c) *Basic rules which apply without change.* Sections 2.201, 2.202, 2.206, 2.207, and 2.210 through 2.215 apply without change to information to which this section applies.

(d) *Effect of submission of information without claim.* Section 2.203 (a) and (b) apply without change to information to which this section applies. Section 2.203(c), however, does not apply to information to which this section applies. A petitioner's failure to assert a claim when initially submitting a petition shall not constitute a waiver of any claim the petitioner may have.

(e) *Initial action by EPA office.* Section 2.204 applies to information to

which this section applies, except that—

(1) Unless the EPA office has on file a written waiver of a petitioner's claim, a petitioner shall be regarded as an affected business, a petition shall be treated as if it were covered by a business confidentiality claim, and an EPA office acting under § 2.204(d) shall determine that the information in the petition is or may be entitled to confidential treatment and shall take action in accordance with § 2.204(d)(1);

(2) In addition to other required provisions of any notice furnished to a petitioner under § 2.204(e), such notice shall state that—

(i) Section 408(f) of the Act, 21 U.S.C. 346a(f), affords absolute confidentiality to information to which this section applies, but after publication by EPA of a regulation establishing a tolerance (or exempting the pesticide chemical from the necessity of a tolerance) neither the Act nor this section affords any protection to the information;

(ii) Information submitted in support of a petition which is also incorporated into a submission in order to satisfy a requirement or condition of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. 136 et seq., is regarded by EPA as being governed, with respect to business confidentiality, by § 2.307 rather than by this section;

(iii) Although it appears that this section may apply to the information at this time, EPA is presently engaged in determining whether for any reason the information is entitled to confidential treatment or will be entitled to such treatment if and when this section no longer applies to the information; and

(iv) Information determined by EPA to be covered by this section will not be disclosed for as long as this section continues to apply, but will be made available to the public thereafter (subject to § 2.210) unless the business furnishes timely comments in response to the notice.

(f) *Final confidentiality determination by EPA legal office.* Section 2.205 applies to information to which this section applies, except that—

(1) Notwithstanding § 2.205(i), the General Counsel or his designee, rather than the Regional counsel, shall in all cases make the determinations and take the actions required by § 2.205;

(2) In addition to the circumstances mentioned in § 2.205(f)(1), notice in the form prescribed by § 2.205(f)(2) shall be furnished to each affected business whenever information is found to be entitled to confidential treatment under section 408(f) of the Act but not otherwise entitled to confidential treatment. With respect to such cases, the following sentences shall be substituted for the third sentence of § 2.205(f)(2): "With respect to EPA's implementation of the determination, the notice shall state that (subject to § 2.210) EPA will make the information available to the public on the thirty-first (31st) calendar day after the business's receipt of the written notice (or on such later date as is established in lieu thereof under paragraph (f)(3) of this section), unless the EPA legal office has first been notified of the business's commencement of an action in a Federal court to obtain judicial review of the determination and to obtain preliminary injunctive relief against disclosure; provided, that the information will not be made available to the public for so long as it is entitled to confidential treatment under section 408(f) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 346a(f)."; and

(3) Notwithstanding § 2.205(g), the 31 calendar day period prescribed by § 2.205(f)(2), as modified by paragraph (f)(2) of this section, shall not be shortened without the consent of the business.

(g) [Reserved]

(h) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Such information shall be determined to be entitled to confidential treatment for so long as this section continues to apply to it.

(i) *Disclosure in special circumstances.* (1) Section 2.209 applies to information to which this section applies. In addition, under Section 408(f) of the Act, 21 U.S.C. 346a(f), EPA is

authorized to disclose the information to other persons. Such authority under section 408(f) of the Act may be exercised only in accordance with paragraph (i)(2) or (i)(3) of this section.

(2) Information to which this section applies may be disclosed (notwithstanding the fact that it otherwise might be entitled to confidential treatment under this subpart) to a person under contract to EPA to perform work for EPA in connection with the Act, with the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, or regulations which implement either such Act, if the EPA program office managing the contract first determines in writing that such disclosure is necessary in order that the contractor may carry out the work required by the contract. Any such disclosure to a contractor shall be made only in accordance with the procedures and requirements of § 2.301(h)(2) (ii) through (iv).

(3) Information to which this section applies may be disclosed by EPA to an advisory committee in accordance with section 408(d) of the Act, 21 U.S.C. 346a(d).

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.309 Special rules governing certain information obtained under the Marine Protection, Research and Sanctuaries Act of 1972.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*

(2) *Permit* means any permit applied for or granted under the Act.

(3) *Application* means an application for a permit.

(b) *Applicability.* This section applies to all information provided to or obtained by EPA as a part of any application or in connection with any permit.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and 2.209 through 2.215 apply without change to information to which this section applies.

(d) *Substantive criteria for use in confidentiality determinations.* Section 2.208 does not apply to information to which this section applies. Pursuant to section 104(f) of the Act, 33 U.S.C. 1414(f), no information to which this section applies is eligible for confidential treatment.

[41 FR 36902, Sept. 1, 1976, as amended at 43 FR 40005, Sept. 8, 1978]

§ 2.310 Special rules governing certain information obtained under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

(a) *Definitions.* For purposes of this section:

(1) *Act* means the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*

(2) *Person* has the meaning given it in section 101(21) of the Act, 42 U.S.C. 9601(21).

(3) *Facility* has the meaning given it in section 101(9) of the Act, 42 U.S.C. 9601(9).

(4) *Hazardous substance* has the meaning given it in section 101(14) of the Act, 42 U.S.C. 9601(14).

(5) *Release* has the meaning given it in section 101 (22) of the Act, 42 U.S.C. 9601(22).

(6) *Proceeding* means any rulemaking or adjudication conducted by EPA under the Act or under regulations which implement the Act (including the issuance of administrative orders under section 106 of the Act), or any administrative determination made under section 104 of the Act, but not including determinations under this subpart.

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under section 104 of the Act, 42 U.S.C. 9604, by or from any person who stores, treats, or disposes of hazardous wastes; or where necessary to ascertain facts not available at the facility where such hazardous substances are located, by or from any person who generates, transports, or othewise handles or has handled hazardous substances. Information will be considered to have been provided or obtained under section 104 of the Act if it was provided in response to a request from EPA or a representative of EPA made for any of the pur-

poses stated in section 104, or if its submission could have been required under section 104, regardless of whether section 104 was cited as authority for any request for the information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies; however, no information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g)(1) Under section 104(e)(2)(A) of the Act (42 U.S.C. 9604(e)(2)(A) any information to which this section applies may be disclosed by EPA because of the relevance of the information in a proceeding under the Act, nothwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Disclosure of information to which this section applies because of its relevance in a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) The provisions of § 2.301(g)(3) are to be used as paragraph (g)(3) of this section.

(4) The provisions of § 2.301(g)(4) are to be used as paragraph (g)(3) of this section.

(h) *Disclosure to authorized representatives.* (1) Under section 104(e)(2) of the Act (42 U.S.C. 9604(e)(2)), EPA possesses authority to disclose to any authorized representative of the United States any information to which this section applies, notwithstanding the fact that the information might otherwise be entitled to confidential treatment under this subpart. Such authority may be exercised only in accordance with paragraph (h)(2) or (h)(3) of this section.

(2) The provisions of § 2.301(h)(2) are to be used as paragraph (h)(2) of this section.

(3) The provisions of § 2.301(h)(3) are to be used as paragraph (h)(3) of this section.

(4) At the time any information is furnished to a contractor, subcontractor, or state or local government agency under this paragraph (h), the EPA office furnishing the information to the contractor, subcontractor, or state or local government agency shall notify the contractor, subcontractor, or state or local government agency that the information may be entitled to confidential treatment and that any knowing and willful disclosure of the information may subject the contractor, subcontractor, or state or local government agency and its employees to penalties in section 104(e)(2)(B) of the Act (42 U.S.C. 9604(e)(2)(B)).

[50 FR 51663, Dec. 18, 1985]

§ 2.311 Special rules governing certain information obtained under the Motor Vehicle Information and Cost Savings Act.

(a) *Definitions.* For the purposes of this section:

(1) *Act* means the Motor Vehicle Information and Cost Savings Act, as amended, 15 U.S.C. 1901 *et seq.*

(2) *Average fuel economy* has the meaning given it in section 501(4) of the Act, 15 U.S.C. 2001(4).

(3) *Fuel economy* has the meaning given it in section 501(6) of the Act, 15 U.S.C. 2001(6).

(4) *Fuel economy data* means any measurement or calculation of fuel economy for any model type and average fuel economy of a manufacturer under section 503(d) of the Act, 15 U.S.C. 2003(d).

(5) *Manufacturer* has the meaning given it in section 501(9) of the Act, 15 U.S.C. 2001(9).

(6) *Model type* has the meaning given it in section 501(11) of the Act, 15 U.S.C. 2001(11).

(b) *Applicability.* This section applies only to information provided to or obtained by EPA under Title V, Part A of the Act, 15 U.S.C. 2001 through 2012. Information will be considered to have been provided or ob-

tained under Title V, Part A of the Act if it was provided in response to a request from EPA made for any purpose stated in Title V, Part A, or if its submission could have been required under Title V Part A, regardless of whether Title V Part A was cited as the authority for any request for information or whether the information was provided directly to EPA or through some third person.

(c) *Basic rules which apply without change.* Sections 2.201 through 2.207 and §§ 2.209 through 2.215 apply without change to information to which this section applies.

(d) [Reserved]

(e) *Substantive criteria for use in confidentiality determinations.* Section 2.208 applies without change to information to which this section applies, except that information this is fuel economy data is not eligible for confidential treatment. No information to which this section applies is voluntarily submitted information.

(f) [Reserved]

(g) *Disclosure of information relevant to a proceeding.* (1) Under section 505(d)(1) of the Act, any information to which this section applies may be released by EPA because of the relevance of the information to a proceeding under Title V, Part A of the Act, notwithstanding the fact that the information otherwise might be entitled to confidential treatment under this subpart. Release of information to which this section applies because of its relevance to a proceeding shall be made only in accordance with this paragraph (g).

(2) The provisions of § 2.301(g)(2) are to be used as paragraph (g)(2) of this section.

(3) The provisions of § 2.301(g)(3) are to be used as paragraph (g)(3) of this section.

(4) The provisions of § 2.301(g)(4) are to be used as paragraph (g)(3) of this section.

[50 FR 51663, Dec. 18, 1985]

Subpart C—Testimony by Employees and Production of Documents in Civil Legal Proceedings Where the United States Is Not a Party

AUTHORITY: 5 U.S.C. 301; Reorganization Plan No. 3 of 1970, 5 U.S.C. App.; 33 U.S.C. 361(a); 42 U.S.C. 300j-9; 42 U.S.C. 6911a, 42 U.S.C. 7601(a).

SOURCE: 50 FR 32387, Aug. 9, 1985, unless otherwise noted.

§ 2.401 Scope and purpose.

This subpart sets forth procedures to be followed when an EPA employee is requested or subpoenaed to provide testimony concerning information acquired in the course of performing official duties or because of the employee's official status. (In such cases, employees must state for the record that their testimony does not necessarily represent the official position of EPA. If they are called to state the official position of EPA, they should ascertain that position before appearing.) These procedures also apply to subpoenas *duces tecum* for any document in the possession of EPA and to requests for certification of copies of documents.

(a) These procedures apply to:

(1) State court proceedings (including grand jury proceedings);

(2) Federal civil proceedings, except where the United States, EPA or another Federal agency is a party; and

(3) State and local legislative and administrative proceedings.

(b) These procedures do not apply:

(1) To matters which are not related to EPA;

(2) To Congressional requests or subpoenas for testimony or documents;

(3) Where employees provide expert witness services as approved outside activities in accordance with 40 CFR part 3, subpart E (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA);

(4) Where employees voluntarily testify as private citizens with respect to environmental matters (in such cases, employees must state for the record that the testimony represents their own views and does not necessarily represent the official position of EPA).

(c) The purpose of this subpart is to ensure that employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA.

§ 2.402 Policy on presentation of testimony and production of documents.

(a) With the approval of the cognizant Assistant Administrator, Office Director, Staff Office Director or Regional Administrator or his designee, EPA employees (as defined in 40 CFR 3.102 (a) and (b)) may testify at the request of another Federal agency, or, where it is in the interests of EPA, at the request of a State or local government or State legislative committee.

(b) Except as permitted by paragraph (a) of this section, no EPA employee may provide testimony or produce documents in any proceeding to which this subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee under §§ 2.403 through 2.406.

§ 2.403 Procedures when voluntary testimony is requested.

A request for testimony by an EPA employee under § 2.402(b) must be in writing and must state the nature of the requested testimony and the reasons why the testimony would be in the interests of EPA. Such requests are immediately sent to the General Counsel or his designee (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee) with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator, or Staff Office Director (or, in the case of employees in the Office of Inspector General, the Inspector General or his designee), determines whether compliance with the request would clearly be in the interests of EPA and responds as soon as practicable.

§ 2.404 Procedures when an employee is subpoenaed.

(a) Copies of subpoenas must immediately be sent to the General Counsel or his designee with the recommendations of the employee's supervisors. The General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director, determines whether compliance with the subpoena would clearly be in the interests of EPA and responds as soon as practicable.

(b) If the General Counsel or his designee denies approval to comply with the subpoena, or if he has not acted by the return date, the employee must appear at the stated time and place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn), produce a copy of these regulations and respectfully refuse to provide any testimony or produce any documents. *United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

(c) Where employees in the Office of Inspector General are subpoenaed, the Inspector General or his designee makes the determination under paragraphs (a) and (b) of this section in consultation with the General Counsel.

(d) The General Counsel will request the assistance of the Department of Justice or a U.S. Attorney where necessary to represent the interests of the Agency and the employee.

§ 2.405 Subpoenas duces tecum.

Subpoenas *duces tecum* for documents or other materials are treated the same as subpoenas for testimony. Unless the General Counsel or his designee, in consultation with the appropriate Assistant Administrator, Regional Administrator or Staff Office Director (or, as to employees in the Office of Inspector General, the Inspector General) determines that compliance with the subpoena is clearly in the interests of EPA, the employee must appear at the stated time and

place (unless advised by the General Counsel or his designee that the subpoena was not validly issued or served or that the subpoena has been withdrawn) and respectfully refuse to produce the subpoenaed materials. However, where a subpoena *duces tecum* is essentially a written request for documents, the requested documents will be provided or denied in accordance with subparts A and B of this part where approval to respond to the subpoena has not been granted.

§ 2.406 Requests for authenticated copies of EPA documents.

Requests for authenticated copies of EPA documents for purposes of admissibility under 28 U.S.C. 1733 and Rule 44 of the Federal Rules of Civil Procedure will be granted for documents which would otherwise be released pursuant to subpart A. For purposes of Rule 44 the "person having legal custody of the record" is the cognizant Assistant Administrator, Regional Administrator, Staff Office Director or Office Director or his designee. The advice of the Office of General Counsel should be obtained concerning the proper form of authentication.

PART 3—EMPLOYEE RESPONSIBILITIES AND CONDUCT

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AUTHORITY: E.O. 11222, 30 FR 6460; 3 CFR 1964-1965 Comp., p. 306; 5 CFR parts 734, 735 and 737.

SOURCE: 49 FR 7530, Feb. 29, 1984, unless otherwise noted.

Subpart A—General Provisions

§ 3.100 Purpose.

These regulations set forth the ethical standards which apply to all Environmental Protection Agency (EPA) employees. They are intended to supplement regulations of the Office of Government Ethics at 5 CFR parts 734, 735 and 737.

§ 3.101 Coverage.

(a) Subparts A, B, C, D and E apply to all regular EPA employees, including Public Health Service commissioned officers assigned to EPA, employees detailed to EPA from other federal agencies and employees detailed or assigned to EPA under the Intergovernmental Personnel Act.

(b) Subpart F applies only to special Government employees.

§ 3.102 Definitions.

(a) *Employee* means any officer or employee of the Environmental Protection Agency, Public Health Service commissioned officers assigned to EPA, employees detailed to EPA from other federal agencies and employees detailed or assigned to EPA under the Intergovernmental Personnel Act. The term does not include special Government employees.

(b) *Special Government employee* means an officer or employee of the Environmental Protection Agency who is retained, designated, appointed or employed to perform, with or without compensation, temporary duties either on a full-time or intermittent basis, for not to exceed 130 days during any period of 365 consecutive days.

(c) *Former employee* means a former Environmental Protection Agency employee, or a former special Government employee.

§ 3.103 Ethical standards of conduct for employees.

Employees may not use their official positions for private gain or act in such a manner that creates the reasonable appearance of doing so.

Employees therefore must not:

(a) Engage, directly or indirectly, in any business transaction or arrangement, including buying or selling securities or recommending the purchase or sale of securities to others, on the basis of information derived from their official positions which has not been made available to the general public;

(b) Use information acquired through EPA duties that has not been made available to the general public to further their private interests;

(c) Use their Government positions to coerce, or appear to coerce, anyone to provide any financial benefit to themselves or others; or

(d) Take any action, whether specifically prohibited or not, which would result in or create the reasonable appearance of:

(1) Using public office for private gain;

(2) Giving preferential treatment to any organization or person;

(3) Impeding Government efficiency or economy;

(4) Losing independence or impartiality of action;

(5) Making a Government decision outside official channels; or

(6) Adversely affecting public confidence in the integrity of the Government or EPA.

§ 3.104 Other general standards of conduct.

(a) *Use of Government property.* Employees must not use or allow the use of, Government-owned or leased property for other than official purposes. Employees have a duty to protect and conserve Government property, especially equipment, supplies and other property entrusted to them.

(b) *Indebtedness.* Indebtedness of EPA employees is essentially a private matter. EPA generally does not act as a collection agency or determine the validity or amount of debts. However, employees are expected to honor just financial obligations and Pub. L. 93-647 provides for garnishment of employees' wages for nonpayment of alimony or child support. In addition, the Debt Collection Act of 1982 at 5 U.S.C. 5514 authorizes agencies to recover employees' debts to the United

States through installment deductions from salaries.

(c) *Gambling, betting, and lotteries.* Employees must not gamble on Government property or while on Government duty. Gambling includes operating a gambling device, conducting a lottery or pool, playing a game for money or property or selling or purchasing a numbers slip. However, employees may participate in federally sponsored fund-raising activities under section 3 of Executive Order 10927 of March 18, 1961, or in similar officially approved activities.

(d) *General conduct prejudicial to the Government.* Employees must not engage in criminal, infamous, dishonest, immoral or disgraceful conduct, or any other conduct prejudicial to the Government.

(e) *Statutory prohibitions relating to gifts and decorations.*

(1) Employees must not solicit contributions from other employees for gifts to official superiors or accept gifts from employees receiving less salary than themselves. 5 U.S.C. 7351. However, small voluntary gifts on special occasions such as marriage, illness, death or retirement are permitted.

(2) Employees may not accept gifts, presents or decorations from foreign governments unless authorized by 5 U.S.C. 7342.

(3) Subpart D contains further guidance on gifts, gratuities and entertainment.

§ 3.105 Post-employment restrictions affecting former EPA attorneys.

This section applies where a jurisdiction in which a former EPA employee holds bar membership has adopted Rule 1.11 of the American Bar Association's Model Rules of Professional Conduct dated August 1983, in particular Rule 1.11(d)(2) which provides that the term *matter* includes *any other matter covered by the conflict of interest rules of the appropriate government agency.* In such cases, the term *matter* includes participation (in the form of drafting, providing advice or making recommendations) in the development of EPA regulations. Where a former EPA employee participated in the development of an EPA regulation while employed by EPA, he or she may not represent or assist in representing any party or parties as an attorney in any judicial proceeding to contest the validity of the rule. However, this section applies only where the complaint was not filed before the effective date of this regulation or the date when Rule 1.11 became effective in the jurisdiction, whichever occurs later.

[50 FR 39623, Sept. 27, 1985]

§ 3.106 Statutes relating to employee conduct.

Appendix A of this subpart sets out the *conflict of interest* statutes, together with examples of their application, and Appendix B cites other statutory provisions which relate to employees' conduct.

[49 FR 7530, Feb. 29, 1984. Redesignated at 50 FR 39623, Sept. 27, 1985]

Appendix A to Subpart A—Conflict of Interest Statutes and Examples

18 U.S.C. 203

Compensation to Members of Congress, officers, and others in matters affecting the Government.

(a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for services rendered or to be rendered either by himself or another—

(1) At a time when he is a Member of Congress, Member of Congress-elect, Resident Commissioner, or Resident Commissioner-elect; or

(2) At a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States including the District of Columbia—in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest before any department, agency, court-martial, officer, or any civil, military, or naval commission, or

(b) Whoever, knowingly, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly gives, promises, or offers any compensation for any such services rendered or to be rendered at a time when the person to whom the compensation is given, promised, or offered,

is or was such a Member, Commissioner, officer, or employee—

Shall be fined not more than $10,000, or imprisoned for not more than 2 years, or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

(c) A special Government employee shall be subject to subsection (a) only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, that clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than 60 days during the immediately preceding period of 365 consecutive days.

Discussion

This provision prohibits employees from accepting fees for representing any outside party in any administrative proceeding before a Federal agency and from sharing in fees earned by others for such activities. For example, an attorney could not share in the partnership income of a law firm to the extent such income is attributable to representational activities before Federal agencies. It does not prohibit receipt of compensation for other than actual appearances as an *agent or attorney* for outside parties; a fee for actual work, such as drafting a brief, is not prohibited. (But see the appearance standards of §§ 3.103 and 3.503). The prohibition covers agreements to receive prohibited fees and requests for such fees. Moreover, the restriction applies even after the employee leaves the Government in that a former employee may not share in fees attributable to representational work before administrative agencies which was performed while the former employee was with the Government.

18 U.S.C. 205

Activities of officers and employees in claims against and other matters affecting the Government.

Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—

(1) Acts as agent or attorney for prosecuting any claim against the United States, or receives any gratuity, or any share of or interest in any such claim in consideration of assistance in the prosecution of such claim, or

(2) Acts as agent or attorney for anyone before any department, agency, court, court-martial, officer, or any civil military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, change, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—

Shall be fined not more than $10,000, or imprisoned for not more than 2 years, or both.

A special Government employee shall be subject to the preceding paragraphs only in relation to a particular matter involving a specific party or parties (1) in which he has at any time participated personally and substantially as a Government employee or as a special Government employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, or (2) which is pending in the department or agency of the Government in which he is serving: *Provided*, That clause (2) shall not apply in the case of a special Government employee who has served in such department or agency no more than 60 days during the immediately preceding period of 365 consecutive days.

Nothing herein prevents an officer or employee, if not inconsistent with the faithful performance of his duties, from acting without compensation as agent or attorney for any person who is the subject of disciplinary, loyalty, or other personnel administration proceedings in connection with those proceedings.

Nothing herein or in section 203 prevents an officer or employee, including a special Government employee, from acting, with or without compensation, as agent or attorney for his parents, spouse, child, or any person for whom, or for any estate for which, he is serving as guardian, executor, administrator, trustee, or other personal fiduciary except in those matters in which he has participated personally and substantially as a Government employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which are the subject of his official responsibility provided that the Government official responsible for appointment to his position approves.

Nothing herein or in section 203 prevents a special Government employee from acting as agent or attorney for another person in the performance of work under a grant by, or a contract with or for the benefit of, the United States provided that the head of the department or agency concerned with the contract shall certify in writing that the national interest so requires.

Such certification shall be published in the FEDERAL REGISTER.

Nothing herein prevents an officer or employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt.

Discussion

This provision generally forbids employees to act as *agent or attorney* (that is, communicate with intent to influence) on behalf of outside parties before Federal agencies or courts in matters in which the United States is a party or has a direct and substantial interest. The prohibition applies to both paid and unpaid representation.

Examples

1. An EPA employee has received permission to work as a consultant to a firm which has been awarded a contract by the Department of Defense. A controversy arises concerning the scope of work of the contract, and the firm asks the EPA employee to discuss the matter with the contracting officer to seek additional compensation for an alleged change in the scope of work.

Answer: The employee may not do so, since he would be acting as agent for an outside party in a claim or controversy to which the Government is a party. (Moreover, under the appearance standards of § 3.502(c) the employee should not assist the firm in preparing its claim.)

2. An employee is an officer in an environmental organization and has been asked to present testimony on behalf of the organization at an EPA rulemaking proceeding.

Answer: Although the statute does not apply to testimony under oath, the activity nonetheless violates the appearance standards of §§ 3.103 and 3.503. However, it would be proper for the employee to appear as a concerned individual rather than as a representative of an outside group.

3. Several years ago, an employee received approval for outside employment as a consultant to an architect/engineer firm which is now competing for a subagreement under an EPA construction grant. The firm has asked the employee to present its proposal to EPA's grantee.

Answer: The statutory restriction does not apply, since the representational activity would not be before EPA or any other Federal agency. Such activity would nonetheless violate the appearance standards of §§ 3.103 and 3.502. Moreover, under the appearance standards, Deputy Ethics Officials would be justified in refusing to approve outside employment involving work on projects funded by EPA.

Exceptions

1. With the approval of the appropriate Deputy Ethics Official, an employee may act as agent or attorney before a Federal court or agency, for his or her parents, spouse, child or any person for whom, or for any estate for which, the employee is serving as guardian, executor, administrator, trustee or other personal fiduciary except where the employee has participated in the same matter on behalf of the Government or where the matter is the subject of the employee's official responsibility.

2. Nothing in the statute prevents an employee from giving testimony under oath or from making statements required to be made under penalty for perjury or contempt. However, this exception does not apply to acting as an expert witness for an outside party in a Government matter.

3. Employees may act without compensation as agent or attorney for anyone who is the subject of disciplinary, loyalty or other personnel proceedings, provided the employee's official duties do not conflict with such representation. Employees are encouraged to seek the advice of the Designated Agency Ethics Official or Deputy Ethics Official before engaging in such representation.

4. The restriction does not apply to special Government employees to the same extent as to employees. Restrictions applicable to such employees are discussed in § 3.604.

18 U.S.C. 207

Disqualification of former officers and employees; disqualification of partners of current officers and employees.

(a) Whoever, having been an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to—

(1) Any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) In connection with any judicial or other preceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter involving a specific party or parties in which the United States or the District of Colum-

bia is a party or has a direct and substantial interest, and

(3) In which he participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation or otherwise, while so employed; or

(b) Whoever, (i) having been so employed, within two years after his employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, any other person (except the United States), in any formal or informal appearance before, or, with the intent to influence, makes any oral or written communication on behalf of any other person (except the United States) to, or (ii) having been so employed as specified in subsection (d) of this section, within two years after his employment has ceased, knowingly represents or aids, counsels, advises, consults, or assists in representing any other person (except the United States) by personal presence at any formal or informal appearance before—

(1) Any department, agency, court, court-martial, or any civil, military or naval commission of the United States or the District of Columbia, or any officer or employee thereof, and

(2) In connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in which the United States or the District of Columbia is a party or has a direct and substantial interest, and

(3) As to (i), which was actually pending under his offical responsibility as an officer or employee within a period of one year prior to the termination of such responsibility, or, as to (ii), in which he participated personally and substantially as an officer or employee; or

(c) Whoever, other than a special Government employee who serves for less than sixty days in a given calendar year, having been so employed as specified in subsection (d) of this section, within one year after such employment has ceased, knowingly acts as agent or attorney for, or otherwise represents, anyone other than the United States in any formal or informal appearance before, or with the intent to influence, makes any oral or written communication on behalf of anyone other than the United States, to—

(1) The department or agency in which he served as an officer or employee, or any officer or employee thereof, and

(2) In connection with any judicial, rulemaking, or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter, and

(3) Which is pending before such department or agency or in which such department or agency has a direct and substantial interest—shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

(d)(1) Subsection (c) of this section shall apply to a person employed—

(A) At a rate of pay specified in or fixed according to subchapter II of chapter 53 of title 5, United States Code, or a comparable or greater rate of pay under other authority;

(B) On active duty as a commissioned officer of a uniformed service assigned to pay grade of 0–9 or above as described in section 201 of Title 37, United States Code; or

(C) In a position which involves significant decision-making or supervisory responsibility, as designated under this subparagraph by the Director of the Office of Government Ethics, in consultation with the department or agency concerned. Only positions which are not covered by subparagraphs (A) and (B) above, and for which the basic rate of pay is equal to or greater than the basic rate of pay for GS–17 of the General Schedule prescribed by section 5332 of title 5, United States Code, or positions which are established within the Senior Executive Service pursuant to the Civil Service Reform Act of 1978, or positions of active duty commissioned officers of the uniformed services assigned to pay 0–7 or 0–8, as described in section 201 of Title 37, United States Code, may be designated. As to persons in positions designated under this subparagraph, the Director may limit the restrictions of subsection (c) to permit a former officer or employee, who served in a separate agency or bureau within a department or agency, to make appearances before or communications to persons in an unrelated agency or bureau, within the same department or agency, having separate and distinct subject matter jurisdiction, upon a determination by the Director that there exists no potential for use of undue influence or unfair advantage based on past Government service. On an annual basis, the Director of the Office of Government Ethics shall review the designations and determinations made under this subparagraph and, in consultation with the department or agency concerned, make such additions and deletions as are necessary. Departments and agencies shall cooperate to the fullest extent with the Director of the Office of Government Ethics in the exercise of his responsibilities under this paragraph.

(2) The prohibition of subsection (c) shall not apply to appearances, communications, or representation by a former officer or employee, who is—

(A) An elected official of a State or local government or

(B) Whose principal occupation or employment is with (i) an agency or instrumentality of a State or local government, (ii) an accredited, degree-granting institution of higher education, as defined in section 1201(a) of the Higher Education Act of 1965, or (iii) a hospital or medical research organization, exempted and defined under section 501(c)(3) of the Internal Revenue Code of 1954, and the appearance, communication, or representation is on behalf of such government, institution, hospital, or organization.

(e) For the purposes of subsection (c), whenever the Director of the Office of Government Ethics determines that a separate statutory agency or bureau within a department or agency exercises functions of the department or agency, the Director shall by rule designate such agency or bureau as a separate department or agency; except that such designation shall not apply to former heads of designated bureaus or agencies, or former officers and employees of the department or agency whose official responsibilities included supervision of said agency or bureau.

(f) The prohibitions of subsections (a), (b), and (c) shall not apply with respect to the making of communications solely for the purpose of furnishing scientific or technological information under procedures acceptable to the department or agency concerned with the particular matter, or if the head of the department or agency concerned with the particular matter, in consultation with the Director of the Office of Government Ethics, makes a certification, published in the FEDERAL REGISTER, that the former officer or employee has outstanding qualifications in a scientific, technological, or other technical discipline, and is acting with respect to a particular matter which requires such qualifications, and that the national interest would be served by the participation of the former officer or employee.

(g) Whoever, being a partner of an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, acts as agent or attorney for anyone other than the United States before any department, agency, court, court-martial, or any civil, military, or naval commission of the United States or the District of Columbia, or any officer or employee thereof, in connection with any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest, or other particular matter in which the United States or the District of Columbia is a party or has direct and substantial interest and in which such officer or employer or special Government employee participates or has participated personally and substantially as an officer or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, or which is the subject of his official responsibility, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

(h) Nothing in this section shall prevent a former officer or employee from giving testimony under oath, or from making statements required to be made under penalty of perjury.

(i) The prohibition contained in subsection (c) shall not apply to appearances or communications by a former officer or employee concerning matters of a personal and individual nature, such as personal income taxes or pension benefits; nor shall the prohibition of that subsection prevent a former officer of employee from making or providing a statement, which is based on the former officer's or employee's own special knowledge in the particular area that is the subject of the statement, provided that no compensation is thereby received, other than that regularly provided for by law or regulation for witnesses.

(j) If the head of the department or agency in which the former officer or employee served finds, after notice and opportunity for a hearing, that such former officer or employee violated subsection (a), (b), or (c) of this section, such department or agency head may prohibit that person from making, on behalf of any other person (except the United States), any informal or formal appearance before or with the intent to influence, any oral or written communication to, such department or agency on a pending matter of business for a period not to exceed five years, or may take other appropriate disciplinary action. Such disciplinary action shall be subject to review in an appropriate United States district court. No later than six months after the effective date of this Act, departments and agencies shall, in consultation with the Director of the Office of Government Ethics, establish procedures to carry out this subsection.

Discussion

The foregoing provision establishes four types of restrictions:

Permanent Restrictions. Former employees are forever barred from representing anyone other than the United States before a federal court or agency with respect to "a particular matter involving a specific party or parties" in which they ever participated as Government employees. Participation is broadly defined to include advice and recommendations as well as decision-making.

However, the restriction applies only to matters which involve specific parties, such as contracts, grants and adjudications, and it covers only actual representation of another. The restriction does not cover rulemaking, and former employees may represent an outside party in proceedings governed by rules they helped to make.

The restriction does not generally prohibit former employees from seeking contracts with EPA nor does it bar work on contracts with which they were involved while at EPA. Of course, representational activity involving contracts in which former employees participated is barred.

Two-Year Restrictions. Former employees who had "official responsibility" for particular matters involving a specific party or parties but who did not actually participate in them are barred for a period of two years from representing outside parties on such matters. This restriction applies only to particular matters which were under a former employee's official responsibility during his or her final year in the responsible position. The terms of this restriction are the same as those of the permanent restriction.

In addition, former Presidential appointees and other employees who have been designated as *senior employees* by the Office of Government Ethics are prohibited for two years from assisting an outside party *by personal presence* in connection with particular matters involving a specific party or parties in which such employees ever participated personally and substantially. This means that a former *senior employee* may not attend a meeting or hearing to assist an outside party's representative where such a matter will be discussed, even if the former employee does not directly communicate with intent to influence. The *senior employee* list is reviewed annually and is published at 5 CFR 737.33.

One-Year Restrictions. Former employees who served for more than 60 days in *senior employee* positions (see 5 CFR 737.33) and who left EPA after February 28, 1980, are subject to a one-year *quarantine* which prohibits any communication with EPA with intent to influence on any matter, including rulemaking, regardless of whether such former employees participated in the matter. There are several exceptions to the one-year restrictions, which are set forth in 5 CFR part 737.

Partners of Current Employees. The prohibition of 18 U.S.C. 207(g) bars partners of current regular and special Government employees from acting as *agent or attorney* where the current employee would be barred from doing so under 18 U.S.C. 207(a) or 18 U.S.C. 207(b) after he or she leaves the Government. However, after the employee leaves the Government the statutory restriction on partners does not apply. (Lawyers should be aware that the Code of Professional Responsibility, as implemented by most local bar associations, continues to bar such activity by partners of former employees unless the Agency grants a waiver based on screening the former employee from participation and sharing in fees.)

Examples

1. An EPA employee served on a technical evaluation panel for a contract award. After he left EPA, he went to work for the contractor and was assigned to work as project manager for the contract he helped to award. A dispute arises over the meaning of a contract provision and the company's management asks the former employee to present the company's point of view to EPA.

Answer: He may not do so because the contractual matter involved a specific party—the offeror—at the time the former employee participated. It is the same particular matter, and presenting the company's position to EPA would amount to communicating with intent to influence. Note, however, that it is proper for the employee to work on the contract.

2. Same situation, except that the company merely asks the former employee to prepare a written submission to EPA for the signature of the company's president.

Answer: The former employee may do so because the statute bars only representational activity, not aid and assistance.

3. A former EPA attorney advised the Office of Air Quality Planning and Standards on a draft emission standard. After she leaves, a private client engages her to represent a company in a court proceeding in which the application of the rule is at issue.

Answer: She may do so, since rulemaking is not "a particular matter involving a specific party or parties."

4. A former Regional Administrator was responsible for an enforcement proceeding during his final year at EPA, but did not personally participate in the matter. Immediately after his resignation from EPA, the firm which was the subject of the enforcement action asks the former Regional Administrator to discuss settlement with EPA and the Justice Department.

Answer: He may not do so during the first two years after leaving EPA. Moreover, since Regional Administrators are *senior employees* they generally may not communicate with EPA with intent to influence on any matter whatever for a period of one year.

18 U.S.C. 208

Acts affecting a personal financial interest.

(a) Except as permitted by subsection (b) hereof, whoever, being an officer or employee of the executive branch of the United

States Government, of any independent agency of the United States, or of the District of Columbia, including a special Government employee, participates personally and substantially as a Government officer or employee, through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or otherwise, in a judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which, to his knowledge, he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner, or employee, or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest—

Shall be fined not more than $10,000, or imprisoned not more than 2 years, or both.

(b) Subsection (a) hereof shall not apply (1) if the officer or employee first advises the Government official responsible for appointment to his position of the nature and circumstances of the judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter and makes full disclosure of the financial interest and receives in advance a written determination made by such official that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect from such officer or employee, or (2) if, by general rule or regulation published in the FEDERAL REGISTER, the financial interest has been exempted from the requirements of clause (1) hereof as being too remote or too inconsequential to affect the integrity of Government officers' or employees' services.

Discussion

This prohibition applies to rulemaking and policy matters which directly and predictably affect employees' financial interests as well as to grants, contracts and adjudications. For example, an employee who owns stock in a steel company may not participate in the development of new source performance standards for the steel industry. However, the employee may participate in developing ambient air quality standards because such rules would not distinctively affect the steel industry. Moreover, the restriction applies to parent and subsidiary companies of the firm in which an employee holds stock. Unless a waiver is granted under 18 U.S.C. 208(b), the restriction is rigid. The size of the financial interest is irrelevant, as is the employee's level of responsibility. Moreover, it does not matter that the organization in which the employee or the employee's spouse or minor child, etc., has a financial interest is a non-profit or public interest group, since such groups nonetheless have financial interests which the employee's EPA duties may affect. (See Section 3.301 concerning waivers under 18 U.S.C. 208(b)).

Retirement plans maintained by a former employer may also amount to a financial interest, depending on the circumstances. For example, a fund managed by a former employer which includes company stock would create a personal financial interest, whereas a pension plan of a State government which is managed by a separate trustee and in which the former employee's right have vested would not create a personal financial interest in the State government in which an EPA employee formerly served. Employees are encouraged to seek the advice of the Designated Agency Ethics Official regarding pension plans.

Examples

1. An employee at grade GS–11 owns 10 shares of common stock in a smelting company which will be required to install additional pollution control equipment if a proposed new source performance standard is promulgated. The employee's EPA duties ordinarily include reviewing drafts of regulations and providing comments.

Answer: The employee may not comment on the regulation, since this would be participation in a matter in which she has a financial interest. However, the Designated Agency Ethics Official might grant a waiver under 18 U.S.C. 208(b) in such a case.

2. Same as above, except that the financial interest is part of a trust bequeathed by the employee's deceased parents for the benefit of her minor children.

Answer: The result is the same, since the prohibition extends to the financial interests of employees' minor children.

3. An employee is the treasurer of an environmental group which has applied to EPA for a grant. The employee receives no pay for this activity.

Answer: The employee is barred from participating in any way, even by advice or recommendation, in the EPA decision on the application, since he is an officer of an organization which has a financial interest in the matter.

4. An EPA employee is serving as Project Officer on a contract with a consulting firm to study emission control technologies for the steel industry. The consulting firm approaches the EPA employee to discuss possible future employment with the firm. The employee indicates that she will consider the matter.

Answer: Until she rejects the offer or the offer is withdrawn, the employee must disqualify herself from any action as Project Officer, since any such action would be

likely to affect the financial interests of an organization with which she is negotiating for employment.

5. An EPA employee works in pesticides registration. As part of a retirement plan, his wife holds stock in a company which manufactures pesticides.

Answer: The employee may not participate in processing any application from the firm in which his wife holds stock.

18 U.S.C. 209

Salary of Government officials and employees payable only by United States.

(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

Shall be fined not more than $5,000 or imprisoned not more than one year, or both.

(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profitsharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such.

(d) This section does not prohibit payment or acceptance of contributions, awards, or other expenses under the terms of the Government Employees Training Act (Pub. L. 85-507, 72 Stat. 327; 5 U.S.C. 2301-2319, July 7, 1958).

Discussion

This provision bars supplementation of a regular employee's Government

The restriction does not apply to payments by States, counties or municipalities. For example, an employee on a leave of absence under the Intergovernmental Personnel Act could receive a higher salary from the receiving agency than he or she would have received from the Government.

The restriction does not forbid receipt of outside earned or investment income nor does it generally apply to pension or employee welfare or benefit plans maintained by former employers.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39623, Sept. 27, 1985]

Appendix B to Subpart A—Other Provisions

1. House Concurrent Resolution 175, 85th Congress, 2d Session, 72 Stat. B12, "Code of Ethics for Government Service."

2. Chapter 11 of Title 18, United States Code, relating to bribery, graft, and conflicts of interests.

3. The prohibition against lobbying with appropriated funds (18 U.S.C. 1913).

4. Disloyalty and striking (5 U.S.C. 7311; 18 U.S.C. 1918).

5. Disclosure of classified information (18 U.S.C. 798, 50 U.S.C. 783) and disclosure of confidential information (18 U.S.C. 1905).

6. Habitual excessive use of intoxicants (5 U.S.C. 7352).

7. Misuse of Government motor vehicles or aircraft (31 U.S.C. 638a(c)).

8. Misuse of the franking privilege (18 U.S.C. 1719).

9. Deceit in an examination or personnel actions in connection with Government employment (18 U.S.C. 1917).

10. Fraud or false statements in a Government matter (18 U.S.C. 1001).

11. Mutilating or destroying a public record (18 U.S.C. 2071).

12. Counterfeiting and forging transportation requests (18 U.S.C. 508).

13. Embezzlement of Government money or property (18 U.S.C. 641); failing to account for public money (18 U.S.C. 643); embezzlement of money or property (18 U.S.C. 564).

14. Unauthorized use of documents relating to claims from or by the Government (18 U.S.C. 285).

15. Proscribed political activities (Hatch Act—5 U.S.C. 7324-7327; 18 U.S.C. 602, 603, 607, and 608).

16. Acting as the agent of a foreign principal registered under the Foreign Agents Registration Act (18 U.S.C. 219).

17. Acceptance of excessive honorariums (2 U.S.C. 411i).

18. Outside earned income in excess of 15% of the salaries of Presidential appointees (5 U.S.C. App. I).

Appendix C to Subpart A—Procedures for Administrative Enforcement of Post-Employment Restrictions

1. Purpose

The purpose of this Appendix is to implement provisions of The Ethics in Government Act which concern restrictions on post-EPA employment. This Appendix contains procedures which EPA follows whenever it believes that a former EPA employee has violated 18 U.S.C. 207 (a), (b), or (c), as implemented by 5 CFR part 737.

Authority: 18 U.S.C. 207 (a), (b), (c), as implemented by 5 CFR part 737.

2. Delegation

The Administrator delegates the authority to carry out this Appendix to the Inspector General, with the following exceptions:

(a) The Judicial Officer or his designee is the presiding official as provided by paragraph 9(a) of this appendix;

(b) The Designated Agency Ethics Official has the authority to designate the Agency Counsel, as provided by paragraph 9(b) of this appendix;

(c) The Deputy Administrator has the authority to impose appropriate administrative sanctions, as provided by paragraph 13 of this appendix.

3. Preliminary Review and Referral of Information About Violations

The Inspector General receives and reviews written or oral information concerning a possible violation of the post-employment restrictions of 18 U.S.C. 207 (a), (b) or (c) as implemented by 5 CFR part 737. The Inspector General reviews the information to determine whether the matter is clearly frivoulous and does not merit further action. If the Inspector General determines that the matter merits further action, the Inspector General informs the Director of the Office of Government Ethics and consults with the Criminal Division of the Department of Justice regarding the conduct of an investigation. The purpose of the consultation is to avoid prejudicing any criminal proceeding that the Justice Department may have under consideration.

4. Investigation by the Inspector General

If the Criminal Division of the Justice Department agrees that EPA should handle the matter, the Inspector General conducts an investigation of the possible violation of the post-employment restrictions of 18 U.S.C. 207 (a), (b) or (c).

5. Initiating Process To Impose Sanctions: Notice

If the Inspector General's investigation establishes that there are reasonable grounds to believe that a former EPA employee has violated the post-employment restrictions of 18 U.S.C. 207 (a), (b) or (c), the Inspector General may initiate the process of imposing sanctions under 18 U.S.C. 207(j). The Inspector General sends the former EPA employee a written notice of charges and a copy of this appendix.

The notice of charges describes the allegations against the former employee in sufficient detail to enable the former employee to prepare an adequate defense and contains the following final paragraph:

You may request a hearing by mailing or otherwise furnishing written notice of your request to me within 30 days after the date you receive this notice of charges. If you do not request a hearing within 30 days, the Agency may nonetheless determine that you have violated the provisions of 18 U.S.C. 207 (a), (b), or (c) as implemented by 5 CFR part 737 and impose administrative sanctions set forth in paragraph 15 of the enclosed Appendix to 40 CFR part 3, Subpart A. You have a right to counsel, at your own expense, at all stages of this administrative enforcement proceeding. The procedures for administrative enforcement of the post-employment restrictions are set forth in the enclosed appendix.

6. Request for a Hearing

A former EPA employee must request a hearing within 30 days after receiving the notice of charges. Otherwise, the initial determination of the charges is made without a hearing.

7. Initial Decision Without a Hearing

If a former EPA employee fails to make a timely request for a hearing, the Inspector General prepares an initial decision in writing. The Inspector General furnishes this decision to the former employee within 60 days after the time for requesting a hearing expires. The initial decision sets forth the findings of fact and conclusions of law on which it is based.

8. Appeal of an Initial Decision Made Without a Hearing

A former employee may appeal an initial decision made without a hearing. The appeal must be submitted to the Deputy Administrator in accordance with paragraph 10(b) of this appendix.

9. Initial Decision After a Hearing

If the former employee requests a hearing, an initial decision is made after a hearing takes place.

(a) *The Presiding Official.* The Judicial Officer or his designee presides at the hearing. The Presiding Official must be an attorney and an employee of the Environmental Protection Agency. The Judicial Officer must promptly notify the former employee and the Inspector General of the Presiding Official's name, address and telephone number.

The Presiding Official shall conduct the hearing in a fair and impartial manner and issue an initial decision as promptly as possible after the record is complete, but in no event later than 60 days after the hearing is completed. No person who has participated in any way in the investigation or in the decision to initiate administrative enforcement, or who is a subordinate of the Agency Counsel, or who has had any connection or dealings with the former employee may serve as Presiding Official. The Judicial Officer may remove a Presiding Official for cause.

(b) *Appointment of Agency Counsel.* The Designated Agency Ethics Official shall designate an attorney to act as Agency Counsel. The Designated Agency Ethics Official notifies the Presiding Official and the former employee (or if the former employee is represented by counsel, his or her attorney) of the name, address and telephone number of the Agency Counsel.

(c) *Hearings.* Hearings will be held at EPA Headquarters in Washington, DC, or at an EPA regional office or laboratory. After conferring with the parties, the Presiding Official shall set a reasonable time, date and place for the hearing with due regard for the former employee's need for adequate time to prepare a defense and the need to expeditiously resolve allegations which may damage the former employee's reputation. At least 15 days before the date set for the hearing, the Presiding Official notifies the parties of the time, date and place of the hearing. Hearings will be as informal as reasonably possible, consistent with establishing an orderly record. Federal rules of evidence do not control the hearing, although the Presiding Official may use these rules as guidance. The Presiding Official generally will admit evidence unless it is clearly irrelevant, immaterial or unduly repetitious. The parties have the right to:

(i) Introduce and examine witnesses;

(ii) Offer documentary evidence;

(iii) Confront and cross-examine adverse witnesses; and

(iv) Present oral argument in the form of brief opening and closing statements.

In addition, the former employee has the right:

(i) To represent himself or herself or be represented by counsel at all stages of administrative enforcement; and

(ii) To require that all persons be excluded from the hearing room except the reporter, the Presiding Official, the Agency Counsel and witnesses during the time they are actually testifying.

Witnesses shall testify under oath or affirmation administered by the Presiding Official.

The Presiding Official must arrange for a transcript of the hearing through the EPA Procurement and Contracts Management Division using the funds of the Office of Administration. The former employee is entitled to a copy of the transcript at no charge, and the Presiding Official must furnish it as soon as it is received from the reporter.

(d) *Burden of Proof.* The Agency has the burden of proof and must establish a violation by clear and convincing evidence.

(e) *Initial Decision.* The Presiding Official must make an initial decision exclusively on matters of record in the proceeding. The initial decision must be made within 60 days after the hearing and must set forth the findings of fact and conclusions of law on which it is based. The Presiding Official must furnish the decision to the former employee or his/her counsel and to the Agency Counsel and the Inspector General.

10. Appeal of an Initial Decision Made After a Hearing

(a) *Initial Decision After a Hearing.* The initial decision of the Presiding Official becomes the final Agency decision unless, within 30 days after receiving the initial decision, either party appeals by mailing or otherwise furnishing to the Deputy Administrator written notice of appeal, with a copy to the opposing party. The notice of appeal may discuss the reasons why the party contends that the initial decision is erroneous, subject to the right of the opposing party to present a written response to the Deputy Administrator within 30 days after receiving a copy of the notice of appeal.

The Deputy Administrator must base his or her decision solely on the record of the proceedings or those portions cited by the parties to limit the issue and the notice of appeal and response. If the Deputy Administrator modifies or reverses the initial decision, he or she must state in writing why the initial decision was erroneous.

(b) *Initial Decision Without a Hearing.* If the former employee did not request a hearing, the initial decision of the Inspector General will become the final Agency decision unless the former employee submits a written notice of appeal to the Deputy Administrator within 30 days after receipt of the initial decision, with a copy to the In-

spector General. The notice of appeal may discuss reasons why the initial decision is erroneous, subject to the right of the Inspector General to present a written response to the Deputy Administrator within 30 days after receiving the notice of appeal. The Deputy Administrator's review will be based on an examination of the Inspector General's evidence and any legal arguments which the former employee or the Inspector General presents.

11. Ex Parte Communications (Communications Outside the Record)

Neither a Presiding Official nor the Deputy Administrator will receive from any person any written or oral communication outside the record about the merits of an administrative enforcement proceeding or appeal. This does not apply to ex parte discussions concerning administrative functions or procedures under this Appendix, or to consultations between the Deputy Administrator and staff members who assist the Deputy Administrator.

12. Calculating Deadlines

If a deadline falls on a Saturday, Sunday or federal holiday, the next working day is considered the deadline.

13. Administrative Sanctions

Whenever a final determination is made that a former employee has violated 18 U.S.C. 207 (a), (b) or (c) as implemented by 5 CFR part 737, the Deputy Administrator may impose an appropriate administrative sanction, which may include one or more of the following:

(i) Prohibiting the former employee from making on behalf of any other person (except the United States) any formal or informal appearance before, or, with the intent to influence, any oral or written communication on any matter of business for a period not to exceed 5 years. This will be accomplished by a memorandum to all EPA employees directing them to refuse to participate in any such appearance or to accept any such communication during the restriction period.

(ii) Debarring the former employee from receiving any EPA contract, grant, cooperative agreement or loan for a period of up to 3 years, provided that the violation was committed in the context of seeking or performing a government contract, grant, cooperative agreement or loan.

(iii) A written reprimand.

The Deputy Administrator may confer with the parties before deciding upon an administrative sanction. The former employee must be notified of any administrative sanction by certified mail, return receipt requested.

14. Confidentiality.

All records and information regarding administrative enforcement proceedings under this Appendix will be kept confidential and will not be disclosed except as required by law or regulation.

15. Judicial Review

Any person found to have violated 18 U.S.C. 207 (a), (b) or (c) as implemented by 5 CFR part 737, may seek judicial review of this administrative determination.

Subpart B—Advice and Enforcement

§ 3.200 Purpose.

This subpart designates EPA officials responsible for advising employees on ethics questions and prescribes procedures for enforcing the requirements of this part. There is no attorney/client relationship between Ethics Officials and employees who seek advice; admissions to Ethics Officials of past violations are *not* privileged.

§ 3.201 Designation.

The following officials are available to advise EPA employees:

(a) The Administrator appoints a Designated Agency Ethics Official who:

(1) Acts as the principal contact with the Office of Government Ethics;

(2) Provides guidance to Deputy Ethics Officials;

(3) Collects, reviews and maintains Executive Personnel Financial Disclosure Reports and provides them to the public as required;

(4) Makes determinations and provides oral and written advice on ethics questions; and

(5) Performs all other functions under 5 CFR 738.203.

(b) The Administrator also appoints an Alternate Agency Ethics Official to assist the Designated Agency Ethics Official under 5 CFR 738.202.

(c) The Designated Agency Ethics Official may appoint Deputy Ethics Officials under 5 CFR 738.202 in addition to those listed below.

The Deputy Ethics Officials are the:

(1) Assistant Administrators;

(2) Inspector General;

(3) Office Directors reporting to Assistant Administrators;

(4) Heads of Staff Offices reporting directly to the Administrator;
(5) Laboratory Directors; and
(6) Regional Administrators.
(d) The Deputy Ethics Officials:
(1) Counsel employees on questions arising under this part;
(2) Review and maintain Confidential Statements of Employment and Financial Interests filed under Subpart C of this part;
(3) Direct employees to file Confidential Statements of Employment and Financial Interest under § 3.302(c);
(4) Decide requests for approval of outside employment under Subpart E of this part; and
(5) Consult, as necessary, with the Designated Agency Ethics Official.

§ 3.202 Reporting, investigating and enforcing.

(a) Any employee who is aware of a possible violation of this part must inform the appropriate Deputy Ethics Official, the Designated Agency Ethics Official or the Inspector General.
(b) Violation of this part may be cause for disciplinary or remedial action. Remedial action may include a direction to dispose of conflicting interests, waivers under 18 U.S.C. 208(b), disqualification from particular assignments, reassignment or other action such as establishment of an appropriate trust.

Subpart C—Financial Interests and Investments

§ 3.300 Prohibitions against acts affecting a personal financial interest.

(a) As discussed in Appendix A to Subpart A, section 208(a) of Title 18, United States Code, prohibits an employee from knowingly participating in an EPA matter in which the employee, the employee's spouse, minor child, present or prospective employer, or organization in which the employee is an officer, has a financial interest.
(b) Activities which may affect a financial interest are:
(1) Negotiating, administering or auditing contracts or assistance agreements;
(2) Selecting or approving contractors or subcontractors;
(3) Enforcement activities;
(4) Issuing permits;
(5) Registering pesticides;
(6) Certifying motor vehicles; and
(7) Rulemaking and policy matters which have a direct and predictable effect on the financial interests of companies in which the employee owns stock or has an official or employment relationships. Examples are discussed in Appendix A to Subpart A.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39623, Sept. 27, 1985]

§ 3.301 Waiver.

(a) The Designated Agency Ethics Official may waive the prohibition of 18 U.S.C. 208(a) for rulemaking and policy matters if the interest is not so substantial as to be deemed likely to affect the integrity of an employee's services. Employees may request such a waiver by submitting a written disclosure of the nature of the financial interest to the Designated Agency Ethics Official, together with a discussion of the employee's duties and the reasons why a waiver is appropriate.
(b) The prohibition of 18 U.S.C. 208(a) may also be waived by general regulation. Financial interests derived from the following have been determined to be too remote or too inconsequential to affect the integrity of employee's services, and employees may participate in matters affecting them:
(1) Mutual funds (including tax-exempt bond funds), except those which concentrate their investments in particular industries;
(2) Life insurance, variable annuity, or guaranteed investment contracts issued by insurance companies;
(3) Deposits in a bank, savings or loan association, credit union or similar financial institution;
(4) Real property used solely as the personal residence of an employee;
(5) Bonds or other securities issued by the U.S. Government or its agencies.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39623, Sept. 27, 1985]

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§ 3.302 Financial Disclosure Reports and Confidential Statements of Employment and Financial Interest.

(a) The following employees (including employees expected to serve in an "acting" capacity for more than 60 days or who actually serve in such capacity for more than 60 days) are required to file public Executive Personnel Financial Disclosure Reports in accordance with 5 CFR part 734

(1) Presidential appointees;

(2) Employees whose positions are classified at GS–16 or above of the General Schedule;

(3) Members of the Senior Executive Service;

(4) Administrative Law Judges appointed under 5 U.S.C. 3105;

(5) Schedule C employees;

(6) The Designated Agency Ethics Official, and

(7) Special Government employees whose basic daily rate of pay equals or exceeds the basic daily rate for GS–16 of the General Schedule and who are expected to perform more than 60 days of actual service during a 365 day period. (If such employees are not expected to perform more than 60 days of actual service, but nonetheless exceed 60 days, reports are due within 15 days after the 60th day of actual service.)

(See 5 CFR part 734 for reporting requirements for Presidential nominees.)

Financial Disclosure Reports must be submitted to the Designated Agency Ethics Official within 30 days after an employee assumes a covered position (unless the employee has left another covered position in the Executive Branch within the previous 30 days), by May 15 of each year (unless the Designated Agency Ethics Official or the Office of Government Ethics grants an extension) and within 30 days after leaving a covered position (unless the employee assumes another covered position in the Executive Branch within 30 days). These reports are available to the public. However, the Designated Agency Ethics Official may charge for direct reproduction costs at the rate set forth in 40 CFR 2.120(g). The Designated Agency Ethics Official may also require prepayment of any fee in accordance with 40 CFR 2.120(c) and waive fees under the circumstances described in 40 CFR 2.120(d).

(b) In addition, all employees in the following positions in grades GM or GS–13 or above (or comparable levels under other pay systems) must file Confidential Statements of Employment and Financial Interests unless they are required to file public Executive Personnel Financial Disclosure Reports:

(1) All employees who report to the General Counsel or the Assistant Administrator for Enforcement and Compliance Monitoring, and Regional Counsel employees;

(2) All employees in the immediate Office of the Administrator or Deputy Administrator;

(3) All Branch chiefs in the Facilities and Support Services Division;

(4) Employees in the Procurement and Contracts Management;

(5) Employees in the Grants Administration Division;

(6) Employees in the Office of Inspector General;

(7) Temporary experts and consultants; and

(8) Special Government employees as provided in § 3.602.

(c) The Designated Agency Ethics Official or cognizant Deputy Ethics Offical may also require employees other than those whose positions are listed above to file Confidential Statements of Employment and Financial Interest by specific written direction. The following employees should be required to file:

(1) Those in positions classified at GM or GS–13 or above (or comparable levels under other pay systems) whose duties and responsibilities require the exercise of judgment in participating in or making Government decisions with respect to:

(i) Evaluating or selecting contractors, initiating procurement requests, acting as project officer on contracts or auditing contractors;

(ii) Awarding or monitoring assistance agreements; or

(iii) Regulating private enterprise.

(2) Those in positions classified at GS–12 or below (or comparable levels under other pay systems) if their duties directly affect the financial in-

terests of specific parties. Such positions are limited to contracting officers, project officers, inspectors, auditors and On-Scene Coordinator representatives.

(d) Other employees classified below the GM or GS-13 level (or comparable levels under other pay systems) who are in positions which otherwise meet the criteria of paragraph (c)(1) of this section may also be required to file, provided the Office of Government Ethics has approved in writing. Deputy Ethics Officials should consult with the Designated Agency Ethics Official in seeking such approval.

(e) *Financial and employment interests of employees' relatives.* In completing Confidential Statements of Employment and Financial Interests. the financial and employment interests of a spouse or minor child are considered to be interests of the employee and must be reported.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39623, Sept. 27, 1985]

§ 3.303 Special requirements under the Clean Air Act.

(a) Notwithstanding any other provisions of this part, employees whose positions are listed in Appendix B may not be employed by, serve as attorney for, act as consultant to, or hold any other official or contractual relationship to (other than ownership of stock, bonds, or other financial interest)—

(1) The owner or operator of any major stationary source or any stationary source which is subject to a standard of performance or emission standard under section 111 (42 U.S.C. 7411) or section 112 (42 U.S.C. 7412) of the Act;

(2) Any manufacturer of any class or category of mobile sources if such mobile sources are subject to regulation under the Act;

(3) Any trade or business association of which an owner or operator referred to in paragraph (a)(1) of this section or a manufacturer referred to in paragraph (a)(2) of this section is a member;

(4) Any organization (whether nonprofit or not) which is a party to litigation or engaged in political, educational or informational activities relating to air quality.

(b) In examining financial interest statements, reviewers must consider whether certain financial interests of a covered employee may be inconsistent with the employee's position and duties. In particular, any financial interest that presents a conflict of interest with an employee's duties under the Act is resolved under § 3.202 of this part.

(c) Under section 318(d) of the Clean Air Act, any employee subject to this provision who knowingly violates the provisions of this section is subject to a fine of not more than $2,500 or imprisonment for not more than one year, or both.

§ 3.304 Special requirements under the Toxic Substances Control Act.

(a) Notwithstanding any other provisions of this part, members of the Interagency Testing Committee established under section 4(e) of the Toxic Substances Control Act (15 U.S.C. 2603(e)) and their designees may not:

(1) Accept employment or compensation from any person subject to any requirement of the Act, or to any rule or order issued under it, for a period of twelve months after their committee service ceases; or

(2) Hold any stocks or bonds or have any substantial pecuniary interest in any person engaged in the manufacture, processing or distribution in commerce of any substance or mixture subject to any requirement of the Act or of any rule or order issued under it.

(b) This provision is enforceable by an action for a court order to restrain violations.

§ 3.305 Special requirements under the Surface Mining Control and Reclamation Act.

(a) Notwithstanding any other provisions of this part, no employee who performs any function or duty under the Surface Mining Control and Reclamation Act (such as reviewing Environmental Impact Statements of the Office of Surface Mining in the Department of the Interior) may have a direct or indirect interest in underground or surface coal mining oper-

ations. Regulations of the Office of Surface Mining at 30 CFR 706.3 define the terms "direct financial interest" and "indirect financial interest" as follows:

(1) *Direct financial interest.* Means ownership or part ownership by an employee of land, stocks, bonds, debentures, warrants, a partnership, shares, or other holdings and also means any other arrangement where the employee may benefit from his or her holding in or salary from coal mining operations. Direct financial interests include employment, pensions, creditor, real property and other financial relationships.

(2) *Indirect financial interest.* Means the same financial relationships as for direct ownership, but where the employee reaps the benefits of such interests, including interests held by his or her spouse, minor child and other relatives, including in-laws, residing in the employee's home. The employee will not be deemed to have an indirect financial interest if there is no relationship between the employee's functions or duties and the coal mining operation in which the spouse, minor children or other resident relative holds a financial interest.

(b) Violation of these restrictions is punishable by a fine of up to $2,500 or imprisonment for not more than one year, or both.

Appendix A to Subpart C—Procedures for Filing Confidential Statements of Employment and Financial Interest

(1) *Submission*—Each employee required to submit a Confidential Statement of Employment and Financial Interests must submit the completed EPA Form 3120-1 within 30 days after entrance on duty or (where the position is not specifically listed in this part) within 30 days after being notified of the requirement to file. Interests which are exempt from the prohibition of 18 U.S.C. 208(a) (except for interests in mutual funds) need not be reported. *See* § 3.301(b). The completed form is sent to the Deputy Ethics Official for the employee's organization. Headquarters employees in the Office of General Counsel and employees in the immediate Office of the Administrator submit their forms to the Designated Agency Ethics Official.

(2) *Decisions.* When there appears to be a conflict between the employee's financial interests and the performance of Government duties, the reviewer provides the employee an opportunity to discuss the matter. Deputy Ethics Officials should discuss any such problems with the Designated Agency Ethics Official, who determines if divestiture is required. See § 3.202(c). The Inspector General may be asked to investigate the circumstances of apparent violations of the conflict of interest laws or these regulations.

(3) *Supplemental Statements*—For purposes of annual review, employees who are required to submit EPA Form 3120-1 must submit a new statement each July by no later than July 31, even if no changes have taken place during the year.

Deputy Ethics Officials must notify such employees of this requirement and must complete review of the statements within 30 days after submission. By September 30 of each year, Deputy Ethics Officials must submit a statement to the Designated Agency Ethics Official containing the following information: (i) the number of employees in their organization at GM/GS 13-15; (ii) the number required to file; (iii) the number of other employees required to file under § 3.302(c) or 3.302(d); (iv) the number of remedial actions taken by type of action (i.e., recusals, waivers, divestitures, reassignments or blind trusts); (v) a certification that no employee who performs any "functions or duties" under the Surface Mining Control and Reclamation Act holds any prohibited interests (see § 3.305); and (6) a certification that all required reports have been received, reviewed and signed and that any necessary remedial actions have been taken.

In addition, whenever additions or changes have taken place, employees who are required to file must submit a supplemental statement by the end of the four month period in which the transactions occurred; that is, by November 30 and March 31. Deputy Ethics Officials must notify employees of this requirement during the months when these updates are due, and must review and sign the updates within 30 days after submission. However, they need not provide any report to the Designated Agency Ethics Official regarding the updates.

(4) *Confidentiality*—EPA Form 3120-1 is confidential. No information from this form may be disclosed other than to the Designated Agency Ethics Official and the Alternate Agency Ethics Official, immediate staff assistants whom the responsible Deputy Ethics Official has specifically designated in writing, the Office of Inspector General, committees or subcommittees of Congress on the written request of the chairman, or

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as the Director of the Office of Government Ethics or the Administrator may determine for good cause.

(5) *Maintenance of statements.* EPA Forms 3120-1 and related records must be kept in a locked container. They are retained for six years after filing and then disposed of (unless needed in an ongoing investigation).

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39623, Sept. 27, 1985]

Appendix B to Subpart C—Employees Subject to Special Requirements Under the Clear Air Act

The positions listed below have been determined to be of a regulatory or policymaking nature under section 318(d) of the Clean Air Act. Whenever the title of a position is listed, it includes any person who occupies the position as "acting" and any person who occupies a successor position under a subsequent reorganization.

Coverage:

(1) Under the Office of the Administrator: the Administrator, Deputy Administrator, Regional Administrators, General Counsel, Deputy General Counsel, Associate General Counsel for Air, Noise and Radiation, Enforcement Counsel, Deputy Enforcement Counsel, Associate Deputy Enforcement Counsel for Air and Director of the Science Advisory Board.

(2)(i) In the Office of the Administrator: Administrator, Deputy Administrator, and the Director of the Science Advisory Board.

(ii) Regional Administrators.

(iii) In the Office of General Counsel: General Counsel, Deputy General Counsel, Associate General Counsel for Air and Radiation.

(iv) In the Office of Enforcement and Compliance Monitoring: Assistant Administrator for Enforcement and Compliance Monitoring, Senior Enforcement Counsel, Associate Enforcement Counsel for Air Enforcement.

(v) In the Office of Policy, Planning and Evaluation: Assistant Administrator for Policy, Planning and Evaluation, Deputy Assistant Administrator for Policy, Planning and Evaluation, Director of the Office of Policy Analysis, Director of the Office of Standards and Regulations.

(vi) In the Office of Air and Radiation: Assistant Administrator for Air and Radiation, Deputy Assistant Administrator for Air and Radiation, Director of the Office of Policy Analysis and Review, Director of the Office of Program Development, Director of the Office of Air Quality Planning and Standards, Director of the Office of Mobile Sources, and Directors of the following Divisions: Control Programs Development, Emission Standards and Engineering, Monitoring and Data Analysis, Stationary Source Compliance, Strategies and Air Standards, Certification, Emission Control Technology, Engineering Operations, Field Operations and Support and Manufacturers Operations.

(3) *Under the Office of Air, Noise and Radiation:*

The Assistant Administrator for Air, Noise and Radiation, Director of the Office of Policy Analysis, Director of the Office of Transportation and Land Use Policy, Director of the Office of Air Quality Planning and Standards and Division Directors reporting to that official, and the Director of the Office of Mobile Source Air Pollution Control and Division Directors reporting to that official.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

Subpart D—Gifts, Gratuities, or Entertainment

§ 3.400 Policy.

(a) Except as provided in paragraph (d) and in § 3.104(e), no employee may directly or indirectly (for example, through spouses or children) accept any gift, gratuity, entertainment (including meals), favor, loan or any other thing of value from any person, corporation or group which:

(1) Has or is seeking to obtain contracts or assistance agreements with EPA;

(2) Has interests which may be substantially affected by the employee's performance or nonperformance of official duty;

(3) Is in any way attempting to affect the employee's official action; or

(4) Conducts activities that EPA regulates.

(b) The following are exceptions to the general rule set forth in paragraph (a):

(1) Accepting modest entertainment, such as meals or refreshments, in connection with participation in widely attended gatherings sponsored by industrial, technical or professional organizations or in connection with attendance at public ceremonies or similar activities where the employee officially represents EPA. Acceptance of ordinary *business lunches* is not permitted.

(2) Accepting gifts, favors or entertainment where there is an obvious family or personal relationship between the employee or the employee's family and the donor, and where this relationship clearly motivated the gift.

(3) Purchasing at advantageous rates offered to Government employees as a class.

(4) Accepting loans from banks or other financial institutions on customary terms.

(5) Accepting unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars or other items worth less than $10 (U.S. retail).

(6) Accepting incidental transportation (such as rides to and from airports) furnished in connection with official duties and customarily provided by private organizations. (For further guidance concerning acceptance of travel and related expenses, see § 3.505.)

(7) Accepting transportation, lodging and meals of modest value in connection with interviews for future employment, provided the employee is in an annual leave status at the time such interview occurs.

(8) Accepting gifts and honors from foreign governments as authorized by 5 U.S.C. 7342. (See 41 CFR part 101-49).

(9) Awards incident to training or meetings under 5 U.S.C. 4111 and 5 CFR part 410, subpart G. This requires the specific written approval of the Designated Agency Ethics Official or the Alternate Agency Ethics Official. See § 3.504(c)(1).

(c) Where circumstances require temporary acceptance of a prohibited gift or gratuity, the acceptance must be reported to the Designated Agency Ethics Official who shall return it to the donor with an explanation, where practical. Otherwise, the gift or gratuity will be donated to a public or charitable institution and, where practical, the donee will be informed of the disposition. (But see 41 CFR part 101-49 regarding gifts from foreign governments.)

Subpart E—Outside Employment

§ 3.500 Definitions.

Outside employment or other outside activity is any work or service preformed by an employee other than the performance of official duties. It includes such activities as writing and editing, publishing, teaching, lecturing, counsulting, self-employment and other work or services. Employees must ensure that their outside activities may not reasonably be construed as implying official EPA endorsement of any statement, activity, product or service.

§ 3.501 Policy.

(a) Subject to the approval requirements of § 3.508, employees may engage in outside employment or other outside activity consistent with the standards of this subpart.

(b) Employees may participate in community affairs as private citizens where consistent with these regulations. Such activities include:

(1) Speaking, writing, editing, and teaching;

(2) Participating in charitable, religious, professional, social, fraternal, nonprofit educational and recreational, public service or civic organizations;

(3) Participating in the activities of national, State and local political parties to the extent permitted under the *Hatch Act* (5 U.S.C. 7324-7324) and 18 U.S.C. 602, 603, 607 and 608.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

§ 3.502 Guidelines and limitations.

Outside employment and other outside activity is prohibited if it would:

(a) Violate a federal or State statute, local ordinance, Executive Order or regulation;

(b) Involve acceptance of a fee, compensation, gift, payment of expense, or other thing of monetary value under circumstances which would result in, or create the appearane of, a conflict of interest;

(c) Bring discredit upon the Government or EPA, or lead to relationships which would impair public confidence in the integrity of the Government or EPA;

(d) Involve work with any EPA contractor or subcontractor on an EPA project or work with any holder of an EPA assistance agreement or subagreement on an EPA project (unless the Designated Agency Ethics Official approves work on such acquisition or assistance agreement in writing) or would involve work for any person or organization in a position to gain advantage through the employee's exercise of official duties;

(e) Involve use of the employee's time during official working hours;

(f) Involve use of official facilities (for example, office space, telephones, office machines or supplies) or the services of other employees during duty hours;

(g) Interfere with the efficient performance of Government duties or impair the employee's mental or physical capacity to perform such duties;

(h) Involve use of information obtained as a result of Government employment which has not been made available to the general public.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

§ 3.503 Distinction between official and outside activities.

Writing, speaking, or editing is normally *official* if it results from a request to EPA to furnish a speaker, author or editor. If an invitation is addressed to an employee, the invitation is *official* if it is tendered because of the employee's EPA position rather than the employee's individual knowledge or accomplishments. The fact that an activity is prepared for or performed outside normal duty hours is not controlling. Otherwise, such activities are *outside* activities for purposes of § 3.500.

§ 3.504 Compensation, honorariums, travel expenses.

(a) Employees may accept compensation for permissible outside employment or other outside activity. However, under 2 U.S.C. 441 no employee may accept any honorarium of more than $2,000 for any single appearance, speech or article. In addition, Presidential appointees are prohibited from receiving outside earned income in any year in excess of 15% of their Government salaries. See section 210 of Pub. L. 95-521, 5 U.S.C. App. 1.

(b) Except as provided below, travel expenses for official activities must be paid by the Government. Conversely, appropriated funds must not be used for nonofficial travel.

(c) The Comptroller General has ruled that acceptance of official travel expenses from outside sources is an impermissible augmentation of agency appropriations in the absence of specific statutory authority. Accordingly, employees may not accept official travel expenses except for:

(1) Attendance at meetings, if paid by organizations listed under section 501(c)(3) of the Internal Revenue Code (*see* 5 U.S.C. 4111), and the prior written approval of the Designated Agency Ethics Official or the Alternate Agency Ethics Official is obtained;

(2) Travel entirely outside the United States paid by foreign governments or public international organizations (5 U.S.C. 7342(c)(1));

(3) Details to State and local governments and to domestic universities and *other organizations* under the Intergovernmental Personnel Act (5 U.S.C. 3374-3375);

(4) Details to public international organizations in which the United States participates as a government (5 U.S.C. 3343);

(5) Details to foreign governments (this requires State Department approval);

(6) Travel approved by the State Department under the Mutual Educational and Cultural Exchange Program of Title 22, U.S. Code, Chapter 33;

(7) Travel expenses of EPA witnesses for non-Government parties (5 U.S.C. 5751).

§ 3.505 Special conditions which apply to teaching, lecturing and speechmaking.

In addition to the limitations of §§ 3.502 and 3.504(a), employees may engage in outside activities involving teaching, lecturing and speechmaking only if:

(a) Such activities are conducted on the employees' own time without the

use of Government property or personnel;

(b) Government travel or per diem funds are not used;

(c) The activities are not for the purpose of special preparation for a civil service or foreign service examination and do not involve the use of information obtained as a result of Government employment that has not been made available to the general public;

(d) The activities do not involve instruction on dealing with specific matters pending before EPA.

§ 3.506 Special conditions applicable to outside writing and editing activities.

(a) Subject to the limitations of §§ 3.502 and 3.504(a) and this section, employees may serve as editors and editorial consultants, or on editorial boards, and may contribute articles to publications.

(b) Writing and editing, whether related or unrelated to an employee's official duties, must not express or imply official support in either the material itself or in advertising or promotional material, including book jackets and covers.

(c) Writing or editing, whether related to an employee's official duties or not, must either omit mention of the employee's official title or affiliation with the Agency, or include a disclaimer substantially as follows:

"This (article, book, etc.) was (written, edited) by (employee's name) in his/her private capacity. No official support or endorsement by the Environmental Protection Agency or any other agency of the Federal Government is intended or should be inferred."

§ 3.507 Special conditions applicable to publishing.

Employees may engage in publishing activities when:

(a) No income is derived from publishing materials which EPA makes available to the general public or which are available to the employee because of his or her official duties but are not available to the general public; and

(b) No income is derived from publishing proceedings or compilations of conferences, symposia or similar gatherings or publishing speeches which are sponsored by the Government or which involve the performance of official duties.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

§ 3.508 Administrative approval.

In addition to avoiding prohibited outside employment, each employee must obtain administrative approval in accordance with Appendix A to this subpart before engaging in the following types of outside employment:

(a) Regular self-employment;

(b) Consulting services;

(c) Holding State or local public office;

(d) Outside employment or other outside activity involving an EPA contractor or subcontractor or holder of an EPA assistance agreement or subagreement; and

(e) Employment by a firm which is regulated by the EPA program Office or Regional Office in which the employee serves.

Employees are encouraged to seek the advice of Deputy Ethics Officials or the Designated Agency Ethics Official regarding other types of outside employment.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

Appendix A to Subpart E—Procedures for Permission to Engage in Outside Employment or Other Outside Activity

1. *Form and content of request*—A written request for administrative approval of outside employment must be addressed to the appropriate Deputy Ethics Official, or, in the immediate Office of the Administrator or Deputy Administrator, to the Designated Agency Ethics Official. The request must be sent through the employee's supervisors and must indicate:

a. Employee's name, title and grade;

b. Nature of the outside activity, including a full description of the services to be performed and the amount of compensation expected;

c. The name and business of the person or organization for which the work will be done (in cases of self-employment, indicate the type of services to be rendered and estimate the number of clients or customers anticipated during the next 6 months);

d. The estimated time to be devoted to the activity;

e. Whether the service will be performed entirely outside of normal duty hours (if not, estimate the number of hours of absence from work required);

f. The assistance agreements or contracts involved, if the outside employment will include consulting or professional services to institutions which have or may seek federal assistance agreements or contracts. Full details must be provided for any service which involves preparing grant applications, contract proposals or program reports. Indicate the basis for compensation (e.g., fee, per diem, per annum, etc.).

2. *Acting on employee requests*—Requests are reviewed for consistency with § 3.502. Reviewers are encouraged to obtain advice from the Designated Agency Ethics Official. The reviewer's decision must be in writing.

3. *Keeping the record up-to-date*—If there is a change in the nature or scope of the duties or services performed or the nature of the employee's business, the employee must submit a revised request for approval.

4. *Enforcement*—Failure to obtain administrative approval for outside employment or other outside activity where required is grounds for disciplinary action.

5. *Confidentiality of requests*—Requests for approval are confidential and, unless the employee consents, may not be disclosed except to the Designated Agency Ethics Official or the Alternate Agency Ethics Official and designated staff who assist them under this part and to Deputy Ethics Officials and designated staff members who assist them under this part.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

Subpart F—Standards of Conduct for Special Government Employees

§ 3.600 Applicability.

The conflict of interest statutes and these regulations apply to special Government employees during their entire period of EPA service, from the date of the oath of office to the date of termination.

§ 3.601 Standards of conduct.

The following standards of conduct apply to special Government employees:

(a) *Use of Government employment.* Special Government employees may not use Government employment for a purpose that is, or gives the appearance of being, motivated by private gain for themselves or others.

(b) *Use of inside information.* Special Government employees may not use inside information obtained as a result of Government employment for private gain. *Inside information* means information obtained as a result of Government employment which has not been made available to the general public.

(c) *Avoiding coercion.* Special Government employees may not use Government employment to coerce anyone to provide a financial benefit to themselves or others.

(d) *Gifts, entertainment or favors.* Except as provided below, special Government employees must not solicit or receive any gift, gratuity, entertainment (including meals), favor, loan or other thing of value, for themselves or others, from persons or organizations having contracts or assistance agreements with EPA or which conduct activities regulated by EPA. The following exceptions apply:

(1) Receiving salary, bonuses or other compensation or benefits from non-Government employers;

(2) Accepting modest entertainment, such as meals or refreshments, in connection with attendance at widely attended gatherings sponsored by industrial, technical or professional organizations, or in connection with attending public ceremonies or similar activities where the special Government employee officially participates on behalf of EPA (this does not include ordinary *business lunches*);

(3) Accepting gifts, favors or entertainment where there is an obvious family or personal relationship between the employees or their families and the donor, and where that relationship clearly motivates the gift;

(4) Accepting loans from banks or other financial institutions on customary terms;

(5) Accepting unsolicited advertising or promotional material, such as pens, pencils, note pads, calendars or other items worth less than $10 (U.S. retail);

(6) Accepting incidental transportation in kind from a private organization (such as rides to and from airports) furnished in connection with official duties and customarily provided by the private organization.

(e) *Gifts and honors from foreign governments.* A special Government employee is not authorized to accept a gift, decoration, or other thing from a foreign government, except as authorized by 5 U.S.C. 7342. (See also 41 CFR part 101-49.)

(f) *Official travel expenses* as authorized by § 3.505.

§ 3.602 Statements of employment and financial interest.

(a) Each special Government employee must submit a Statement of Employment and Financial Interests, EPA Form 3120-1, at the time of initial appointment except where the special Government employee is required to file a public Financial Disclosure Report (SF 278). Annual supplemental statements are also due by July 31 of each year. In addition, if changes occur in the employee's financial interests or investments, a supplemental report is also due by the end of the four month period in which the transaction occurs; that is, by November 30 and March 31.

(b) The Statement of Employment and Financial Interests must be submitted to the cognizant Deputy Ethics Official or to the Designated Agency Ethics Official, as appropriate. (See § 3.201.) Public Financial Disclosure Reports must be submitted to the Designated Agency Ethics Official. (See § 3.302.)

Special government employees often have income from other employers, and all such sources of income must be reported. For example, researchers and analysts must disclose the sources of their research contracts, and, where employees of universities or other public bodies or business organizations are working on projects supported by outside parties, the contributors must be identified.

(c) The purpose of the Statement of Employment and Financial Interests is to assist the employee and the Agency in avoiding conflicts of interest. The statement is confidential and will not be disclosed except to the Designated Agency Ethics Official and the Alternate Agency Ethics Official and designated staff members who assist them under this part and to Deputy Ethics Officials and members of their staffs who assist them under this part. The statements will not otherwise be disclosed except to the Office of Inspector General, to committees or subcommittees of Congress on written request, or as authorized by the Administrator or the Director of the Office of Government Ethics for good cause.

(d) Submitting a Statement of Employment and Financial Interests does not relieve employees of the duty to comply with the law. Employees must continue to refrain from participation where prohibited by 18 U.S.C. 208(a). (See § 3.606(d).)

(e) Information concerning financial interests which have been exempted from the prohibition of 18 U.S.C. 208(a) may be omitted. (See § 3.301(b) of this part.)

(f) The following special Government employees are not required to file a Statement of Employment and Financial Interest:

(1) Temporary and summer employees under 5 U.S.C. 5332 below the grade of GS-13;

(2) Employees participating in intern or other training programs.

§ 3.603 Review, enforcement, reporting and investigation.

(a) Statements of Employment and Financial Interests are reviewed by the cognizant Deputy Ethics Official or, in the immediate Office of the Administrator, by the Designated Agency Ethics Official. If the review discloses an actual or apparent conflict of interest, the matter will be discussed with the employee. If necessary, the Deputy Ethics Official or the Designated Agency Ethics Official may: (1) Direct the employee not to paticipate in certain matters; (2) arrange a reassignment with the employee's supervisor; or (3) the Designated Agency Ethics official may grant a waiver under 18 U.S.C. 208(b) or direct the employee to divest.

(b) Special Government employees are encouraged to consult with the Designated Agency Ethics Official or the cognizant Deputy Ethics Official if they have questions concerning this subpart.

(c) Violation of these regulations may be cause for disciplinary action,

and the Inspector General may be asked to investigate alleged or apparent violations.

[49 FR 7530, Feb. 29, 1984, as amended at 50 FR 39624, Sept. 27, 1985]

§ 3.604 Application of conflict-of-interest statutes.

The *conflict-of-interest* statutes (18 U.S.C. 203, 205, 207, 208 and 209) are set forth in Appendix A to subpart A of this part. They apply to special Government employees as follows:

(a) Sections 203 and 205 of Title 18, United States Code, provide generally that a special Government employee may not:

(1) Represent anyone else before a court or any Government agency in connection with a *particular matter involving a specific party or parties* in which the United States is a party or has a direct and substantial interest, and in which the employee has ever participated *personally and substantially* as a Government employee; or

(2) Act as *agent or attorney*, that is, communicate with intent to influence on behalf of another, in connection with a *particular matter involving a specific party or parties* pending in EPA, if he or she has served as an EPA employee for more than 60 days during the preceding 365 days. This restriction applies regardless of whether the special Government employee has participated in the matter.

(b) Under 18 U.S.C. 207, former special Government employees may not act as *agent or attorney*, that is, communicate with intent to influence, on behalf of anyone other than the United States before any Federal agency or court in connection with a *particular matter involving a specific party or parties* in which the United States is a party or has a direct and substantial interest and in which they participated *personally and substantially* as Government employees. The two-year restriction of 18 U.S.C. 207(b) is unlikely to affect special Government employees because they are not likely to have exercised *direct supervisory or operating responsibility*. Likewise, the one-year *quarantine* of 18 U.S.C. 207(c) probably will not apply because special Government employees are unlikely to be designated as *senior employees*. See 5 CFR 737.33.

(c) Under 18 U.S.C. 207(g), during the entire period of the special Government employee's appointment, partners of special Government employees are forbidden to act as agent or attorney in connection with *particular matters* in which the United States is a party or has a direct and substantial interest and in which the special Government employee is participating or has participated *personally and substantially* as a special Government employee or which are under the special Government employee's *official responsibility*. This restriction applies to policy and rulemaking matters as well as to contracts, grants and adjudications. However, it applies only during the period of a special Government employee's service.

(d) Under 18 U.S.C. 208 special Government employees are forbidden to participate *personally and substantially* in any *particular matter* in which, to their knowledge, they, their spouses, minor children, partners, organizations in which they are serving as officers, directors, trustees, partners or employees or any persons or organizations with whom they are negotiating or have any arrangement concerning prospective employment, have a financial interest. However, the Designated Agency Ethics Official may waive this restriction if *the interest is not so substantial as to be deemed likely to affect the integrity of the services*. Requests for waiver must be addressed to the Designated Agency Ethics Official and must specifically set forth the nature and amount of the financial or employment interest and explain why a waiver should be granted.

The general exemptions of Appendix A to § 3.301(b) of this part apply to both regular and special Government employees.

(e) Section 209 of Title 18, United States Code, does not apply to special Government employees.

§ 3.605 Other statutes.

(a) *Bribery*. Section 201 of Title 18, United States Code, prohibits soliciting, receiving or agreeing to receive,

directly or indirectly, anything of value in connection with the performance of official duties or in return for committing or aiding in the commission of a fraud on the United States.

(b) *Disclosure of confidential information.* Section 1905 of Title 18, United States Code, prohibits disclosing, in any manner and to any extent not authorized by law, any information acquired in the course of Government employment or official duties which concerns or is related to the trade secrets, processes, operations, style or work or apparatus or to the identity, confidential statistical data, amount or source of any income, profits, losses or expenditures of any person, business entity or association.

(c) Other statutes which apply to both regular and special Government employees are listed in appendix B to subpart A of this part.

PART 4—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100-17, 101 Stat. 246-256 (42 U.S.C. 4601 note).

§ 4.1 Uniform relocation assistance and real property acquisition.

Effective April 2, 1989, regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (Pub. L. 91-646, 84 Stat. 1894, 42 U.S.C. 4601), as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Pub. L. 100-17, 101 Stat. 246-255, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48023, Dec. 17, 1987 and 54 FR 8912, Mar. 2, 1989]

PART 5—TUITION FEES FOR DIRECT TRAINING

Sec.
5.1 Establishment of fees.
5.2 Definitions.
5.3 Schedule of fees.
5.4 Registration offices.
5.5 Procedure for payment.
5.6 Refunds.
5.7 Waiver of fee.
5.8 Appeal of waiver denial.

AUTHORITY: Title V, 65 Stat. 290 (31 U.S.C. 483a).

SOURCE: 38 FR 32806, Nov. 28, 1973, unless otherwise noted.

§ 5.1 Establishment of fees.

The Environmental Protection Agency shall charge the revised schedule of tuition fees for all persons attending EPA direct training courses which commence on or after January 1, 1974.

§ 5.2 Definitions.

Direct Training means all technical and managerial training conducted directly by EPA for personnel of State and local governmental agencies, other Federal agencies, private industries, universities, and other non-EPA agencies and organizations.

Registration office means any of the several offices in EPA which have been designated to receive applications for attendance at direct training courses. (See § 5.4 for a listing of such courses.)

§ 5.3 Schedule of fees.

Tuition fees for direct training will be established within the range of $15 to $70 per training day depending upon whether the course is predominantly a laboratory, lecture, or survey course, or a course with other similar variables. Each cognitive program and regional office will announce the tuition fee at the time the date for offering the course is announced. As a transition easement, tuition fees for all State and local government employees are established at a maximum of $25 per training day regardless of type of course until July 1, 1974. After that date they are to pay the full fee.

Charges for field courses taught by EPA instructors are for actual expenses on a per course basis. Complete tuition fee schedules may be obtained from the registration offices listed in § 5.4. Tuition fees will be subject to change either upward or downward, based on actual experience under the system.

§ 5.4 Registration offices.

Direct training programs are offered by both EPA national program offices and regional EPA offices. Listed in this Section are the EPA national program offices and regional offices to which applications are to be sent. The proper registration office may be determined from the specific course announcement.

National Program Offices

AIR PROGRAM

Direct Training Registration Office, Office of Air Programs, Research Triangle Park, NC 27717.

WASTE WATER TREATMENT PROGRAM

Direct Training Registration Office, National Training Center, Robert A. Taft Sanitary Engineering Center, Environmental Protection Agency, 4676 Columbia Parkway, Cincinnati, OH 45226.

WATER SUPPLY TREATMENT PROGRAM

Direct Training Registration Office, Environmental Protection Agency, 4676 Columbia Parkway, Cincinnati, OH 45226.

SOLID WASTES MANAGEMENT PROGRAM

U.S. Environmental Protection Agency, Office of Solid Waste Management Programs, Washington, DC 20460.

RADIATION PROGRAM

U.S. Environmental Protection Agency, Office of Radiation Programs, Washington, DC 20460.

PESTICIDES PROGRAM

U.S. Environmental Protection Agency, Office of Pesticides Programs, Washington, DC 20460.

Regional EPA Offices

EPA, Regional Manpower Office, Region I, JFK Federal Building—Room 2303, Boston, MA 02203.

EPA, Regional Manpower Office, Region II, 26 Federal Plaza, Room 845D, New York, NY 10007.

EPA, Regional Manpower Office, Region III, Sixth and Walnut Streets, Philadelphia, PA 19106

EPA, Regional Manpower Office, Region IV, 1421 Peachtree Street, NE., 4th floor, Atlanta, GA 30309.

EPA, Regional Manpower Office, Region V, 1 North Wacker Drive, Chicago, IL 60606

EPA, Regional Manpower Office, Region VI, 1600 Patterson, Suite 1100, Dallas, TX 75201.

EPA, Regional Manpower Office, Region VII, Room 249, 1735 Baltimore Avenue, Kansas City, MO 64108.

EPA, Regional Manpower Office, Region VIII, Suite 900, 1860 Lincoln Street, Denver, CO 80203.

EPA, Regional Manpower Office, Region IX, 100 California Street, San Francisco, CA 94111.

EPA, Regional Manpower Office, Region X, 1200 Sixth Avenue, Seattle, WA 98101.

§ 5.5 Procedure for payment.

Applications for direct training courses shall be completed and submitted in accordance with the instructions issued by the respective national program and/or regional offices. Fee payment in the amount indicated by the course announcement shall accompany completed applications (except in the case of waiver requests as described in § 5.75). All applications for field courses will be submitted in a timely manner by the sponsoring agency. Expenses will be noted and charges assessed the sponsoring agency after the course is conducted. The charge will be payable upon submission. All applicants shall make payment by check, payable to the U.S. Environmental Protection Agency, except applicants from Federal, State, and local agencies may send a purchase order of other acceptable financial commitment. Such financial commitment statements shall include information as to the agency and account number to be charged and other necessary information for billing purposes.

§ 5.6 Refunds.

An applicant may withdraw his application and receive full reimbursement of his fee provided that he notifies the appropriate registration office in writing no later than 10 days before commencement of the course for which he has registered.

§ 5.7 Waiver of fee.

Waivers of the full tuition fee may be granted on a limited basis. Each waiver request must be justified and considered by cognitive EPA units on: (a) Severity of the pollution problem in the area in which the applicant employee is working; (b) bona-fide administrative or legal constraints of the applicant agency to pay the reduced fee; (c) service, resulting from the training that will be provided as a benefit to the Federal Government. No waivers will be granted for field courses. Waivers are provided as a transitional easement for exceptional cases and will not be granted after July 1, 1975.

§ 5.8 Appeal of waiver denial.

Waiver denials may be appealed to the Office of Education and Manpower Planning, Washington, DC 20460, to adjudicate and expedite agency review. Appeal submissions should include copies of original application and justification for waiver, EPA registration office denial correspondence, and other pertinent information supporting the request for waiver.

PART 6—PROCEDURES FOR IMPLEMENTING THE REQUIREMENTS OF THE COUNCIL ON ENVIRONMENTAL QUALITY ON THE NATIONAL ENVIRONMENTAL POLICY ACT

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APPENDIX A—STATEMENT OF PROCEDURES ON FLOODPLAIN MANAGEMENT AND WETLANDS PROTECTION

AUTHORITY: Secs. 101, 102, and 103 of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*); also, the Council on Environmental Quality Regulations dated Nov. 29, 1978 (40 CFR part 1500).

SOURCE: 44 FR 64177, Nov. 6, 1979, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes affecting part 6 appear at 50 FR 26315, June 25, 1985.

Subpart A—General

§ 6.100 Purpose and policy.

(a) The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, as implemented by Executive Orders 11514 and 11991 and the Council on Environmental Quality (CEQ) Regulations of November 29, 1978 (43 FR 55978) requires that Federal agencies include in their decision-making processes appropriate and careful consideration of all environmental effects of proposed actions, analyze potential environmental effects of proposed actions and their alternatives for public understanding and scrutiny, avoid or minimize adverse effects of proposed actions, and restore and enhance environmental quality as much as possible. The Environmental Protection Agency (EPA) shall integrate these NEPA factors as early in the Agency planning processes as possible. The environmental review process shall be the focal point to assure NEPA considerations are taken into account. To the extent applicable, EPA shall prepare environmental impact statements (EISs) on those major actions determined to have significant impact on the quality of the human environment. This part takes into account the EIS exemptions set forth under section 511(c)(1) of the Clean Water Act (Pub. L. 92-500) and section 7(c)(1) of the Energy Supply and Environmental Coordination Act of 1974 (Pub. L. 93-319).

(b) This part establishes EPA policy and procedures for the identification and analysis of the environmental impacts of EPA-related activities and the preparation and processing of EISs.

§ 6.101 Definitions.

(a) *Terminology.* All terminology used in this part will be consistent with the terms as defined in 40 CFR part 1508 (the CEQ Regulations). Any qualifications will be provided in the definitions set forth in each subpart of this regulation.

(b) The term *CEQ Regulations* means the regulations issued by the Council on Environmental Quality on November 29, 1978 (see 43 FR 55978), which implement Executive Order 11991. The CEQ Regulations will often be referred to throughout this regulation by reference to 40 CFR part 1500 *et al.*

(c) The term *environmental review* means the process whereby an evaluation is undertaken by EPA to determine whether a proposed Agency action may have a significant impact

on the environment and therefore require the preparation of the EIS.

(d) The term *environmental information document* means any written analysis prepared by an applicant, grantee or contractor describing the environmental impacts of a proposed action. This document will be of sufficient scope to enable the responsible official to prepare an environmental assessment as described in the remaining subparts of this regulation.

(e) The term *grant* as used in this part means an award of funds or other assistance by a written grant agreement or cooperative agreement under 40 CFR Chapter I, subpart B.

§ 6.102 Applicability.

(a) *Administrative actions covered.* This part applies to the activities of EPA in accordance with the outline of the subparts set forth below. Each subpart describes the detailed environmental review procedures required for each action.

(1) Subpart A sets forth an overview of the regulation. Section 6.102(b) describes the requirements for EPA legislative proposals.

(2) Subpart B describes the requirements for the content of an EIS prepared pursuant to subparts E, F, G, H, and I.

(3) Subpart C describes the requirements for coordination of all environmental laws during the environmental review undertaken pursuant to subparts E, F, G, H, and I.

(4) Subpart D describes the public information requirements which must be undertaken in conjunction with the environmental review requirements under subparts E, F, G, H, and I.

(5) Subpart E describes the environmental review requirements for the wastewater treatment construction grants program under Title II of the Clean Water Act.

(6) Subpart F describes the environmental review requirements for new source National Pollutant Discharge Elimination System (NPDES) permits under section 402 of the Clean Water Act.

(7) Subpart G describes the environmental review requirements for research and development programs undertaken by the Agency.

(8) Subpart H describes the environmental review requirements for solid waste demonstration projects undertaken by the Agency.

(9) Subpart I describes the environmental review requirements for construction of special purpose facilities and facility renovations by the Agency.

(b) *Legislative proposals.* As required by the CEQ Regulations, legislative EISs are required for any legislative proposal developed by EPA which significantly affects the quality of the human environment. A preliminary draft EIS shall be prepared by the responsible EPA office concurrently with the development of the legislative proposal and contain information required under subpart B. The EIS shall be processed in accordance with the requirements set forth under 40 CFR 1506.8.

(c) *Application to ongoing activities*—(1) *General.* The effective date for these regulations is December 5, 1979. These regulations do not apply to an EIS or supplement to that EIS if the draft EIS was filed with the Office of External Affairs, (OEA) before July 30, 1979. No completed environmental documents need be redone by reason of these regulations.

(2) With regard to activities under subpart E, these regulations shall apply to all EPA environmental review procedures effective December 15, 1979. However, for facility plans begun before December 15, 1979, the responsible official shall impose no new requirements on the grantee. Such grantees shall comply with requirements applicable before the effective date of this regulation. Notwithstanding the above, this regulation shall apply to any facility plan submitted to EPA after September 30, 1980.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.103 Responsibilities.

(a) *General responsibilities.* (1) The responsible official's duties include:

(i) Requiring applicants, contractors, and grantees to submit environmental information documents and related documents and assuring that environmental reviews are conducted on pro-

posed EPA projects at the earliest possible point in EPA's decision-making process. In this regard, the responsible official shall assure the early involvement and availability of information for private applicants and other non-Federal entities requiring EPA approvals.

(ii) When required, assuring that adequate draft EISs are prepared and distributed at the earliest possible point in EPA's decision-making process, their internal and external review is coordinated, and final EISs are prepared and distributed.

(iii) When an EIS is not prepared, assuring documentation of the decision to grant a categorical exclusion, or assuring that findings of no significant impact (FNSIs) and environmental assessments are prepared and distributed for those actions requiring them.

(iv) Consulting with appropriate officials responsible for other environmental laws set forth in subpart C.

(v) Consulting with the Office of External Affairs (OEA) on actions involving unresolved conflicts concerning this part or other Federal agencies.

(vi) When required, assuring that public participation requirements are met.

(2) *Office of External Affairs duties include:* (i) Supporting the Administrator in providing EPA policy guidance and assuring that EPA offices establish and maintain adequate administrative procedures to comply with this part.

(ii) Monitoring the overall timeliness and quality of the EPA effort to comply with this part.

(iii) Providing assistance to responsible officials as required, i.e., preparing guidelines describing the scope of environmental information required by private applicants relating to their proposed actions.

(iv) Coordinating the training of personnel involved in the review and preparation of EISs and other associated documents.

(v) Acting as EPA liaison with the Council on Environmental Quality and other Federal and State entities on matters of EPA policy and administrative mechanisms to facilitate external review of EISs, to determine lead agency and to improve the uniformity of the NEPA procedures of Federal agencies.

(vi) Advising the Administrator and Deputy Administrator on projects which involve more than one EPA office, are highly controversial, are nationally significant, or *pioneer* EPA policy, when these projects have had or should have an EIS prepared on them.

(vii) Carrying out administrative duties relating to maintaining status of EISs within EPA, i.e., publication of notices of intent in the FEDERAL REGISTER and making available to the public status reports on EISs and other elements of the environmental review process.

(3) *Office of an Assistant Administrator duties include:* (i) Providing specific policy guidance to their respective offices and assuring that those offices establish and maintain adequate administrative procedures to comply with this part.

(ii) Monitoring the overall timeliness and quality of their respective office's efforts to comply with this part.

(iii) Acting as liaison between their offices and the OEA and between their offices and other Assistant Administrators or Regional Administrators on matters of agencywide policy and procedures.

(iv) Advising the Administrator and Deputy Administrator through the OEA on projects or activities within their respective areas of responsibilities which involve more than one EPA office, are highly controversial, are nationally significant, or *pioneer* EPA policy, when these projects will have or should have an EIS prepared on them.

(v) Pursuant to § 6.102(b) of this subpart, preparing legislative EISs as appropriate on EPA legislative initiatives.

(4) The Office of Policy, Planning, and Evaluation duties include: responsibilities for coordinating the preparation of EISs required on EPA legislative proposals in accordance with § 6.102(b).

(b) *Responsibilities for subpart E—*(1) *Responsible official.* The responsible official for EPA actions covered by

this subpart is the Regional Administrator.

(2) *Assistant Administrator.* The responsibilities of the Assistant Administrator, as described in § 6.103(a)(3), shall be assumed by the Assistant Administrator for Water for EPA actions covered by this subpart.

(c) *Responsibilities for subpart F—*(1) *Responsible official.* The responsible official for activities covered by this subpart is the Regional Administrator.

(2) *Assistant Administrator.* The responsibilities of the Assistant Administrator, as described in § 6.103(a)(3), shall be assumed by the Assistant Administrator for Enforcement and Compliance Monitoring for EPA actions covered by this subpart.

(d) *Responsibilities for subpart G.* The Assistant Administrator for Research and Development will be the responsible official for activities covered by this subpart.

(e) *Responsibilities for subpart H.* The Assistant Administrator for Solid Waste and Emergency Response will be the responsible official for activities covered by this subpart.

(f) *Responsibilities for subpart I.* The responsible official for new construction and modification of special purpose facilities is as follows:

(1) The Chief, Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, Office of the Assistant Administrator for Administration and Resource Management (OARM) shall be the responsible official on all new construction of special purpose facilities and on all new modification projects for which the Facilities Engineering and Real Estate Branch has received a funding allowance and for all other field components not covered elsewhere in paragraph (f) of this section.

(2) The Regional Administrator shall be the responsible official on all improvement and modification projects for which the regional office has received the funding allowance.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982; 50 FR 26315, June 25, 1985; 51 FR 32609, Sept. 12, 1986]

§ 6.104 Early involvement of private parties.

As required by 40 CFR 1501.2(d) and § 6.103(a)(3)(v) of this regulation, responsible officials must ensure early involvement of private applicants or other non-Federal entities in the environmental review process related to EPA grant and permit actions set forth under subparts E, F, G, and H. The responsible official in conjunction with OEA shall:

(a) Prepare where practicable, generic guidelines describing the scope and level of environmental information required from applicants as a basis for evaluating their proposed actions, and make these guidelines available upon request.

(b) Provide such guidance on a project-by-project basis to any applicant seeking assistance.

(c) Upon receipt of an application for agency approval, or notification that an application will be filed, consult as required with other appropriate parties to initiate and coordinate the necessary environmental analyses.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.105 Synopsis of environmental review procedures.

(a) *Responsible official.* The responsible official shall utilize a systematic, interdisciplinary approach to integrate natural and social sciences as well as environmental design arts in planning programs and making decisions which are subject to environmental review. The respective staffs may be supplemented by professionals from other agencies (see 40 CFR 1501.6) or consultants whenever in-house capabilities are insufficiently interdisciplinary.

(b) *Environmental information documents (EID).* Environmental information documents (EIDs) must be prepared by applicants, grantees, or permittees and submitted to EPA as required in subparts E, F, G, H, and I. EIDs will be of sufficient scope to enable the responsible official to prepare an environmental assessment as described under § 6.105(d) of this part and subparts E through I. EIDs will not have to be prepared for actions

where a categorical exclusion has been granted.

(c) *Environmental reviews.* Environmental reviews shall be conducted on the EPA activities outlined in § 6.102 of this part and set forth under subparts E, F, G, H and I. This process shall consist of a study of the action to identify and evaluate the related environmental impacts. The process shall include a review of any related environmental information document to determine whether any significant impacts are anticipated and whether any changes can be made in the proposed action to eliminate significant adverse impacts; when an EIS is required, EPA has overall responsibility for this review, although grantees, applicants, permittees or contractors will contribute to the review through submission of environmental information documents.

(d) *Environmental assessments.* Environmental assessments (i.e., concise public documents for which EPA is responsible) are prepared to provide sufficient data and analysis to determine whether an EIS or finding of no significant impact is required. Where EPA determines that a categorical exclusion is appropriate or an EIS will be prepared, there is no need to prepare a formal environmental assessment.

(e) *Notice of intent and EISs.* When the environmental review indicates that a significant environmental impact may occur and significant adverse impacts can not be eliminated by making changes in the project, a notice of intent to prepare an EIS shall be published in the FEDERAL REGISTER, scoping shall be undertaken in accordance with 40 CFR 1501.7, and a draft EIS shall be prepared and distributed. After external coordination and evaluation of the comments received, a final EIS shall be prepared and disseminated. The final EIS shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(f) *Finding of no significant impact* (FNSI). When the environmental review indicates no significant impacts are anticipated or when the project is altered to eliminate any significant adverse impacts, a FNSI shall be issued and made available to the public. The environmental assessment shall be included as a part of the FNSI. The FNSI shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(g) *Record of decision.* At the time of its decision on any action for which a final EIS has been prepared, the responsible official shall prepare a concise public record of the decision. The record of decision shall describe those mitigation measures to be undertaken which will make the selected alternative environmentally acceptable. Where the final EIS recommends the alternative which is ultimately chosen by the responsible official, the record of decision may be extracted from the executive summary to the final EIS.

(h) *Monitoring.* The responsible official shall provide for monitoring to assure that decisions on any action where a final EIS has been prepared are properly implemented. Appropriate mitigation measures shall be included in actions undertaken by EPA.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26315, June 25, 1985; 51 FR 32610, Sept. 12, 1986]

§ 6.106 Deviations.

(a) *General.* The Assistant Administrator, OEA, is authorized to approve deviations from these regulations. Deviation approvals shall be made in writing by the Assistant Administrator, OEA.

(b) *Requirements.* (1) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the substantive provisions of these regulations or the CEQ Regulations, the responsible official shall notify the Assistant Administrator, OEA, before taking such action. The responsible official shall consider to the extent possible alternative arrangements; such arrangements will be limited to actions necessary to control the immediate impacts of the emergency; other actions remain subject to the environmental review process. The Assistant Administrator, OEA, after consulting CEQ, will inform the responsible official, as expeditiously as possible of the disposition of his request.

(2) Where circumstances make it necessary to take action without observing procedural provisions of these regulations, the responsible official shall notify the Assistant Administrator, OEA, before taking such action. If the Assistant Administrator, OEA, determines such a deviation would be in the best interest of the Government, he shall inform the responsible official, as soon as possible, of his approval.

(3) The Assistant Administrator, OEA, shall coordinate his action on a deviation under § 6.106(b) (1) or (2) of this part with the Director, Grants Administration Division, Office of Planning and Management, for any required grant-related deviation under 40 CFR 30.1000, as well as the appropriate Assistant Administrator.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.107 Categorical exclusions.

(a) *General.* Categories of actions which do not individually, cumulatively over time, or in conjunction with other Federal, State, local, or private actions have a significant effect on the quality of the human environment and which have been identified as having no such effect based on the requirements in § 6.505, may be exempted from the substantive environmental review requirements of this part. Environmental information documents and environmental assessments or environmental impact statements will not be required for excluded actions.

(b) *Determination.* The responsible official shall determine whether an action is eligible for a categorical exclusion as established by general criteria in § 6.107 (d) and (e) and any applicable criteria in program specific subparts of part 6 of this title. A determination shall be made as early as possible following the receipt of an application. The responsible official shall document the decision to issue or deny an exclusion as soon as practicable following review in accordance with § 6.400(f). For qualified actions, the documentation shall include the application, a brief description of the proposed action, and a brief statement of how the action meets the criteria for a categorical exclusion without violating criteria for not granting an exclusion.

(c) *Revocation.* The responsible official shall revoke a categorical exclusion and shall require a full environmental review if, subsequent to the granting of an exclusion, the responsible official determines that: (1) The proposed action no longer meets the requirements for a categorical exclusion due to changes in the proposed action; or (2) determines from new evidence that serious local or environmental issues exist; or (3) that Federal, State, local, or tribal laws are being or may be violated.

(d) *General categories of actions eligible for exclusion.* Actions consistent with any of the following categories are eligible for a categorical exclusion:

(1) Actions which are solely directed toward minor rehabilitation of existing facilities, functional replacement of equipment, or towards the construction of new ancillary facilities adjacent or appurtenant to existing facilities;

(2) Other actions specifically allowed in program specific subparts of this regulation; or

(3) Other actions developed in accordance with paragraph (f) of this section.

(e) *General criteria for not granting a categorical exclusion.* (1) The full environmental review procedures of this part must be followed if undertaking an action consistent with allowable categories in paragraph (d) of this section may involve serious local or environmental issues, or meets any of the criteria listed below:

(i) The action is known or expected to have a significant effect on the quality of the human environment, either individually, cumulatively over time, or in conjunction with other federal, State, local, tribal or private actions;

(ii) The action is known or expected to directly or indirectly affect:

(A) Cultural resource areas such as archaeological and historic sites in accordance with § 6.301,

(B) Endangered or threatened species and their critical habitats in accordance with § 6.302 or State lists,

(C) Environmentally important natural resource areas such as flood-

plains, wetlands, important farmlands, aquifer recharge zones in accordance with § 6.302, or

(D) Other resource areas identified in supplemental guidance issued by the OEA;

(iii) The action is known or expected not to be cost-effective or to cause significant public controversy; or

(iv) Appropriate specialized program specific criteria for not granting an exclusion found in other subparts of this regulation are applicable to the action.

(2) Notwithstanding the provisions of paragraph (d) of this section, if any of the conditions cited in paragraph (e)(1) of this section exist, the responsible official shall ensure:

(i) That a categorical exclusion is not granted or, if previously granted, that it is revoked according to paragraph (c) of this section;

(ii) That an adequate EID is prepared; and

(iii) That either an environmental assessment and FNSI or a notice of intent for an EIS and ROD is prepared and issued.

(f) *Developing new categories of excluded actions.* The responsible official, or other interested parties, may request that a new general or specialized program specific category of excluded actions be created, or that an existing category be amended or deleted. The request shall be in writing to the Assistant Administrator, OEA, and shall contain adequate information to support the request. Proposed new categories shall be developed by OEA and published in the FEDERAL REGISTER as a proposed rule, amending paragraph (d) of this section when the proposed new category applies to all eligible programs or, amending appropriate paragraphs in other subparts of this part when the proposed new category applies to one specific program. The publication shall include a thirty (30) day public comment period. In addition to criteria for specific programs listed in other subparts of this part, the following general criteria shall be considered in evaluating proposals for new categories:

(1) Any action taken seldom results in the effects identified in general or specialized program specific criteria identified through the application of criteria for not granting a categorica exclusion;

(2) Based upon previous environmen tal reviews, actions consistent with th proposed category have not require the preparation of an EIS; and

(3) Whether information adequat to determine if a potential action i consistent with the proposed categor will normally be available whe needed.

[50 FR 26315, June 25, 1985, as amended a 51 FR 32610, Sept. 12, 1986]

§ 6.108 Criteria for initiating an EIS.

The responsible official shall assur that an EIS will be prepared an issued for actions under subparts E, G H, and I when it is determined tha any of the following conditions exist:

(a) The Federal action may signifi cantly affect the pattern and type o land use (industrial, commercial, agri cultural, recreational, residential) o growth and distribution of population

(b) The effects resulting from an structure or facility constructed or op erated under the proposed action ma conflict with local, regional or Stat land use plans or policies;

(c) The proposed action may hav significant adverse effects on wet lands, including indirect and cumula tive effects, or any major part of structure or facility constructed or op erated under the proposed action ma be located in wetlands;

(d) The proposed action may signifi cantly affect threatened and endan gered species or their habitats identi fied in the Department of the Interi or's list, in accordance with § 6.302, o a State's list, or a structure or a facili ty constructed or operated under th proposed action may be located in th habitat;

(e) Implementation of the propose action or plan may directly cause o induce changes that significantly:

(1) Displace population;

(2) Alter the character of existing residential areas;

(3) Adversely affect a floodplain; or

(4) Adversely affect significant amounts of important farmlands a defined in requirements in § 6.302(c) or agricultural operations on this land

(f) The proposed action may, directly, indirectly or cumulatively have significant adverse effect on parklands, preserves, other public lands or areas of recognized scenic, recreational, archaeological, or historic value; or

(g) The Federal action may directly or through induced development have a significant adverse effect upon local ambient air quality, local ambient noise levels, surface water or groundwater quality or quantity, water supply, fish, shellfish, wildlife, and their natural habitats.

[50 FR 26315, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

Subpart B—Content of EISs

§ 6.200 The environmental impact statement.

Preparers of EISs must conform with the requirements of 40 CFR part 1502 in writing EISs.

§ 6.201 Format.

The format used for EISs shall encourage good analysis and clear presentation of alternatives, including the proposed action, and their environmental, economic and social impacts. The following standard format for EISs should be used unless the responsible official determines that there is a compelling reason to do otherwise:

(a) Cover sheet;

(b) Executive Summary;

(c) Table of contents;

(d) Purpose of and need for action;

(e) Alternatives including proposed action;

(f) Affected environment;

(g) Environmental consequences of the alternatives;

(h) Coordination (includes list of agencies, organizations, and persons to whom copies of the EIS are sent);

(i) List of preparers;

(j) Index (commensurate with complexity of EIS);

(k) Appendices.

§ 6.202 Executive summary.

The executive summary shall describe in sufficient detail (10–15 pages) the critical facets of the EIS so that the reader can become familiar with the proposed project or action and its net effects. The executive summary shall focus on:

(a) The existing problem;

(b) A brief description of each alternative evaluated (including the preferred and no action alternatives) along with a listing of the environmental impacts, possible mitigation measures relating to each alternative, and any areas of controversy (including issues raised by governmental agencies and the public); and

(c) Any major conclusions.

A comprehensive summary may be prepared in instances where the EIS is unusually long in nature. In accordance with 40 CFR 1502.19, the comprehensive summary may be circulated in lieu of the EIS; however, both documents shall be distributed to any Federal, State and local agencies who have EIS review responsibilities and also shall be made available to other interested parties upon request.

§ 6.203 Body of EISs.

(a) *Purpose and need.* The EIS shall clearly specify the underlying purpose and need to which EPA is responding. If the action is a request for a permit or a grant, the EIS shall clearly specify the goals and objectives of the applicant.

(b) *Alternatives including the proposed action.* In addition to 40 CFR 1502.14, the EIS shall discuss:

(1) *Alternatives considered by the applicant.* This section shall include a *balanced* description of each alternative considered by the applicant. These discussions shall include size and location of facilities, land requirements, operation and maintenance requirements, auxiliary structures such as pipelines or transmission lines, and construction schedules. The alternative of no action shall be discussed and the applicant's preferred alternative(s) shall be identified. For alternatives which were eliminated from detailed study, a brief discussion of the reasons for their having been eliminated shall be included.

(2) *Alternatives available to EPA.* EPA alternatives to be discussed shall include: (i) Taking an action; or (ii) taking an action on a modified or alternative project, including an action

not considered by the applicant; and (iii) denying the action.

(3) *Alternatives available to other permitting agencies.* When preparing a joint EIS, and if applicable, the alternatives available to other Federal and/or State agencies shall be discussed.

(4) *Identifying preferred alternative.* In the final EIS, the responsible official shall signify the preferred alternative.

(c) *Affected environment and environmental consequences of the alternatives.* The affected environment on which the evaluation of each alternative shall be based includes, for example, hydrology, geology, air quality, noise, biology, socioeconomics, energy, land use, and archeology and historic subjects. The discussion shall be structured so as to present the total impacts of each alternative for easy comparison among all alternatives by the reader. The effects of a "no action" alternative should be included to facilitate reader comparison of the beneficial and adverse impacts of other alternatives to the applicant doing nothing. A description of the environmental setting shall be included in the "no action" alternative for the purpose of providing needed background information. The amount of detail in describing the affected environment shall be commensurate with the complexity of the situation and the importance of the anticipated impacts.

(d) *Coordination.* The EIS shall include: (1) The objections and suggestions made by local, State, and Federal agencies before and during the EIS review process must be given full consideration, along with the issues of public concern expressed by individual citizens and interested environmental groups. The EIS must include discussions of any such comments concerning our actions, and the author of each comment should be identified. If a comment has resulted in a change in the project or the EIS, the impact statement should explain the reason.

(2) Public participation through public hearings or scoping meetings shall also be included. If a public hearing has been held prior to the publication of the EIS, a summary of the transcript should be included in this section. For the public hearing which shall be held after the publication of the draft EIS, the date, time, place and purpose shall be included here.

(3) In the final EIS, a summary of the coordination process and EPA responses to comments on the draft EIS shall be included.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.204 Incorporation by reference.

In addition to 40 CFR 1502.21, material incorporated into an EIS by reference shall be organized to the extent possible into a Supplemental Information Document and be made available for review upon request. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the period allowed for comment.

§ 6.205 List of preparers.

When the EIS is prepared by contract, either under direct contract to EPA or through an applicant's or grantee's contractor, the responsible official must independently evaluate the EIS prior to its approval and take responsibility for its scope and contents. The EPA officials who undertake this evaluation shall also be described under the list of preparers.

Subpart C—Coordination With Other Environmental Review and Consultation Requirements

§ 6.300 General.

Various Federal laws and executive orders address specific environmental concerns. The responsible official shall integrate to the greatest practicable extent the applicable procedures in this subpart during the implementation of the environmental review process under Subparts E through I. This subpart presents the central requirements of these laws and executive orders. It refers to the pertinent authority and regulations or guidance that contain the procedures. These laws and executive orders establish review procedures independent of NEPA requirements. The responsible

official shall be familiar with any other EPA or appropriate agency procedures implementing these laws and executive orders.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.301 Landmarks, historical, and archeological sites.

EPA is subject to the requirements of the Historic Sites Act of 1935, 16 U.S.C. 461 *et seq.*, the National Historic Preservation Act of 1966, as amended, 16 U.S.C. 470 *et seq.*, the Archaeological and Historic Preservation Act of 1974, 16 U.S.C. 469 *et seq.*, and Executive Order 11593, entitled "Protection and Enhancement of the Cultural Environment." These statutes, regulations and executive orders establish review procedures independent of NEPA requirements.

(a) *National natural landmarks.* Under the Historic Sites Act of 1935, the Secretary of the Interior is authorized to designate areas as national natural landmarks for listing on the National Registry of Natural Landmarks. In conducting an environmental review of a proposed EPA action, the responsible official shall consider the existence and location of natural landmarks using information provided by the National Park Service pursuant to 36 CFR 62.6(d) to avoid undesirable impacts upon such landmarks.

(b) *Historic, architectural, archeological, and cultural sites.* Under section 106 of the National Historic Preservation Act and Executive Order 11593, if an EPA undertaking affects any property with historic, architectural, archeological or cultural value that is listed on or eligible for listing on the National Register of Historic Places, the responsible official shall comply with the procedures for consultation and comment promulgated by the Advisory Council on Historic Preservation in 36 CFR part 800. The responsible official must identify properties affected by the undertaking that are potentially eligible for listing on the National Register and shall request a determination of eligibility from the Keeper of the National Register, Department of the Interior, under the procedures in 36 CFR part 63.

(c) *Historic, prehistoric and archeological data.* Under the Archeological and Historic Preservation Act, if an EPA activity may cause irreparable loss or destruction of significant scientific, prehistoric, historic or archeological data, the responsible official or the Secretary of the Interior is authorized to undertake data recovery and preservation activities. Data recovery and preservation activities shall be conducted in accordance with implementing procedures promulgated by the Secretary of the Interior. The National Park Service has published technical standards and guidelines regarding archeological preservation activities and methods at 48 FR 44716 (September 29, 1983).

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.302 Wetlands, floodplains, important farmlands, coastal zones, wild and scenic rivers, fish and wildlife, and endangered species.

The following procedures shall apply to EPA administrative actions in programs to which the pertinent statute or executive order applies.

(a) *Wetlands protection.* Executive Order 11990, Protection of Wetlands, requires Federal agencies conducting certain activities to avoid, to the extent possible, the adverse impacts associated with the destruction or loss of wetlands and to avoid support of new construction in wetlands if a practicable alternative exists. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection (dated January 5, 1979, incorporated as Appendix A hereto) requires EPA programs to determine if proposed actions will be in or will affect wetlands. If so, the responsible official shall prepare a floodplains/wetlands assessment, which will be part of the environmental assessment or environmental impact statement. The responsible official shall either avoid adverse impacts or minimize them if no practicable alternative to the action exists.

(b) *Floodplain management.* Executive Order 11988, Floodplain Management, requires Federal agencies to evaluate the potential effects of actions they may take in a floodplain to

avoid, to the extent possible, adverse effects associated with direct and indirect development of a floodplain. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection (dated January 5, 1979, incorporated as Appendix A hereto), requires EPA programs to determine whether an action will be located in or will affect a floodplain. If so, the responsible official shall prepare a floodplain/wetlands assessment. The assessment will become part of the environmental assessment or environmental impact statement. The responsible official shall either avoid adverse impacts or minimize them if no practicable alternative exists.

(c) *Important farmlands.* It is EPA's policy as stated in the EPA Policy To Protect Environmentally Significant Agricultural Lands, dated September 8, 1978, to consider the protection of the Nation's significant/important agricultural lands from irreversible conversion to uses which result in its loss as an environmental or essential food production resource. In addition the Farmland Protection Policy Act, (FPPA) 7 U.S.C. 4201 *et seq.*, requires federal agencies to use criteria developed by the Soil Conservation Service, U.S. Department of Agriculture, to:

(1) Identify and take into account the adverse effects of their programs on the preservation of farmlands from conversion to other uses; (2) consider alternative actions, as appropriate, that could lessen such adverse impacts; and (3) assure that their programs, to the extent possible, are compatible with State and local government and private programs and policies to protect farmlands. If an EPA action may adversely impact farmlands which are classified prime, unique or of State and local importance as defined in the Act, the responsible official shall in all cases apply the evaluative criteria promulgated by the U.S. Department of Agriculture at 7 CFR part 658. If categories of important farmlands, which include those defined in both the FPPA and the EPA policy, are identified in the project study area, both direct and indirect effects of the undertaking on the remaining farms and farm support services within the project area and immediate environs shall be evaluated. Adverse effects shall be avoided or mitigated to the extent possible.

(d) *Coastal zone management.* The Coastal Zone Management Act, 16 U.S.C. 1451 *et seq.*, requires that all Federal activities in coastal areas be consistent with approved State Coastal Zone Management Programs, to the maximum extent possible. If an EPA action may affect a coastal zone area, the responsible official shall assess the impact of the action on the coastal zone. If the action significantly affects the coastal zone area and the State has an approved coastal zone management program, a consistency determination shall be sought in accordance with procedures promulgated by the Office of Coastal Zone Management in 15 CFR part 930.

(e) *Wild and scenic rivers.* (1) The Wild and Scenic Rivers Act, 16 U.S.C. 1274 *et seq.*, establishes requirements applicable to water resource projects affecting wild, scenic or recreational rivers within the National Wild and Scenic Rivers system as well as rivers designated on the National Rivers Inventory to be studied for inclusion in the national system. Under the Act, a federal agency may not assist, through grant, loan, license or otherwise, the construction of a water resources project that would have a direct and adverse effect on the values for which a river in the National System or study river on the National Rivers Inventory was established, as determined by the Secretary of the Interior for rivers under the jurisdiction of the Department of the Interior and by the Secretary of Agriculture for rivers under the jurisdiction of the Department of Agriculture. Nothing contained in the foregoing sentence, however, shall:

(i) Preclude licensing of, or assistance to, developments below or above a wild, scenic or recreational river area or on any stream tributary thereto which will not invade the area or unreasonably diminish the scenic, recreational, and fish and wildlife values present in the area on October 2, 1968; or

(ii) Preclude licensing of, or assistance to, developments below or above a study river or any stream tributary

thereto which will not invade the area or diminish the scenic, recreational and fish and wildlife values present in the area on October 2, 1968.

(2) The responsible official shall:

(i) Determine whether there are any wild, scenic or study rivers on the National Rivers Inventory or in the planning area, and

(ii) Not recommend authorization of any water resources project that would have a direct and adverse effect on the values for which such river was established, as determined by the administering Secretary in request of appropriations to begin construction of any such project, whether heretofore or hereafter authorized, without advising the administering Secretary, in writing of this intention at least sixty days in advance, and without specifically reporting to the Congress in writing at the time the recommendation or request is made in what respect construction of such project would be in conflict with the purposes of the Wild and Scenic Rivers Act and would affect the component and the values to be protected by the Responsible Official under the Act.

(3) Applicable consultation requirements are found in section 7 of the Act. The Department of Agriculture has promulgated implementing procedures, under section 7 at 36 CFR part 297, which apply to water resource projects located within, above, below or outside a wild and scenic river or study river under the Department's jurisdiction.

(f) *Barrier islands.* The Coastal Barrier Resources Act, 16 U.S.C. 3501 *et seq.*, generally prohibits new federal expenditures or financial assistance for any purpose within the Coastal Barrier Resources System on or after October 18, 1982. Specified exceptions to this prohibition are allowed only after consultation with the Secretary of the Interior. The responsible official shall ensure that consultation is carried out with the Secretary of the Interior before making available new expenditures or financial assistance for activities within areas covered by the Coastal Barriers Resources Act in accord with the U.S. Fish and Wildlife Service published guidelines defining new expenditures and financial assistance, and describing procedures for consultation at 48 FR 45664 (October 6, 1983).

(g) *Fish and wildlife protection.* The Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*, requires Federal agencies involved in actions that will result in the control or structural modification of any natural stream or body of water for any purpose, to take action to protect the fish and wildlife resources which may be affected by the action. The responsible official shall consult with the Fish and Wildlife Service and the appropriate State agency to ascertain the means and measures necessary to mitigate, prevent and compensate for project-related losses of wildlife resources and to enhance the resources. Reports and recommendations of wildlife agencies should be incorporated into the environmental assessment or environmental impact statement. Consultation procedures are detailed in 16 U.S.C. 662.

(h) *Endangered species protection.* Under the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, Federal agencies are prohibited from jeopardizing threatened or endangered species or adversely modifying habitats essential to their survival. The responsible official shall identify all designated endangered or threatened species or their habitat that may be affected by an EPA action. If listed species or their habitat may be affected, formal consultation must be undertaken with the Fish and Wildlife Service or the National Marine Fisheries Service, as appropriate. If the consultation reveals that the EPA activity may jeopardize a listed species or habitat, mitigation measures should be considered. Applicable consultation procedures are found in 50 CFR part 402.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26316, June 25, 1985]

§ 6.303 Air quality.

(a) The Clean Air Act, as amended in 1977, 42 U.S.C. 7476(c), requires all Federal projects, licenses, permits, plans, and financial assistance activities to conform to any State Air Quality Implementation Plan (SIP) approved or promulgated under section

110 of the Act. For proposed EPA actions that may significantly affect air quality, the responsible official shall assess the extent of the direct or indirect increases in emissions and the resultant change in air quality.

(b) If the proposed action may have a significant direct or indirect adverse effect on air quality, the responsible official shall consult with the appropriate State and local agencies as to the conformity of the proposed action with the SIP. Such agencies shall include the State agency with primary responsibility for the SIP, the agency designated under section 174 of the Clean Air Act and, where appropriate, the metropolitan planning organization (MPO). This consultation should include a request for a recommendation as to the conformity of the proposed action with the SIP.

(c) The responsible official shall provide an assurance in the FNSI or the draft EIS that the proposed action conforms with the SIP.

(d) The assurance of conformity shall be based on a determination of the following:

(1) The proposed action will be in compliance with all applicable Federal and State air pollution emission limitations and standards;

(2) The direct and indirect air pollution emissions resulting from the proposed action have been expressly quantified in the emissions growth allowance of the SIP; or if a case-by-case offset approach is included in the SIP, that offsets have been obtained for the proposed action's air quality impacts;

(3) The proposed action conforms to the SIP's provisions for demonstrating reasonable further progress toward attainment of the national ambient air quality standards by the required date;

(4) The proposed action complies with all other provisions and requirements of the SIP.

(e) During the 30-day FNSI and 45-day draft EIS review time periods EPA shall provide an opportunity for the State agency with primary responsibility for the SIP to concur or nonconcur with the determination of conformity. All State notifications of concurrence or nonconcurrence with the EPA conformity determination shall include a record of consultation with the appropriate section 174 agency and, where different, the MPO. There shall be a presumption of State concurrence if no objection is received by EPA during the review time period.

(f) The responsible official shall provide in the FNSI or the final EIS a response to a notification of state nonconcurrence with the EPA conformity determination. This response shall include the basis by which the conformity of the proposed action to the SIP will be assured. If the responsible official finds that the State nonconcurrence with the EPA conformity determination is unjustified, then an explanation of this finding shall be included in the FNSI or the final EIS.

(g) With regard to wastewater treatment works subject to review under Subpart E of this part, the responsible official shall consider the air pollution control requirements specified in section 316(b) of the Clean Air Act, 42 U.S.C. 7616, and Agency implementing procedures.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26317, June 25, 1985]

Subpart D—Public and Other Federal Agency Involvement

§ 6.400 Public involvement.

(a) *General.* EPA shall make diligent efforts to involve the public in the environmental review process consistent with program regulations and EPA policies on public participation. The responsibile official shall ensure that public notice is provided for in accordance with 40 CFR 1506.6(b) and shall ensure that public involvement is carried out in accordance with EPA Public Participation Regulations, 40 CFR part 25, and other applicable EPA public participation procedures.

(b) *Publication of notices of intent.* As soon as practicable after his decision to prepare an EIS and before the scoping process, the responsible official shall send the notice of intent to interested and affected members of the public and shall request the OEA to publish the notice of intent in the FEDERAL REGISTER. The responsible official shall send to OEA the signed

original notice of intent for FEDERAL REGISTER publication purposes. The scoping process should be initiated as soon as practicable in accordance with the requirements of 40 CFR 1501.7. Participants in the scoping process shall be kept informed of substantial changes which evolve during the EIS drafting process.

(c) *Public meetings or hearings.* Public meetings or hearings shall be conducted consistent with Agency program requirements. There shall be a presumption that a scoping meeting will be conducted whenever a notice of intent has been published. The responsible official shall conduct a public hearing on a draft EIS. The responsible official shall ensure that the draft EIS is made available to the public at least 30 days in advance of the hearing.

(d) *Findings of no significant impact (FNSI).* The responsible official shall allow for sufficient public review of a FNSI before it becomes effective. The FNSI and attendant publication must state that interested persons disagreeing with the decision may submit comments to EPA. The responsible official shall not take administrative action on the project for at least thirty (30) calendar days after release of the FNSI and may allow more time for response. The responsible official shall consider, fully, comments submitted on the FNSI before taking administrative action. The FNSI shall be made available to the public in accordance with the requirements and all appropriate recommendations contained in § 1506.6 of this title.

(e) *Record of Decision (ROD).* The responsible official shall disseminate the ROD to those parties which commented on the draft or final EIS.

(f) *Categorical exclusions.* An applicant who files for and receives a determination of categorical exclusion under § 6.107(a), or has one rescinded under § 6.107(c), shall publish a notice indicating the determination of eligibility or rescission in a local newspaper of community-wide circulation and indicate the availability of the supporting documentation for public inspection. The responsible official shall, concurrent with the publication of the notice: Make the documentation as outlined in § 6.107(b) available to the public; and distribute the notice of the determination to all known interested parties.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32611, Sept. 12, 1986]

§ 6.401 Official filing requirements.

(a) *General.* OEA is responsible for the conduct of the official filing system for EISs. This system was established as a central repository for all EISs which serves not only as means of advising the public of the availability of each EIS but provides a uniform method for the computation of minimum time periods for the review of EISs. OEA publishes a weekly notice in the FEDERAL REGISTER listing all EISs received during a given week. The 45-day and 30-day review periods for draft and final EISs, respectively, are computed from the Friday following a given reporting week. Pursuant to 40 CFR 1506.9, responsible officials shall comply with the guidelines established by OEA on the conduct of the filing system.

(b) *Minimum time periods.* No decision on EPA actions shall be made until the later of the following dates: (1) Ninety (90) days after the date established in § 6.401(a) of this part from which the draft EIS review time period is computed.

(2) Thirty (30) days after the date established in § 6.401(a) of this part from which the final EIS review time period is computed.

(c) *Filing of EISs.* All EISs, including supplements, must be officially filed with OEA. Responsible officials shall transmit each EIS in five (5) copies to the Director, Office of Environmental Review, EIS Filing Section (A-104). OEA will provide CEQ with one copy of each EIS filed. No EIS will be officially filed by OER unless the EIS has been made available to the public. OEA will not accept unbound copies of EISs for filing.

(d) *Extensions or waivers.* The responsible official may independently extend review periods. In such cases, the responsible official shall notify OEA as soon as possible so that adequate notice may be published in the weekly FEDERAL REGISTER report. OEA

upon a showing of compelling reasons of national policy may reduce the prescribed review periods. Also, OEA upon a showing by any other Federal agency of compelling reasons of national policy may extend prescribed review periods, but only after consultation with the responsible official. If the responsible official does not concur with the extension of time, OEA may not extend a prescribed review period more than 30 days beyond the minimum prescribed review period.

(e) *Rescission of filed EISs.* The responsible official shall file EISs with OEA at the same time they are transmitted to commenting agencies and made available to the public. The responsible official is required to reproduce an adequate supply of EISs to satisfy these distribution requirements prior to filing an EIS. If the EIS is not made available, OEA will consider retraction of the EIS or revision of the prescribed review periods based on the circumstances.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9829, Mar. 8, 1982]

§ 6.402 Availability of documents.

(a) *General.* The responsible official will ensure sufficient copies of the EIS are distributed to interested and affected members of the public and are made available for further public distribution. EISs, comments received, and any underlying documents should be available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552(b)), without regard to the exclusion for interagency memoranda where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed actions. To the extent practicable, materials made available to the public shall be provided without charge; otherwise, a fee may be imposed which is not more than the actual cost of reproducing copies required to be sent to another Federal agency.

(b) *Public information.* Lists of all notices, determinations and other reports/documentation, related to these notices and determinations, involving CEs, EAs, FNSIs, notices of intent, EISs, and RODs prepared by EPA shall be available for public inspecti and maintained by the responsible o ficial as a monthly status report. OE shall maintain a comprehensive list notices of intent and draft and fin EISs provided by all responsible of cials for public inspection includi publication in the FEDERAL REGISTE In addition, OEA will make copies all EPA-prepared EISs available f public inspection; the responsible of cial shall do the same for any EIS h she undertakes.

[44 FR 64177, Nov. 6, 1979, as amended at FR 32611, Sept. 12, 1986]

§ 6.403 The commenting process.

(a) *Inviting comments.* After prepa ing a draft EIS and before preparing final EIS, the responsible official sha obtain the comments of Federal age cies, other governmental entities an the public in accordance with 40 CF 1503.1.

(b) *Response to comments.* The re sponsible official shall respond to com ments in the final EIS in accordan with 40 CFR 1503.4.

§ 6.404 Supplements.

(a) *General.* The responsible offici shall consider preparing supplement to draft and final EISs in accordanc with 40 CFR 1502.9(c). A supplemen shall be prepared, circulated and file in the same fashion (exclusive of scop ing) as draft and final EISs.

(b) *Alternative procedures.* In th case where the responsible offici wants to deviate from existing proc dures, OEA shall be consulted. OE shall consult with CEQ on any alte native arrangements.

[44 FR 64177, Nov. 6, 1979, as amended at FR 9829, Mar. 8, 1982]

Subpart E—Environmental Revie Procedures for Wastewat Treatment Construction Gran Program

SOURCE: 50 FR 26317, June 25, 1985, unle otherwise noted.

§ 6.500 Purpose.

This subpart amplifies the proc dures described in subparts A throug

D with detailed environmental review procedures for the Municipal Wastewater Treatment Works Construction Grants Program under Title II of the Clean Water Act.

§ 6.501 Definitions.

(a) *Step 1 facilities planning* means preparation of a plan for facilities as described in 40 CFR part 35, subpart E or I.

(b) *Step 2* means a project to prepare design drawings and specifications as described in 40 CFR part 35, subpart E or I.

(c) *Step 3* means a project to build a publicly owned treatment works as described in 40 CFR part 35, subpart E or I.

(d) *Step 2+3* means a project which combines preparation of design drawings and specifications as described in § 6.501(b) and building as described in § 6.501(c).

(e) *Applicant* means any individual, agency, or entity which has filed an application for grant assistance under 40 CFR part 35, subpart E or I.

(f) *Grantee* means any individual, agency, or entity which has been awarded wastewater treatment construction grant assistance under 40 CFR part 35, subpart E or I.

(g) *Responsible Official* means a Federal or State official authorized to fulfill the requirements of this subpart. The responsible federal official is the EPA Regional Administrator and the responsible State official is as defined in a delegation agreement under 205(g) of the Clean Water Act. The responsibilities of the State official are subject to the limitations in § 6.514 of this subpart.

(h) *Approval of the facilities plan* means approval of the facilities plan for a proposed wastewater treatment works pursuant to 40 CFR part 35, subpart E or I.

§ 6.502 Applicability and limitations.

(a) *Applicability.* This subpart applies to the following actions:

(1) Approval of a facilities plan or an amendment to the plan;

(2) Award of grant assistance for a project where signficant change has occurred in the project or its impact since prior compliance with this part; and

(3) Approval of preliminary Step 3 work prior to the award of grant assistance pursuant to 40 CFR part 35, subpart E or I.

(b) *Limitations.* (1) Except as provided in § 6.504(c), all recipients of Step 1 grant assistance must comply with the requirements, steps, and procedures described in this subpart.

(2) As specified in 40 CFR 35.2113, projects that have not received Step 1 grant assistance must comply with the requirements of this subpart prior to submission of an application for Step 3 or Step 2+3 grant assistance.

(3) Except as otherwise provided in § 6.507, no step 3 or 2+3 grant assistance may be awarded for the construction of any component/portion of a proposed wastewater treatment system(s) until the responsible official has:

(i) Completed the environmental review for all complete wastewater treatment system alternatives under consideration for the facilities planning area, or any larger study area identified for the purposes of conducting an adequate environmental review as required under this subpart; and

(ii) Recorded the selection of the preferred alternative(s) in the appropriate decision document (ROD for EISs, FNSI for environmental assessments, or written determination for categorical exclusions).

(4) In accord with § 6.302(f), on or after October 18, 1982, no new expenditures or financial assistance involving the construction grants program can be made within the Coastal Barrier Resource System, or for projects outside the system which would have the effect of encouraging development in the system, other than specified exceptions made by the EPA after consultation with the Secretary of the Interior.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

§ 6.503 Overview of the environmental review process.

The process for conducting an environmental review of wastewater treat-

ment construction grant projects includes the following steps:

(a) *Consultation.* The Step 1 grantee or the potential Step 3 or Step 2+3 applicant is encouraged to consult with the State and EPA early in project formulation or the facilities planning stage to determine whether a project is eligible for a categorical exclusion from the remaining substantive environmental review requirements of this part (§ 6.505), to determine alternatives to the proposed project for evaluation, to identify potential environmental issues and opportunities for public recreation and open space, and to determine the potential need for partitioning the environmental review process and/or the need for an Environmental Impact Statement (EIS).

(b) *Determining categorical exclusion eligibility.* At the request of a potential Step 3 or Step 2+3 grant applicant, or a Step 1 facilities planning grantee, the responsible official will determine if a project is eligible for a categorical exclusion in accordance with § 6.505. A Step 1 facilities planning grantee awarded a Step 1 grant on or before December 29, 1981 may request a categorical exclusion at any time during Step 1 facilities planning. A potential Step 3 or Step 2+3 grant applicant may request a categorical exclusion at any time before the submission of a Step 3 or Step 2+3 grant application.

(c) *Documenting environmental information.* If the project is determined to be ineligible for a categorical exclusion, or if no request for a categorical exclusion is made, the potential Step 3 or Step 2+3 applicant or the Step 1 grantee subsequently prepares an Environmental Information Document (EID) (§ 6.506) for the project.

(d) *Preparing environmental assessments.* Except as provided in § 6.506(c)(4) and following a review of the EID by EPA or by a State with delegated authority, EPA prepares an environmental assessment (§ 6.506), or a State with delegated authority (§ 6.514) prepares a preliminary environmental assessment. EPA reviews and finalizes any preliminary assessments. EPA subsequently:

(1) Prepares and issues a Finding o No Significant Impact (FNSI (§ 6.508); or

(2) Prepares and issues a Notice o Intent to prepare an original or su plemental EIS (§ 6.510) and Record o Decision (ROD) (§ 6.511).

(e) *Monitoring.* The constructio and post-construction operation an maintenance of the facilities are mon tored (§6.512) to ensure implementa tion of mitigation measures (§ 6.51 identified in the FNSI or ROD.

[50 FR 26317, June 25, 1985, as amended a 51 FR 32611, Sept. 12, 1986]

§ 6.504 Consultation during the facilit planning process.

(a) *General.* Consistent with 40 CF 1501.2 and 35.2030(c), the responsibl official shall initiate the environme tal review process early to identify e vironmental effects, avoid delays, an resolve conflicts. The environmenta review process should be integrate throughout the facilities plannin process. Two processes for consulta tion are described in this section t meet this objective. The first addres es projects awarded Step 1 grant a sistance on or before December 2 1981. The second applies to project not receiving grant assistance for f cilities planning on or before Decem ber 29, 1981 and, therefore, subject t the regulations implementing the Mu nicipal Wastewater Treatment Con struction Grant Amendments of 198 (40 CFR part 35, subpart I).

(b) *Projects receiving Step 1 gran assistance on or before December 2 1981.* (1) During facilities planning the grantee shall evaluate project a ternatives and the existence of envi ronmentally important resource area including those identified in § 6.10 and § 6.509 of this subpart, and poten tial for open space and recreation op portunities in the facilities planning area. This evaluation is intended to b brief and concise and should draw o existing information from EPA, Stat agencies, regional planning agencie areawide water quality managemen agencies, and the Step 1 grantee. Th Step 1 grantee should submit this in formation to EPA or a delegated Stat at the earliest possible time during fa

cilities planning to allow EPA to determine if the action is eligible for a categorical exclusion. The evaluation and any additional analysis deemed necessary by the responsible official may be used by EPA to determine whether the action is eligible for a categorical exclusion from the substantive environmental review requirements of this part. If a categorical exclusion is granted, the grantee will not be required to prepare a formal EID nor will the responsible official be required to prepare an environmental assessment under NEPA. If an action is not granted a categorical exclusion, this evaluation may be used to determine the scope of the EID required of the grantee. This information can also be used to make an early determination of the need for partitioning the environmental review or for an EIS. Whenever possible, the Step 1 grantee should discuss this initial evaluation with both the delegated State and EPA.

(2) A review of environmental information developed by the grantee should be conducted by the responsible official whenever meetings are held to assess the progress of facilities plan development. These meetings should be held after completion of the majority of the EID document and before a preferred alternative is selected. Since any required EIS must be completed before the approval of a facilities plan, a decision whether to prepare an EIS is encouraged early during the facilities planning process. These meetings may assist in this early determination. EPA should inform interested parties of the following:

(i) The preliminary nature of the Agency's position on preparing an EIS;

(ii) The relationship between the facilities planning and environmental review processes;

(iii) The desirability of public input; and

(iv) A contact person for further information.

(c) *Projects not receiving grant assistance for Step 1 facilities planning on or before December 29, 1981.* Potential Step 3 or Step 2+3 grant applicants should, in accordance with §35.2030(c), consult with EPA and the State early in the facilities planning process to determine the appropriateness of a categorical exclusion, the scope of an EID, or the appropriateness of the early preparation of an environmental assessment or an EIS. The consultation would be most useful during the evaluation of project alternatives prior to the selection of a preferred alternative to assist in resolving any identified environmental problems.

§ 6.505 Categorical exclusions.

(a) *General.* At the request of an existing Step 1 facilities planning grantee or of a potential Step 3 or Step 2+3 grant applicant, the responsible official, as provided for in §§ 6.107(b), 6.400(f) and 6.504(a), shall determine from existing information and document whether an action is consistent with the categories eligible for exclusion from NEPA review identified in § 6.107(d) or § 6.505(b) and not inconsistent with the criteria in § 6.107(e) or § 6.505(c).

(b) *Specialized categories of actions eligible for exclusion.* For this subpart, eligible actions consist of any of the categories in § 6.107(d), or:

(1) Actions for which the facilities planning is consistent with the category listed in § 6.107(d)(1) which do not affect the degree of treatment or capacity of the existing facility including, but not limited to, infiltration and inflow corrections, grant-eligible replacement of existing mechanical equipment or structures, and the construction of small structures on existing sites;

(2) Actions in sewered communities of less than 10,000 persons which are for minor upgrading and minor expansion of existing treatment works. This category does not include actions that directly or indirectly involve the extension of new collection systems funded with federal or other sources of funds;

(3) Actions in unsewered communities of less than 10,000 persons where on-site technologies are proposed; or

(4) Other actions are developed in accordance with § 6.107(f).

(c) *Specialized Criteria for not granting a categorical exclusion.* (1)

The full environmental review procedures of this part must be followed if undertaking an action consistent with the categories described in paragraph (b) of this section meets any of the criteria listed in § 6.107(e) or when:

(i) The facilities to be provided will (A) create a new, or (B) relocate an existing, discharge to surface or ground waters;

(ii) The facilities will result in substantial increases in the volume of discharge or the loading of pollutants from an existing source or from new facilities to receiving waters; or

(iii) The facilities would provide capacity to serve a population 30% greater than the existing population.

(d) *Proceeding with grant awards.* (1) After a categorical exclusion on a proposed treatment works has been granted, and notices published in accordance with § 6.400(f), grant awards may proceed without being subject to any further environmental review requirements under this part, unless the responsible official later determines that the project, or the conditions at the time the categorical determination was made, have changed significantly since the independent EPA review of information submitted by the grantee in support of the exclusion.

(2) For all categorical exclusion determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project without need for any further environmental review;

(B) *Supplement*—update the information in the decision document on the categorically excluded project and prepare, issue, and distribute a revised notice in accordance with § 6.107(f); or

(C) *Reassess*—revoke the categorical exclusion in accordance with § 6.107(c) and require a complete environmental review to determine the need for an EIS in accordance with § 6.506, followed by preparation, issuance and distribution of an EA/FNSI or EIS/ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant the responsible official shall, at the time of plans and specifications review under § 35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed and prior to plans and specifications approval, advise the Regional Administrator if additional environmental review is necessary.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32611, Sept. 12, 1986]

§ 6.506 Environmental review process.

(a) *Review of completed facilities plans.* The responsible official shall ensure a review of the completed facilities plan with particular attention to the EID and its utilization in the development of alternatives and the selection of a preferred alternative. An adequate EID shall be an integral part of any facilities plan submitted to EPA or to a State. The EID shall be of sufficient scope to enable the responsible official to make determinations on requests for partitioning the environmental review process in accordance with § 6.507 and for preparing environmental assessments in accordance with § 6.506(b).

(b) *Environmental assessment.* The environmental assessment process shall cover all potentially significant environmental impacts. The responsible official shall prepare a preliminary environmental assessment on which to base a recommendation to finalize and issue the environmental assessment/FNSI. For those States delegated environmental review responsibilities under § 6.514, the State responsible official shall prepare the preliminary environmental assessment in sufficient detail to serve as an adequate basis for EPA's independent NEPA review and decision to finalize and issue an environmental assessment/FNSI or to prepare and issue a notice of intent for an EIS/ROD. The EPA also may require submission of supplementary information before the facilities plan is approved if needed for its independent review of the State's preliminary assessment for compliance with environmental review requirements. Substan-

tial requests for supplementary information by EPA, including the review of the facilities plan, shall be made in writing. Each of the following subjects outlined below, and requirements of subpart C of this part, shall be reviewed by the responsible official to identify potentially significant environmental concerns and their associated potential impacts, and the responsible official shall furthermore address these concerns and impacts in the environmental assessment:

(1) *Description of the existing environment.* For the delineated facilities planning area, the existing environmental conditions relevant to the analysis of alternatives, or to determining the environmental impacts of the proposed action, shall be considered.

(2) *Description of the future environment without the project.* The relevant future environmental conditions shall be described. The no action alternative should be discussed.

(3) *Purpose and need.* This should include a summary discussion and demonstration of the need, or absence of need, for wastewater treatment in the facilities planning area, with particular emphasis on existing public health or water quality problems and their severity and extent.

(4) *Documentation.* Citations to information used to describe the existing environment and to assess future environmental impacts should be clearly referenced and documented. These sources should include, as appropriate but not limited to, local, tribal, regional, State, and federal agencies as well as public and private organizations and institutions with responsibility or interest in the types of conditions listed in § 6.509 and in subpart C of this part.

(5) *Analysis of alternatives.* This discussion shall include a comparative analysis of feasible alternatives, including the no action alternative, throughout the study area. The alternatives shall be screened with respect to capital and operating costs; direct, indirect, and cumulative environmental effects; physical, legal, or institutional constraints; and compliance with regulatory requirements. Special attention should given to: the environmental consequences of long-term, irreversible, and induced impacts; and for projects initiated after September 30, 1978, that grant applicants have satisfactorily demonstrated analysis of potential recreation and open-space opportunities in the planning of the proposed treatment works. The reasons for rejecting any alternatives shall be presented in addition to any significant environmental benefits precluded by rejection of an alternative. The analysis should consider when relevant to the project:

(i) Flow and waste reduction measures, including infiltration/inflow reduction and pretreatment requirements;

(ii) Appropriate water conservation measures;

(iii) Alternative locations, capacities, and construction phasing of facilities;

(iv) Alternative waste management techniques, including pretreatment, treatment and discharge, wasterwater reuse, land application, and individual systems;

(v) Alternative methods for management of sludge, other residual materials, including utilization options such as land application, composting, and conversion of sludge for marketing as a soil conditioner or fertilizer;

(vi) Improving effluent quality through more efficient operation and maintenance;

(vii) Appropriate energy reduction measures; and

(viii) Multiple use including recreation, other open space, and environmental education.

(6) *Evaluating environmental consequences of proposed action.* A full range of relevant impacts of the proposed action shall be discussed, including measures to mitigate adverse impacts, any irreversible or irretrievable commitments of resources to the project and the relationship between local short-term uses of the environment and the maintenance and enhancement of long-term productivity. Any specific requirements, including grant conditions and areawide waste treatment management plan requirements, should be identified and referenced. In addition to these items, the responsible official may require that other analyses and data in accordance with subpart C which are needed to

satisfy environmental review requirements be included with the facilities plan. Such requirements should be discussed whenever meetings are held with Step 1 grantees or potential Step 3 or Step 2 + 3 applicants.

(7) *Minimizing adverse effects of the proposed action.* (i) Structural and nonstructural measures, directly or indirectly related to the facilities plan, to mitigate or eliminate adverse effects on the human and natural environments, shall be identified during the environmental review. Among other measures, structual provisions include changes in facility design, size, and location; non-structural provisions include staging facilities, monitoring and enforcement of environmental regulations, and local commitments to develop and enforce land use regulations.

(ii) The EPA shall not accept a facilities plan, nor award grant assistance for its implementation, if the applicant/grantee has not made, or agreed to make, changes in the project, in accordance with determinations made in a FNSI based on its supporting environmental assessment or the ROD for a EIS. The EPA shall condition a grant, or seek other ways, to ensure that the grantee will comply with such environmental review determinations.

(c) *FNSI/EIS determination.* The responsible official shall apply the criteria under § 6.509 to the following:

(1) A complete facilities plan;

(2) The EID;

(3) The preliminary environmental assessment; and

(4) Other documentation, deemed necessary by the responsible official adequate to make an EIS determination by EPA. Where EPA determines that an EIS is to be prepared, there is no need to prepare a formal environmental assessment. If EPA or the State identifies deficiencies in the EID, preliminary environmental assessment, or other supporting documentation, necessary corrections shall be made to this documentation before the conditions of the Step 1 grant are considered satisfied or before the Step 3 or Step 2+3 application is considered complete. The responsible official's determination to issue a FNSI or to prepare an EIS shall constitute final Agency action, and shall not be subject to administrative review under 40 CFR part 30, subpart L.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32612, Sept. 12, 1986]

§ 6.507 Partitioning the environmental review process.

(a) *Purpose.* Under certain circumstances the building of a component/portion of a wastewater treatment system may be justified in advance of completing all NEPA requirements for the remainder of the system(s). When there are overriding considerations of cost or impaired program effectiveness, the responsible official may award a construction grant, or approve procurement by other than EPA funds, for a discrete component of a complete wastewater treatment system(s). The process of partitioning the environmental review for the discrete component shall comply with the criteria and procedures described in paragraph (b) of this section. In addition, all reasonable alternatives for the overall wastewater treatment works system(s) of which the component is a part shall have been previously identified, and each part of the environmental review for the remainder of the overall facilities system(s) in the planning area in accordance with § 6.502(b)(3) shall comply with all requirements under § 6.506.

(b) *Criteria for partitioning.* (1) Projects may be partitioned under the following circumstances:

(i) To overcome impaired program effectiveness, the project component, in addition to meeting the criteria listed in paragraph (b)(2) of this section, must immediately remedy a severe public health, water quality or other environmental problem; or

(ii) To significantly reduce direct costs on EPA projects, or other related public works projects, the project component (such as major pieces of equipment, portions of conveyances or small structures) in addition to meeting the criteria listed in paragraph (b)(2) of this section, must achieve a cost savings to the federal government and/or to the grantee's or potential grantee's overall costs incurred in procuring the

wastewater treatment component(s) and/or the installation of other related public works projects funded in coordination with other federal, State, tribal or local agencies.

(2) The project component also must:

(i) Not foreclose any reasonable alternatives identified for the overall wastewater treatment works system(s);

(ii) Not cause significant adverse direct or indirect environmental impacts including those which cannot be acceptably mitigated without completing the entire wastewater treatment system of which the component is a part; and

(iii) Not be highly controversial.

(c) *Requests for partitioning.* The applicant's or State's request for partitioning must contain the following:

(1) A description of the discrete component proposed for construction before completing the environmental review of the entire facilities plan;

(2) How the component meets the above criteria;

(3) The environmental information required by § 6.506 of this subpart for the component; and

(4) Any preliminary information that may be important to EPA in an EIS determination for the entire facilities plan (§ 6.509).

(d) *Approval of requests for partitioning.* The responsible official shall:

(1) Review the request for partitioning against all requirements of this subpart;

(2) If approvable, prepare and issue a FNSI in accordance with § 6.508;

(3) Include a grant condition prohibiting the building of additional or different components of the entire facilities system(s) in the planning area as described in § 6.502(b)(3)(i).

[50 FR 26317, June 25, 1985, as amended at 51 FR 32612, Sept. 12, 1986]

§ 6.508 Finding of No Significant Impact (FNSI) determination.

(a) *Criteria for producing and distributing FNSIs.* If, after completion of the environmental review, EPA determines that an EIS will not be required, the responsible official shall issue a FNSI in accordance with §§ 6.105(f) and 6.400(d). The FNSI will be based on EPA's independent review of the preliminary environmental assessment and any other environmental information deemed necessary by the responsible official consistent with the requirements of § 6.506(c). Following the Agency's independent review, the environmental assessment will be finalized and either be incorporated into, or attached to, the FNSI. The FNSI shall list all mitigation measures as defined in § 1508.20 of this title, and specifically identify those mitigation measures necessary to make the recommended alternative environmentally acceptable.

(b) *Proceeding with grant awards.* (1) Once an environmental assessment has been prepared and the issued FNSI becomes effective for the treatment works within the study area, grant awards may proceed without preparation of additional FNSIs, unless the responsible official later determines that the project or environmental conditions have changed significantly from that which underwent environmental review.

(2) For all environmental assessment/FNSI determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project without revising the environmental assessment;

(B) *Supplement*—update information and prepare, issue and distribute a revised EA/FNSI in accordance with §§ 6.105(f) and 6.400(d); or

(C) *Reassess*—withdraw the FNSI and publish a notice of intent to produce an EIS followed by the preparation, issuance and distribution of the EIS/ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant, the responsible official shall, at the time of plans and specifications review under § 35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed and, prior to plans and specifications approval, advise the Regional Adminis-

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trator if additional environmental review is necessary.

[51 FR 32612, Sept. 12, 1986]

§ 6.509 Criteria for initiating Environmental Impact Statements (EIS).

(a) *Conditions requiring EISs.* (1) The responsible official shall assure that an EIS will be prepared and issued when it is determined that the treatment works or collector system will cause any of the conditions under § 6.108 to exist, or when

(2) The treated effluent is being discharged into a body of water where the present classification is too lenient or is being challenged as too low to protect present or recent uses, and the effluent will not be of sufficient quality or quantity to meet the requirements of these uses.

(b) *Other conditions.* The responsible official shall also consider preparing an EIS if: The project is highly controversial; the project in conjunction with related Federal, State, local or tribal resource projects produces significant cumulative impacts; or if it is determined that the treatment works may violate federal, State, local or tribal laws or requirements imposed for the protection of the environment.

§ 6.510 Environmental Impact Statement (EIS) preparation.

(a) *Steps in preparing EISs.* In addition to the requirements specified in subparts A, B, C, and D of this part, the responsible official will conduct the following activities:

(1) *Notice of intent.* If a determination is made that an EIS will be required, the responsible official shall prepare and distribute a notice of intent as required in § 6.105(e) of this part.

(2) *Scoping.* As soon as possible, after the publication of the notice of intent, the responsible official will convene a meeting of affected federal, State and local agencies, or affected Indian tribes, the grantee and other interested parties to determine the scope of the EIS. A notice of this scoping meeting must be made in accordance with § 6.400(a) and 40 CFR 1506.6(b). As part of the scoping meeting EPA, in cooperation with any delegated State, will as a minimum:

(i) Determine the significance issues for and the scope of those sig nificant issues to be analyzed in depth in the EIS;

(ii) Identify the preliminary range alternatives to be considered;

(iii) Identify potential cooperating agencies and determine the information or analyses that may be needed from cooperating agencies or other parties;

(iv) Discuss the method for EIS preparation and the public participation strategy;

(v) Identify consultation requirements of other environmental laws, in accordance with subpart C; and

(vi) Determine the relationship between the EIS and the completion of the facilities plan and any necessary coordination arrangements between the preparers of both documents.

(3) *Identifying and evaluating alternatives.* Immediately following the scoping process, the responsible official shall commence the identification and evaluation of all potentially viable alternatives to adequately address the range of issues identified in the scoping process. Additional issues may be addressed, or others eliminated during this process and the reasons documented as part of the EIS.

(b) *Methods for preparing EISs.* After EPA determines the need for an EIS, it shall select one of the following methods for its preparation:

(1) Directly by EPA's own staff;

(2) By EPA contracting directly with a qualified consulting firm;

(3) By utilizing a third party method, whereby the responsible official enters into "third party agreements" for the applicant to engage and pay for the services of a third party contractor to prepare the EIS. Such agreement shall not be initiated unless both the applicant and the responsible official agree to its creation. A third party agreement will be established prior to the applicant's EID and eliminate the need for that document. In proceeding under the third party agreement, the responsible official shall carry out the following practices:

(i) In consultation with the applicant, choose the third party contractor and manage that contract;

(ii) Select the consultant based on ability and an absence of conflict of interest. Third party contractors will be required to execute a disclosure statement prepared by the responsible official signifying they have no financial or other conflicting interest in the outcome of the project; and

(iii) Specify the information to be developed and supervise the gathering, analysis and presentation of the information. The responsible official shall have sole authority for approval and modification of the statements, analyses, and conclusions included in the third party EIS; or

(4) By utilizing a joint EPA/State process on projects within States which have requirements and procedures comparable to NEPA, whereby the EPA and the State agree to prepare a single EIS document to fulfill both federal and State requirements. Both EPA and the State shall sign a Memorandum of Agreement which includes the responsibilities and procedures to be used by both parties for the preparation of the EIS as provided for in 40 CFR 1506.2(c).

§ 6.511 Record of Decision (ROD) for EISs and identification of mitigation measures.

(a) *Record of Decision.* After a final EIS has been issued, the responsible official shall prepare and issue a ROD in accordance with 40 CFR 1505.2 prior to, or in conjunction with, the approval of the facilities plan. The ROD shall include identification of mitigation measures derived from the EIS process including grant conditions which are necessary to minimize the adverse impacts of the selected alternative.

(b) *Specific mitigation measures.* Prior to the approval of a facilities plan, the responsible official must ensure that effective mitigation measures identified in the ROD will be implemented by the grantee. This should be done by revising the facilities plan, initiating other steps to mitigate adverse effects, or including conditions in grants requiring actions to minimize effects. Care should be exercised if a condition is to be imposed in a grant document to assure that the applicant possesses the authority to fulfill the conditions.

(c) *Proceeding with grant awards.* (1) Once the ROD has been prepared on the selected, or preferred, alternative(s) for the treatment works described within the EIS, grant awards may proceed without the preparation of supplemental EISs unless the responsible official later determines that the project or the environmental conditions described within the current EIS have changed significantly from the previous environmental review in accordance with § 1502.9(c) of this title.

(2) For all EIS/ROD determinations:

(i) That are five or more years old on projects awaiting Step 2+3 or Step 3 grant funding, the responsible official shall re-evaluate the project, environmental conditions and public views and, prior to grant award, either:

(A) *Reaffirm*—issue a public notice reaffirming EPA's decision to proceed with the project, and documenting that no additional significant impacts were identified during the re-evaluation which would require supplementing the EIS; or

(B) *Supplement*—conduct additional studies and prepare, issue and distribute a supplemental EIS in accordance with § 6.404 and document the original, or any revised, decision in an addendum to the ROD.

(ii) That are made on projects that have been awarded a Step 2+3 grant, the responsible official shall, at the time of plans and specifications review under § 35.2202(b) of this title, assess whether the environmental conditions or the project's anticipated impact on the environment have changed, and prior to plans and specifications approval, advise the Regional Administrator if additional environmental review is necessary.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.512 Monitoring for compliance.

(a) *General.* The responsible official shall ensure adequate monitoring of mitigation measures and other grant conditions identified in the FNSI, or ROD.

(b) *Enforcement.* If the grantee fails to comply with grant conditions, the responsible official may consider applying any of the sanctions specified in 40 CFR 30.900.

§ 6.513 Public participation.

(a) *General.* Consistent with public participation regulations in part 25 of this title, and subpart D of this part, it is EPA policy that certain public participation steps be achieved before the State and EPA complete the environmental review process. As a minimum, all potential applicants that do not qualify for a categorical exclusion shall conduct the following steps in accordance with procedures specified in part 25 of this title:

(1) One public meeting when alternatives have been developed, but before an alternative has been selected, to discuss all alternatives under consideration and the reasons for rejection of others; and

(2) One public hearing prior to formal adoption of a facilities plan to discuss the proposed facilities plan and any needed mitigation measures.

(b) *Coordination.* Public participation activities undertaken in connection with the environmental review process should be coordinated with any other applicable public participation program wherever possible.

(c) *Scope.* The requirements of 40 CFR 6.400 shall be fulfilled, and consistent with 40 CFR 1506.6, the responsible official may institute such additional NEPA-related public participation procedures as are deemed necessary during the environmental review process.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.514 Delegation to States.

(a) *General.* Authority delegated to the State under section 205(g) of the Clean Water Act to review a facilities plan may include all EPA activities under this part except for the following:

(1) Determinations of whether or not a project qualifies for a categorical exclusion;

(2) Determinations to partition the environmental review process;

(3) Finalizing the scope of an EIS when required to adequately conclude an independent review of a preliminary environmental assessment;

(4) Finalizing the scope of an environmental assessement, and finalization, approval and issuance of a final environmental assessment;

(5) Determination to issue, and issuance of, a FNSI based on a completed (§ 6.508) or partitioned (§ 6.507(d)(2)) environmental review;

(6) Determination to issue, and issuance of, a notice of intent for preparing an EIS;

(7) Preparation of EISs under § 6.510(b) (1) and (2), final decisions required for preparing an EIS under § 6.510(b)(3), finalizing the agreement to prepare an EIS under § 6.510(b)(4), finalizing the scope of an EIS, and issuance of draft, final and supplemental EISs;

(8) Preparation and issuance of the ROD based on an EIS;

(9) Final decisions under other applicable laws described in subpart C of this part;

(10) Determination following re-evaluations of projects awaiting grant funding in the case of Step 3 projects whose existing evaluations and/or decision documents are five or more years old, or determinations following re-evaluations on projects submitted for plans and specifications review and approval in the case of awarded Step 2+3 projects where the EPA Regional Administrat r has been advised that additional environmental review is necessary, in accordance with § 6.505(d)(2), § 6.508(b)(2) or § 6.511(c)(2); and

(11) Maintenance of official EPA monthly status reports as required under § 6.402(b).

(b) *Elimination of duplication.* The responsible official shall assure that maximum efforts are undertaken to minimize duplication within the limits described under paragraph (a) of this section. In carrying out requirements under this subpart, maximum consideration shall be given to eliminating duplication in accordance with § 1506.2 of this title. Where there are State or local procedures comparable to NEPA, EPA should enter into memoranda of understanding with these States con-

cerning workload distribution and responsibilities not specifically reserved to EPA in paragraph (a) of this section for implementing the environmental review and facilities planning process.

[50 FR 26317, June 25, 1985, as amended at 51 FR 32613, Sept. 12, 1986]

Subpart F—Environmental Review Procedures for the New Source NPDES Program

§ 6.600 Purpose.

(a) *General.* This subpart provides procedures for carrying out the environmental review process for the issuance of new source National Pollutant Discharge Elimination System (NPDES) discharge permits authorized under section 306, section 402, and section 511(c)(1) of the Clean Water Act.

(b) *Permit regulations.* All references in this subpart to the *permit regulations* shall mean parts 122 and 124 of title 40 of the CFR relating to the NPDES program.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§ 6.601 Definitions.

(a) The term *administrative action* for the sake of this subpart means the issuance by EPA of an NPDES permit to discharge as a new source, pursuant to 40 CFR 124.15.

(b) The term *applicant* for the sake of this subpart means any person who applies to EPA for the issuance of an NPDES permit to discharge as a new source.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§ 6.602 Applicability.

(a) *General.* The procedures set forth under subparts A, B, C and D, and this subpart shall apply to the issuance of new source NPDES permits, except for the issuance of a new source NPDES permit from any State which has an approved NPDES program in accordance with section 402(b) of the Clean Water Act.

(b) *New Source Determination.* An NPDES permittee must be determined a *new source* before these procedures apply. New source determinations will be undertaken pursuant to the provisions of the permit regulations under § 122.29(a) and (b) of this chapter and § 122.53(h).

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982; 51 FR 32613, Sept. 12, 1986]

§ 6.603 Limitations on actions during environmental review process.

The processing and review of an applicant's NPDES permit application shall proceed concurrently with the procedures within this subpart. Actions undertaken by the applicant or EPA shall be performed consistent with the requirements of § 122.29(c) of this chapter.

[47 FR 9831, Mar. 8, 1982, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.604 Environmental review process.

(a) *New source.* If EPA's initial determination under § 6.602(b) is that the facility is a new source, the responsible official shall evaluate any environmental information to determine if any significant impacts are anticipated and an EIS is necessary. If the permit applicant requests, the responsible official shall establish time limits for the completion of the environmental review process consistent with 40 CFR 1501.8.

(b) *Information needs.* Information necessary for a proper environmental review shall be provided by the permit applicant in an environmental information document. The responsible official shall consult with the applicant to determine the scope of an environmental information document. In doing this the responsible official shall consider the size of the new source and the extent to which the applicant is capable of providing the required information. The responsible official shall not require the applicant to gather data or perform analyses which unnecessarily duplicate either existing data or the results of existing analyses available to EPA. The responsible official shall keep requests for data to the minimum consistent with his responsibilities under NEPA.

(c) *Environmental assessment.* The responsible official shall prepare a

written environmental assessment based on an environmental review of either the environmental information document and/or any other available environmental information.

(d) *EIS determination.* (1) When the environmental review indicates that a significant environmental impact may occur and that the significant adverse impacts cannot be eliminated by making changes in the proposed new source project, a notice of intent shall be issued, and a draft EIS prepared and distributed. When the environmental review indicates no significant impacts are anticipated or when the proposed project is changed to eliminate the significant adverse impacts, a FNSI shall be issued which lists any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(2) The FNSI together with the environmental assessment that supports the finding shall be distributed in accordance with § 6.400(d) of this regulation.

(e) *Lead agency.* (1) If the environmental review reveals that the preparation of an EIS is required, the responsible official shall determine if other Federal agencies are involved with the project. The responsible official shall contact all other involved agencies and together the agencies shall decide the lead agency based on the criteria set forth in 40 CFR 1501.5.

(2) If, after the meeting of involved agencies, EPA has been determined to be the lead agency, the responsible official may request that other involved agencies be cooperating agencies. Cooperating agencies shall be chosen and shall be involved in the EIS preparation process in the manner prescribed in the 40 CFR 1501.6(a). If EPA has been determined to be a cooperating agency, the responsible official shall be involved in assisting in the preparation of the EIS in the manner prescribed in 40 CFR 1501.6(b).

(f) *Notice of intent.* (1) If EPA is the lead agency for the preparation of an EIS, the responsible official shall arrange through OER for the publication of the notice of intent in the FEDERAL REGISTER, distribute the notice of intent and arrange and conduct a scoping meeting as outlined in 40 CFR 1501.7.

(2) If the responsible official and the permit applicant agree to a third party method of EIS preparation, pursuant to § 6.604(g)(3) of this part, the responsible official shall insure that a notice of intent is published and that a scoping meeting is held before the third party contractor begins work which may influence the scope of the EIS.

(g) *EIS method.* EPA shall prepare EISs by one of the following means:

(1) Directly by its own staff;

(2) By contracting directly with a qualified consulting firm; or

(3) By utilizing a third party method, whereby the responsible official enters into a *third party agreement* for the applicant to engage and pay for the services of a third party contractor to prepare the EIS. Such an agreement shall not be initiated unless both the applicant and the responsible official agree to its creation. A third party agreement will be established prior to the applicant's environmental information document and eliminate the need for that document. In proceeding under the third party agreement, the responsible official shall carry out the following practices:

(i) In consultation with the applicant, choose the third party contractor and manage that contract.

(ii) Select the consultant based on his ability and an absence of conflict of interest. Third party contractors will be required to execute a disclosure statement prepared by the responsible official signifying they have no financial or other conflicting interest in the outcome of the project.

(iii) Specify the information to be developed and supervise the gathering, analysis and presentation of the information. The responsible official shall have sole authority for approval and modification of the statements, analyses, and conclusions included in the third party EIS.

(h) *Documents for the administrative record.* Pursuant to 40 CFR 124.9(b)(6) and 124.18(b)(5) any environmental assessment, FNSI EIS, or supplement to an EIS shall be made a part of the administrative record related to permit issuance.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§ 6.605 Criteria for preparing EISs.

(a) *General guidelines.* (1) When determining the significance of a proposed new source's impact, the responsible official shall consider both its short term and long term effects as well as its direct and indirect effects and beneficial and adverse environmental impacts as defined in 40 CFR 1508.8.

(2) If EPA is proposing to issue a number of new source NPDES permits during a limited time span and in the same general geographic area, the responsible official shall examine the possibility of tiering EISs. If the permits are minor and environmentally insignificant when considered separately, the responsible official may determine that the cumulative impact of the issuance of all these permits may have a significant environmental effect and require an EIS for the area. Each separate decision to issue an NPDES permit shall then be based on the information in this areawide EIS. Site specific EISs may be required in certain circumstances in addition to the areawide EIS.

(b) *Specific criteria.* An EIS will be prepared when:

(1) The new source will induce or accelerate significant changes in industrial, commercial, agricultural, or residential land use concentrations or distributions which have the potential for significant environmental effects. Factors that should be considered in determining if these changes are environmentally significant include but are not limited to: The nature and extent of the vacant land subject to increased development pressure as a result of the new source; the increases in population or population density which may be induced and the ramifications of such changes; the nature of land use regulations in the affected area and their potential effects on development and the environment; and the changes in the availability or demand for energy and the resulting environmental consequences.

(2) The new source will directly, or through induced development, have significant adverse effect upon local ambient air quality, local ambient noise levels, floodplains, surface or groundwater quality or quantity, fish, wildlife, and their natural habitats.

(3) Any major part of the new source will have significant adverse effect on the habitat of threatened or endangered species on the Department of the Interior's or a State's lists of threatened and endangered species.

(4) The environmental impact of the issuance of a new source NPDES permit will have significant direct and adverse effect on a property listed in or eligible for listing in the National Register of Historic Places.

(5) Any major part of the source will have significant adverse effects on parklands, wetlands, wild and scenic rivers, reservoirs or other important bodies of water, navigation projects, or agricultural lands.

§ 6.606 Record of decision.

(a) *General.* At the time of permit award, the responsible official shall prepare a record of decision in those cases where a final EIS was issued in accordance with 40 CFR 1505.2 and pursuant to the provisions of the permit regulations under 40 CFR 124.15 and 124.18(b)(5). The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(b) *Mitigation measures.* The mitigation measures derived from the EIS process shall be incorporated as conditions of the permit; ancillary agreements shall not be used to require mitigation.

[44 FR 64177, Nov. 6, 1979, as amended at 47 FR 9831, Mar. 8, 1982]

§ 6.607 Monitoring.

In accordance with 40 CFR 1505.3 and pursuant to 40 CFR 122.66(c) and 122.10 the responsible official shall ensure that there is adequate monitoring of compliance with all NEPA related requirements contained in the permit.

[47 FR 9831, Mar. 8, 1982]

Subpart G—Environmental Review Procedures for Research and Development Programs

§ 6.700 Purpose.

This subpart amplifies the requirements described in subparts A through D by providing more specific environmental review procedures on research and development programs undertaken by the Office of Research and Development (ORD).

§ 6.701 Definition.

The term *appropriate program official* means the official at each decision level within ORD to whom the Assistant Administrator has delegated responsibility for carrying out the environmental review process.

§ 6.702 Applicability.

The requirements of this subpart apply to administrative actions undertaken to approve intramural and extramural programs under the purview of ORD.

§ 6.703 Criteria for preparing EISs.

(a) The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions under § 6.108 exist and when:

(1) The project consists of field tests involving the introduction of significant quantities of toxic or polluting agricultural chemicals, animal wastes, pesticides, radioactive materials or other hazardous substances into the environment by ORD, its grantees or its contractors;

(2) The action may involve the introduction of species or subspecies not indigenous to an area;

(3) There is a high probability of an action ultimately being implemented on a large scale, and this implementation may result in significant environmental impacts; or

(4) The project involves commitment to a new technology which is significant and may restrict future viable alternatives;

(b) An EIS will not usually be needed when:

(1) The project is conducted completely within any laboratory or other facility, and external environmental effects have been eliminated by methods for disposal of laboratory wastes and safeguards to prevent hazardous materials entering the environment accidentally; or

(2) The project is a relatively small experiment or investigation that is part of a non-Federally funded activity of the private sector, and it makes no significant new or additional contribution to existing pollution.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26323, June 25, 1985]

§ 6.704 Environmental review process.

Environmental review activities will be integrated into the decision levels of ORD's research planning system to assure managerial control.

(a) *Environmental information.* (1) Environmental information documents shall be submitted with all grant applications and all unsolicited contract proposals. The documents shall contain the same information required for EISs under subpart B. Guidance on environmental information documents shall be included in all grant application kits and attached to instructions for the submission of unsolicited proposals.

(2) In the case of competitive contracts, environmental information documents need not be submitted by potential contractors since the environmental review procedures must be completed before a request for proposal (RFP) is issued. If there is a question concerning the need for an environmental information document, the potential contractor should contact the official responsible for the contract.

(b) *Environmental review.* (1) At the start of the planning year, an environmental review will be performed for each program plan with its supporting substructures (work plans and projects) before incorporating them into the ORD program planning system, unless they are excluded from review by existing legislation. This review is an evaluation of the potentially adverse environmental effects of the efforts required by the program plan. The criteria in § 6.703 of this part shall be used in conducting this

review. Each program plan with its supporting substructures which does not have significant adverse impacts may be dismissed from further current year environmental considerations with a single FNSI. Any supporting substructures of a program plan which cannot be dismissed with the parent plan shall be reviewed at the appropriate subordinate levels of the planning system.

(i) All continuing program plans and supporting substructures, including those previously dismissed from consideration, will be reevaluated annually. An environmental review will coincide with the annual planning cycle and whenever a major redirection of a parent plan is undertaken. All environmental documents will be updated as appropriate.

(ii) Later plans and/or projects, added to fulfill the mission objectives but not identified at the time program plans were approved, will be subjected to the same environmental review.

(2) The responsible official shall assure completion of the EPA Form 5300-23 for each extramural project subject to an environmental review. If the project consists of literature studies, computer studies, or studies in which essentially all work is performed within the confines of the laboratory, the Form 5300-23 may be issued as a finding of no significant impact.

(c) *Notice of intent and EIS.* (1) If the reviews conducted according to § 6.704(b) of this part reveal a potential significant adverse effect on the environment and the adverse impact cannot be eliminated by replanning, the appropriate program official shall issue a notice of intent and through proper organizational channels shall request the Regional Administrator to assist him in the preparation and distribution of the EIS.

(2) As soon as possible after release of the notice of intent, the appropriate program official shall prepare a draft EIS in accordance with subpart B and distribute the draft EIS in accordance with subpart D.

(3) All draft and final EISs shall be sent through the proper organizational channels to the Assistant Administrator for ORD for approval.

(d) *Finding of no significant impact.* If an environmental review conducted according to § 6.704(b) of this part reveals that proposed actions will not have significant adverse environmental impacts, the appropriate program official shall prepare a FNSI which lists any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(e) *Timing of action.* Pursuant to § 6.401(b), in no case shall a contract or grant be awarded or intramural activity undertaken until the prescribed 30-day review period for a final EIS has elapsed. Similarly, no action shall be taken until the 30-day comment period for a FNSI is completed.

§ 6.705 Record of decision.

The responsible official shall prepare a record of decision in any case where final EIS has been issued in accordance with 40 CFR 1505.2. It shall be prepared at the time of contract or grant award or before the undertaking of the intramural activity. The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

Subpart H—Environmental Review Procedures for Solid Waste Demonstration Projects

§ 6.800 Purpose.

This subpart amplifies the procedures described in subparts A through D by providing more specific environmental review procedures for demonstration projects undertaken by the Office of Solid Waste and Emergency Response.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.801 Applicability.

The requirements of this subpart apply to solid waste demonstration projects for resource recovery systems and improved solid waste disposal facilities undertaken pursuant to section 8006 of the Resource Conservation and Recovery Act of 1976.

§ 6.802 Criteria for preparing EISs.

The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions in § 6.108 exist.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26323, June 25, 1985]

§ 6.803 Environmental review process.

(a) *Environmental information.* (1) Environmental information documents shall be submitted to EPA by grant applicants or contractors. If there is a question concerning the need for a document, the potential contractor or grantee should consult with the appropriate project officer for the grant or contract.

(2) The environmental information document shall contain the same sections specified for EIS's in subpart B. Guidance alerting potential grantees and contractors of the environmental information documents shall be included in all grant application kits, attached to letters concerning the submission of unsolicited proposals, and included with all requests for proposal.

(b) *Environmental review.* An environmental review will be conducted before a grant or contract award is made. This review will include the preparation of an environmental assessment by the responsible official; the appropriate Regional Administrator's input will include his recommendations on the need for an EIS.

(c) *Notice of intent and EIS.* Based on the environmental review if the criteria in § 6.802 of this part apply, the responsible official will assure that a notice of intent and a draft EIS are prepared. The responsible official may request the appropriate Regional Administrator to assist him in the preparation and distribution of the environmental documents.

(d) *Finding of no significant impact.* If the environmental review indicated no significant environmental impacts, the responsible official will assure that a FNSI is prepared which lists any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(e) *Timing of action.* Pursuant to § 6.401(b), in no case shall a contract or grant be awarded until the prescribed 30-day review period for a final EIS has elapsed. Similarly, no action shall be taken until the 30-day comment period for a FNSI is completed.

§ 6.804 Record of decision.

The responsible official shall prepare a record of decision in any case where final EIS has been issued in accordance with 40 CFR 1505.2. It shall be prepared at the time of contract or grant award. The record of decision shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

Subpart I—Environmental Review Procedures for EPA Facility Support Activities

§ 6.900 Purpose.

This subpart amplifies the general requirements described in subparts A through D by providing environmental procedures for the preparation of EISs on construction and renovation of special purpose facilities.

§ 6.901 Definitions.

(a) The term *special purpose facility* means a building or space, including land incidental to its use, which is wholly or predominantly utilized for the special purpose of an agency and not generally suitable for other uses as determined by the General Services Administration.

(b) The term *program of requirements* means a comprehensive document (booklet) describing program activities to be accomplished in the new special purpose facility or improvement. It includes architectural, mechanical, structural, and space requirements.

(c) The term *scope of work* means a document similar in content to the program of requirements but substantially abbreviated. It is usually prepared for small-scale projects.

§ 6.902 Applicability.

(a) *Actions covered.* These procedures apply to all new special purpose facility construction, activities related to this construction (e.g., site acquisition and clearing), and any improve-

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ments or modifications to facilities having potential environmental effects external to the facility, including new construction and improvements undertaken and funded by the Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, Office of the Assistant Administrator for Administration and Resource Management;or by a regional office .

(b) *Action excluded.* This subpart does not apply to those activities of the Facilities Engineering and Real Estate Branch, Facilities and Support Services Division, for which the branch does not have full fiscal responsibility for the entire project. This includes pilot plant construction, land acquisition, site clearing and access road construction where the Facilities Engineering and Real Estate Branch's activity is only supporting a project financed by a program office. Responsibility for considering the environmental impacts of such projects rests with the office managing and funding the entire project. Other subparts of this regulation apply depending on the nature of the project.

[44 FR 64177, Nov. 6, 1979, as amended at 51 FR 32613, Sept. 12, 1986]

§ 6.903 Criteria for preparing EISs.

(a) *Preliminary information.* The responsible official shall request an environmental information document from a construction contractor or consulting architect/engineer employed by EPA if he is involved in the planning, construction or modification of special purpose facilities when his activities have potential environmental effects external to the facility. Such modifications include but are not limited to facility additions, changes in central heating systems or wastewater treatment systems, and land clearing for access roads and parking lots.

(b) *EIS preparation criteria.* The responsible official shall conduct an environmental review of all actions involving construction of special purpose facilities and improvements to these facilities. The responsible official shall assure that an EIS will be prepared when it is determined that any of the conditions in § 6.108 of this part exist.

[44 FR 64177, Nov. 6, 1979, as amended at 50 FR 26323, June 25, 1985]

§ 6.904 Environmental review process.

(a) *Environmental review.* (1) An environmental review shall be conducted when the program of requirements or scope of work has been completed for the construction, improvements, or modification of special purpose facilities. For special purpose facility construction, the Chief, Facilities Engineering and Real Estate Branch, shall request the assistance of the appropriate program office and Regional Administrator in the review. For modifications and improvement, the appropriate responsible official shall request assistance in making the review from other cognizant EPA offices.

(2) Any environmental information documents requested shall contain the same sections listed for EISs in subpart B. Contractors and consultants shall be notified in contractual documents when an environmental information document must be prepared.

(b) *Notice of intent, EIS, and FNSI.* The responsible official shall decide at the completion of the Environmental review whether there may be any significant environmental impacts. If there could be significant environmental impacts, a notice of intent and an EIS shall be prepared according to the procedures under subparts A, B, C and D. If there are not any significant environmental impacts, a FNSI shall be prepared according to the procedures in subparts A and D. The FNSI shall list any mitigation measures necessary to make the recommended alternative environmentally acceptable.

(c) *Timing of action.* Pursuant to § 6.401(b), in no case shall a contract be awarded or construction activities begun until the prescribed 30-day wait period for a final EIS has elapsed. Similarly, under § 6.400(d), no action shall be taken until the 30-day comment period for FNSIs is completed.

§ 6.905 Record of decision.

At the time of contract award, the responsible official shall prepare a record of decision in those cases where a final EIS has been issued in accordance with 40 CFR 1505.2. The record of decision shall list any mitigation

measures necessary to make the recommended alternative environmentally acceptable.

Subpart J—Assessing the Environmental Effects Abroad of EPA Actions

AUTHORITY: Executive Order 12114, 42 U.S.C. 4321, note.

SOURCE: 46 FR 3364, Jan. 14, 1981, unless otherwise noted.

§ 6.1001 Purpose and policy.

(a) *Purpose.* On January 4, 1979, the President signed Executive Order 12114 entitled "Environmental Effects Abroad of Major Federal Actions." The purpose of this Executive Order is to enable responsible Federal officials in carrying out or approving major Federal actions which affect foreign nations or the global commons to be informed of pertinent environmental considerations and to consider fully the environmental impacts of the actions undertaken. While based on independent authority, this Order furthers the purpose of the National Environmental Policy Act (NEPA) (42 U.S.C. section 4321 *et seq.*) and the Marine Protection Research and Sanctuaries Act (MPRSA) (33 U.S.C. section 1401 *et seq.*). It should be noted, however, that in fulfilling its responsibilities under Executive Order 12114, EPA shall be guided by CEQ regulations only to the extent that they are made expressly applicable by this subpart. The procedures set forth below reflect EPA's duties and responsibilities as required under the Executive Order and satisfy the requirement for issuance of procedures under section 2-1 of the Executive Order.

(b) *Policy.* It shall be the policy of this Agency to carry out the purpose and requirements of the Executive Order to the fullest extent possible. EPA, within the realm of its expertise, shall work with the Department of State and the Council on Environmental Quality to provide information to other Federal agencies and foreign nations to heighten awareness of and interest in the environment. EPA shall further cooperate to the extent possible with Federal agencies to lend special expertise and assistance in the preparation of required environmental documents under the Executive Order. EPA shall perform environmental reviews of activities significantly affecting the global commons and foreign nations as required under Executive Order 12114 and as set forth under these procedures.

§ 6.1002 Applicability.

(a) Administrative actions requiring environmental review. The environmental review requirements apply to the activities of EPA as set forth below:

(1) Major research or demonstration projects which affect the global commons or a foreign nation.

(2) Ocean dumping activities carried out under section 102 of the MPRSA which affect the related environment.

(3) Major permitting or licensing by EPA of facilities which affect the global commons or the environment of a foreign nation. This may include such actions as the issuance by EPA of hazardous waste treatment, storage, or disposal facility permits pursuant to section 3005 of the Resource Conservation and Recovery Act (42 U.S.C. Section 6925), NPDES permits pursuant to section 402 of the Clean Water Act (33 U.S.C. section 1342), and prevention of significant deterioration approvals pursuant to Part C of the Clean Air Act (42 U.S.C. section 7470 et seq.).

(4) Wastewater Treatment Construction Grants Program under section 201 of the Clean Water Act when activities addressed in the facility plan would have environmental effects abroad.

(5) Other EPA activities as determined by OER and OIA (see § 6.1007(c)).

§ 6.1003 Definitions.

As used in this subpart, *environment* means the natural and physical environment and excludes social, economic and other environments; *global commons* is that area (land, air, water) outside the jurisdiction of any nation; and *responsible official* is either the EPA Assistant Administrator or Regional Administrator as appropriate

for the particular EPA program. Also, an action *significantly* affects the environment if it does *significant* harm to the environment even though on balance the action may be beneficial to the environment. To the extent applicable, the responsible official shall address the considerations set forth in the CEQ Regulations under 40 CFR 1508.27 in determining significant effect.

§ 6.1004 Environmental review and assessment requirements.

(a) *Research and demonstration projects.* The appropriate Assistant Administrator is responsible for performing the necessary degree of environmental review on research and demonstration projects undertaken by EPA. If the research or demonstration project affects the environment of the global commons, the applicant shall prepare an environmental analysis. This will assist the responsible official in determining whether an EIS is necessary. If it is determined that the action significantly affects the environment of the global commons, then an EIS shall be prepared. If the undertaking significantly affects a foreign nation EPA shall prepare a unilateral, bilateral or multilateral environmental study. EPA shall afford the affected foreign nation or international body or organization an opportunity to participate in this study. This environmental study shall discuss the need for the action, analyze the environmental impact of the various alternatives considered and list the agencies and other parties consulted.

(b) *Ocean dumping activities.* (1) The Assistant Administrator for Water and Waste Management shall ensure the preparation of appropriate environmental documents relating to ocean dumping activities in the global commons under section 102 of the MPRSA. For ocean dumping site designations prescribed pursuant to section 102(c) of the MPRSA and 40 CFR part 228, EPA shall prepare an environmental impact statement consistent with the requirements of EPA's Procedures for the Voluntary Preparation of Environmental Impact Statements dated October 21, 1974 (see 39 FR 37419). Also EPA shall prepare an environmental impact statement for the establishment or revision of criteria under section 102(a) of MPRSA.

(2) For individual permits issued by EPA under section 102(b) an environmental assessment shall be made by EPA. Pursuant to 40 CFR part 221, the permit applicant shall submit with the application an environmental analysis which includes a discussion of the need for the action, an outline of alternatives, and an analysis of the environmental impact of the proposed action and alternatives consistent with the EPA criteria established under section 102(a) of MPRSA. The information submitted under 40 CFR part 221 shall be sufficient to satisfy the environmental assessment requirement.

(c) *EPA permitting and licensing activities.* The appropriate Regional Administrator is responsible for conducting concise environmental reviews with regard to permits issued under section 3005 of the Resource Conservation and Recovery Act (RCRA permits), section 402 of the Clean Water Act (NPDES permits), and section 165 of the Clean Air Act (PSD permits), for such actions undertaken by EPA which affect the global commons or foreign nations. The information submitted by applicants for such permits or approvals under the applicable consolidated permit regulations (40 CFR parts 122 and 124) and Prevention of Significant Deterioration (PSD) regulations (40 CFR part 52) shall satisfy the environmental document requirement under section 2-4(b) of Executive Order 12114. Compliance with applicable requirements in part 124 of the consolidated permit regulations (40 CFR part 124) shall be sufficient to satisfy the requirements to conduct a concise environmental review for permits subject to this paragraph.

(d) *Wastewater treatment facility planning.* 40 CFR 6.506 details the environmental review process for the facilities planning process under the wastewater treatment works construction grants program. For the purpose of these regulations, the facility plan shall also include a concise environmental review of those activities that would have environmental effects abroad. This shall apply only to the

Step 1 grants awarded after January 14, 1981, but on or before December 29, 1981, and facilities plans developed after December 29, 1981. Where water quality impacts identified in a facility plan are the subject or water quality agreements with Canada or Mexico, nothing in these regulations shall impose on the facility planning process coordination and consultation requirements in addition to those required by such agreements.

(e) *Review by other Federal agencies and other appropriate officials.* The responsible officials shall consult with other Federal agencies with relevant expertise during the preparation of the environmental document. As soon as feasible after preparation of the environmental document, the responsible official shall make the document available to the Council on Environmental Quality, Department of State, and other appropriate officials. The responsible official with assistance from OIA shall work with the Department of State to establish procedures for communicating with and making documents available to foreign nations and international organizations.

[46 FR 3364, Jan. 14, 1981, as amended at 50 FR 26323, June 25, 1985]

§ 6.1005 Lead or cooperating agency.

(a) *Lead Agency.* Section 3-3 of Executive Order 12114 requires the creation of a lead agency whenever an action involves more than one federal agency. In implementing section 3-3, EPA shall, to the fullest extent possible, follow the guidance for the selection of a lead agency contained in 40 CFR 1501.5 of the CEQ regulations.

(b) *Cooperating Agency.* Under section 2-4(d) of the Executive Order, Federal agencies with special expertise are encouraged to provide appropriate resources to the agency preparing environmental documents in order to avoid duplication of resources. In working with a lead agency, EPA shall to the fullest extent possible serve as a cooperating agency in accordance with 40 CFR 1501.6. When other program commitments preclude the degree of involvement requested by the lead agency, the responsible EPA official shall so inform the lead agency in writing.

§ 6.1006 Exemptions and considerations.

Under section 2-5 (b) and (c) of the Executive Order, Federal agencies may provide for modifications in the contents, timing and availability of documents or exemptions from certain requirements for the environmental review and assessment. The responsible official, in consultation with the Director, Office of Environmental Review (OER), and the Director, Office of International Activities (OIA), may approve modifications for situations described in section 2-5(b). The responsible official, in consultation with the Director, OER and Director OIA, shall obtain exemptions from the Administrator for situations described in section 2-5(c). The Department of State and the Council on Environmental Quality shall be consulted as soon as possible on the utilization of such exemptions.

§ 6.1007 Implementation.

(a) *Oversight.* OER is responsible for overseeing the implementation of these procedures and shall consult with OIA wherever appropriate. OIA shall be utilized for making formal contacts with the Department of State. OER shall assist the responsible officials in carrying out their responsibilities under these procedures.

(b) *Information exchange.* OER with the aid of OIA, shall assist the Department of State and the Council on Environmental Quality in developing the informational exchange on environmental review activities with foreign nations.

(c) *Unidentified activities.* The responsible official shall consult with OER and OIA to establish the type of environmental review or document appropriate for any new EPA activities or requirements imposed upon EPA by statute, international agreement or other agreements.

Appendix A—Statement of Procedures on Floodplain Management and Wetlands Protection

Contents:

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Section 1 General

a. Executive Order 11988 entitled, "Floodplain Management" dated May 24, 1977, requires Federal agencies to evaluate the potential effects of actions it may take in a floodplain to avoid adversely impacting floodplains wherever possible, to ensure that its planning programs and budget requests reflect consideration of flood hazards and floodplain management, including the restoration and preservation of such land areas as natural undeveloped floodplains, and to prescribe procedures to implement the policies and procedures of this Executive Order. Guidance for implementation of the Executive Order has been provided by the U.S. Water Resources Council in its Floodplain Management Guidelines dated February 10, 1978 (see 40 FR 6030).

b. Executive Order 11990 entitled "Protection of Wetlands", dated May 24, 1977, requires Federal agencies to take action to avoid adversely impacting wetlands wherever possible, to minimize wetlands destruction and to preserve the values of wetlands, and to prescribe procedures to implement the policies and procedures of this Executive Order.

c. It is the intent of these Executive Orders that, wherever possible, Federal agencies implement the floodplains/wetlands requirements through existing procedures, such as those internal procedures established to implement the National Environmental Policy Act (NEPA) and OMB A-95 review procedures. In those instances where the environmental impacts of a proposed action are not significant enough to require an environmental impact statement (EIS) pursuant to section 102(2)(C) of NEPA, or where programs are not subject to the requirements of NEPA, alternative but equivalent floodplain/wetlands evaluation and notice procedures must be established.

Section 2 Purpose

a. The purpose of this Statement of Procedures is to set forth Agency policy and guidance for carrying out the provisions of Executive Orders 11988 and 11990.

b. EPA program offices shall amend existing regulations and procedures to incorporate the policies and procedures set forth in this Statement of Procedures.

c. To the extent possible, EPA shall accommodate the requirements of Executive Orders 11988 and 11990 through the Agency NEPA procedures contained in 40 CFR part 6.

Section 3 Policy

a. The Agency shall avoid wherever possible the long and short term impacts associated with the destruction of wetlands and the occupancy and modification of floodplains and wetlands, and avoid direct and indirect support of floodplain and wetlands development wherever there is a practicable alternative.

b. The Agency shall incorporate floodplain management goals and wetlands protection considerations into its planning, regulatory, and decisionmaking processes. It shall also promote the preservation and restoration of floodplains so that their natural and beneficial values can be realized. To the extent possible EPA shall:

(1) Reduce the hazard and risk of flood loss and wherever it is possible to avoid direct or indirect adverse impact on floodplains;

(2) Where there is no practical alternative to locating in a floodplain, minimize the impact of floods on human safety, health, and welfare, as well as the natural environment;

(3) Restore and preserve natural and beneficial values served by floodplains;

(4) Require the construction of EPA structures and facilities to be in accordance with the standards and criteria, of the regulations promulgated pursuant to the National Flood Insurance Program;

(5) Identify floodplains which require restoration and preservation and recommend management programs necessary to protect these floodplains and to include such considerations as part of on-going planning programs; and

(6) Provide the public with early and continuing information concerning floodplain management and with opportunities for participating in decision making including the (evaluation of) tradeoffs among competing alternatives.

c. The Agency shall incorporate wetlands protection considerations into its planning, regulatory, and decisionmaking processes. It shall minimize the destruction, loss, or degradation of wetlands and preserve and enhance the natural and beneficial values of wetlands. Agency activities shall continue to be carried out consistent with the Administrator's Decision Statement No. 4 dated February 21, 1973 entitled "EPA Policy to Protect the Nation's Wetlands."

Section 4 Definitions

a. *Base Flood* means that flood which has a one percent chance of occurrence in any given year (also known as a 100-year flood). This term is used in the National Flood Insurance Program (NFIP) to indicate the minimum level of flooding to be used by a

community in its floodplain management regulations.

b. *Base Floodplain* means the land area covered by a 100-year flood (one percent chance floodplain). Also see definition of floodplain.

c. *Flood or Flooding* means a general and temporary condition of partial or complete inundation of normally dry land areas from the overflow of inland and/or tidal waters, and/or the unusual and rapid accumulation or runoff of surface waters from any source, or flooding from any other source.

d. *Floodplain* means the lowland and relatively flat areas adjoining inland and coastal waters and other floodprone areas such as offshore islands, including at a minimum, that area subject to a one percent or greater chance of flooding in any given year. The base floodplain shall be used to designate the 100-year floodplain (one percent chance floodplain). The critical action floodplain is defined as the 500-year floodplain (0.2 percent chance floodplain).

e. *Floodproofing* means modification of individual structures and facilities, their sites, and their contents to protect against structural failure, to keep water out or to reduce effects of water entry.

f. *Minimize* means to reduce to the smallest possible amount or degree.

g. *Practicable* means capable of being done within existing constraints. The test of what is practicable depends upon the situation and includes consideration of the pertinent factors such as environment, community welfare, cost, or technology.

h. *Preserve* means to prevent modification to the natural floodplain environment or to maintain it as closely as possible to its natural state.

i. *Restore* means to re-establish a setting or environment in which the natural functions of the floodplain can again operate.

j. *Wetlands* means those areas that are inundated by surface or ground water with a frequency sufficient to support and under normal circumstances does or would support a prevalence of vegetative or aquatic life that requires saturated or seasonally saturated soil conditions for growth and reproduction. Wetlands generally include swamps, marshes, bogs, and similar areas such as sloughs, potholes, wet meadows, river overflows, mud flats, and natural ponds.

Section 5 Applicability

a. The Executive Orders apply to activities of Federal agencies pertaining to (1) acquiring, managing, and disposing of Federal lands and facilities, (2) providing Federally undertaken, financed, or assisted construction and improvements, and (3) conducting Federal activities and programs affecting land use, including but not limited to water and related land resources planning, regulating, and licensing activities.

b. These procedures shall apply to EPA's programs as follows: (1) All Agency actions involving construction of facilities or management of lands or property. This will require amendment of the EPA Facilities Management Manual (October 1973 and revisions thereafter).

(2) All Agency actions where the NEPA process applies. This would include the programs under sections 306/402 of the Clean Water Act pertaining to new source permitting and section 201 of the Clean Water Act pertaining to wastewater treatment construction grants.

(3) All agency actions where there is sufficient independent statutory authority to carry out the floodplain/wetlands procedures.

(4) In program areas where there is no EIS requirement nor clear statutory authority for EPA to require procedural implementation, EPA shall continue to provide leadership and offer guidance so that the value of floodplain management and wetlands protection can be understood and carried out to the maximum extent practicable in these programs.

c. These procedures shall not apply to any permitting or source review programs of EPA once such authority has been transferred or delegated to a State. However, EPA shall, to the extent possible, require States to provide equivalent effort to assure support for the objectives of these procedures as part of the state assumption process.

Section 6 Requirements

a. Floodplain/Wetlands review of proposed Agency actions.

(1) *Floodplain/Wetlands Determination*—Before undertaking an Agency action, each program office must determine whether or not the action will be located in or affect a floodplain or wetlands. The Agency shall utilize maps prepared by the Federal Insurance Administration of the Federal Emergency Management Agency (Flood Insurance Rate Maps or Flood Hazard Boundary Maps), Fish and Wildlife Service (National Wetlands Inventory Maps), and other appropriate agencies to determine whether a proposed action is located in or will likely affect a floodplain or wetlands. If there is no floodplain/wetlands impact identified, the action may proceed without further consideration of the remaining procedures set forth below.

(2) *Early Public Notice*—When it is apparent that a proposed or potential agency action is likely to impact a floodplain or wetlands, the public should be informed through appropriate public notice procedures.

(3) *Floodplain/Wetlands Assessment*—If the Agency determines a proposed action is located in or affects a floodplain or wetlands, a floodplain/wetlands assessment shall be undertaken. For those actions where an environmental assessment (EA) or environmental impact statement (EIS) is prepared pursuant to 40 CFR part 6, the floodplain/wetlands assessment shall be prepared concurrently with these analyses and shall be included in the EA or EIS. In all other cases, a *floodplain/wetlands assessment* shall be prepared. Assessments shall consist of a description of the proposed action, a discussion of its effect on the floodplain/wetlands, and shall also describe the alternatives considered.

(4) *Public Review of Assessments*—For proposed actions impacting floodplain/wetlands where an EA or EIS is prepared, the opportunity for public review will be provided through the EIS provisions contained in 40 CFR parts 6, 25, or 35, where appropriate. In other cases, an equivalent public notice of the floodplain/wetlands assessment shall be made consistent with the public involvement requirements of the applicable program.

(5) *Minimize, Restore or Preserve*—If there is no practicable alternative to locating in or affecting the floodplain or wetlands, the Agency shall act to minimize potential harm to the floodplain or wetlands. The Agency shall also act to restore and preserve the natural and beneficial values of floodplains and wetlands as part of the analysis of all alternatives under consideration.

(6) *Agency Decision*—After consideration of alternative actions, as they have been modified in the preceding analysis, the Agency shall select the desired alternative. For all Agency actions proposed to be in or affecting a floodplain/wetlands, the Agency shall provide further public notice announcing this decision. This decision shall be accompanied by a Statement of Findings, not to exceed three pages. This Statement shall include: (i) The reasons why the proposed action must be located in or affect the floodplain or wetlands; (ii) a description of significant facts considered in making the decision to locate in or affect the floodplain or wetlands including alternative sites and actions; (iii) a statement indicating whether the proposed action conforms to applicable State or local floodplain protection standards; (iv) a description of the steps taken to design or modify the proposed action to minimize potential harm to or within the floodplain or wetlands; and (v) a statement indicating how the proposed action affects the natural or beneficial values of the floodplain or wetlands. If the provisions of 40 CFR part 6 apply, the Statement of Findings may be incorporated in the final EIS or in the environmental assessment. In other cases, notice should be placed in the FEDERAL REGISTER or other local medium and copies sent to Federal, State, and local agencies and other entities which submitted comments or are otherwise concerned with the floodplain/wetlands assessment. For floodplain actions subject to Office of Management and Budget (OMB) Circular A-95, the Agency shall send the Statement of Findings to State and areawide A-95 clearinghouse in the geographic area affected. At least 15 working days shall be allowed for public and interagency review of the Statement of Findings.

(7) *Authorizations/Appropriations*—Any requests for new authorizations or appropriations transmitted to OMB shall include, a floodplain/wetlands assessment and, for floodplain impacting actions, a Statement of Findings, if a proposed action will be located in a floodplain or wetlands.

b. *Lead agency concept.* To the maximum extent possible, the Agency shall relay on the lead agency concept to carry out the provisions set forth in section 6.a of this appendix. Therefore, when EPA and another Federal agency have related actions, EPA shall work with the other agency to identify which agency shall take the lead in satisfying these procedural requirements and thereby avoid duplication of efforts.

c. *Additional floodplain management provisions relating to Federal property and facilities.*

(1) *Construction Activities*—EPA controlled structures and facilities must be constructed in accordance with existing criteria and standards set forth under the NFIP and must include mitigation of adverse impacts wherever feasible. Deviation from these requirements may occur only to the extent NFIP standards are demonstrated as inappropriate for a given structure or facility.

(2) *Flood Protection Measures*—If newly constructed structures or facilities are to be located in a floodplain, accepted floodproofing and other flood protection measures shall be undertaken. To achieve flood protection, EPA shall, wherever practicable, elevate structures above the base flood level rather than filling land.

(3) *Restoration and Preservation*—As part of any EPA plan or action, the potential for restoring and preserving floodplains and wetlands so that their natural and beneficial values can be realized must be considered and incorporated into the plan or action wherever feasible.

(4) *Property Used by Public*—If property used by the public has suffered damage or is located in an identified flood hazard area, EPA shall provide on structures, and other places where appropriate, conspicuous indicators of past and probable flood height to enhance public knowledge of flood hazards.

(5) *Transfer of EPA Property*—When property in flood plains is proposed for lease, easement, right-of-way, or disposal to non-Federal public or private parties, EPA shall reference in the conveyance those uses that are restricted under Federal, State and local floodplain regulations and attach other restrictions to uses of the property as may be deemed appropriate. Notwithstanding, EPA shall consider withholding such properties from conveyance.

Section 7 Implementation

a. Pursuant to section 2, the EPA program offices shall amend existing regulations, procedures, and guidance, as appropriate, to incorporate the policies and procedures set forth in this Statement of Procedures. Such amendments shall be made within six months of the date of these Procedures.

b. The Office of External Affairs (OEA) is responsible for the oversight of the implementation of this Statement of Procedures and shall be given advanced opportunity to review amendments to regulations, procedures, and guidance. OEA shall coordinate efforts with the program offices to develop necessary manuals and more specialized supplementary guidance to carry out this Statement of Procedures.

[44 FR 64177, Nov. 6, 1976, as amended at 50 FR 26323, June 25, 1985]

PART 7—NONDISCRIMINATION IN PROGRAMS RECEIVING FEDERAL ASSISTANCE FROM THE ENVIRONMENTAL PROTECTION AGENCY

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APPENDIX A—EPA ASSISTANCE PROGRAMS AS LISTED IN THE "CATALOG OF FEDERAL DOMESTIC ASSISTANCE"

AUTHORITY: The Civil Rights Act of 1964, as amended (42 U.S.C. 2000d *et seq.*); sec. 504, Rehabilitation Act of 1973, as amended (29 U.S.C. 794); sec. 13, Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500.

SOURCE: 49 FR 1659, Jan. 12, 1984, unless otherwise noted.

Subpart A—General

§ 7.10 Purpose of this part.

This part implements: Title VI of the Civil Rights Act of 1964, as amended; section 504 of the Rehabilitation Act of 1973, as amended; and section 13 of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, (collectively, the Acts).

§ 7.15 Applicability.

This part applies to all applicants for, and recipients of, EPA assistance in the operation of programs or activities receiving such assistance beginning Feburary 13, 1984. New construction (§ 7.70) for which design was initiated prior to February 13, 1984, shall comply with the accessibility requirements in the Department of Health, Education and Welfare (now the Department of Health and Human Services) nondiscrimination regulation, 45 CFR 84.23, issued June 3, 1977, or with equivalent standards that ensure the

facility is readily accessible to and usable by handicapped persons. Such assistance includes but is not limited to that which is listed in the *Catalogue of Federal Domestic Assistance* under the 66.000 series. It supersedes the provisions of former 40 CFR parts 7 and 12.

§ 7.20 Responsible agency officers.

(a) The EPA Office of Civil Rights (OCR) is responsible for developing and administering EPA's compliance programs under the Acts.

(b) EPA's Project Officers will, to the extent possible, be available to explain to each recipient its obligations under this part and to provide recipients with technical assistance or guidance upon request.

§ 7.25 Definitions.

As used in this part:

Administrator means the Administrator of EPA. It includes any other agency official authorized to act on his or her behalf, unless explicity stated otherwise.

Alcohol abuse means any misuse of alcohol which demonstrably interferes with a person's health, interpersonal relations or working ability.

Applicant means any entity that files an application or unsolicited proposal or otherwise requests EPA assistance (see definition for *EPA assistance*).

Assistant Attorney General is the head of the Civil Rights Division, U.S. Department of Justice.

Award Official means the EPA official with the authority to approve and execute assistance agreements and to take other assistance related actions authorized by this part and by other EPA regulations or delegation of authority.

Drug abuse means:

(a) The use of any drug or substance listed by the Department of Justice in 21 CFR 1308.11, under authority of the Controlled Substances Act, 21 U.S.C. 801, as a controlled substance unavailable for prescription because:

(1) The drug or substance has a high potential for abuse,

(2) The drug or other substance has no currently accepted medical use in treatment in the United States, or

(3) There is a lack of accepted safety for use of the drug or other substance under medical supervision.

NOTE: Examples of drugs under paragraph (a)(1) of this section include certain opiates and opiate derivatives (*e.g.*, heroin) and hallucinogenic substances (*e.g.*, marijuana, mescaline, peyote) and depressants (*e.g.*, methaqualone). Examples of (a)(2) include opium, coca leaves, methadone, amphetamines and barbiturates.

(b) The misuse of any drug or substance listed by the Department of Justice in 21 CFR 1308.12–1308.15 under authority of the Controlled Substances Act as a controlled substance available for prescription.

EPA means the United States Environmental Protection Agency.

EPA assistance means any grant or cooperative agreement, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which EPA provides or otherwise makes available assistance in the form of:

(1) Funds;

(2) Services of personnel; or

(3) Real or personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of such property if EPA's share of its fair market value is not returned to EPA.

Facility means all, or any part of, or any interests in structures, equipment, roads, walks, parking lots, or other real or personal property.

Handicapped person:

(a) *Handicapped person* means any person who (1) has a physical or mental impairment which substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment. For purposes of employment, the term *handicapped person* does not include any person who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current drug or alcohol abuse,

would constitute a direct threat to property or the safety of others.

(b) As used in this paragraph, the phrase:

(1) *Physical or mental impairment* means (i) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovasular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; and (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means:

(i) Has a physical or mental impairment that does not substantially limit major life activities but that is treated by a recipient as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined above but is treated by a recipient as having such an impairment.

Office of Civil Rights or OCR means the Director of the Office of Civil Rights, EPA Headquarters or his/her designated representative.

Project Officer means the EPA official designated in the assistance agreement (as defined in *EPA assistance*) as EPA's program contact with the recipient; Project Officers are responsible for monitoring the project.

Qualified handicapped person means:

(a) With respect to employment: A handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question.

(b) With respect to services: A handicapped person who meets the essential eligibility requirements for the receipt of such services.

Racial classifications: [1]

(a) *American Indian or Alaskan native.* A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(b) *Asian or Pacific Islander.* A person having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, Japan, Korea, the Philippine Islands, and Samoa.

(c) *Black and not of Hispanic origin.* A person having origins in any of the black racial groups of Africa.

(d) *Hispanic.* A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin, regardless or race.

(e) *White, not of Hispanic origin.* A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

Recipient means, for the purposes of this regulation, any state or its political subdivision, any instrumentality of a state or its political subdivision, any public or private agency, institution, organization, or other entity, or any person to which Federal financial assistance is extended directly or through another recipient, including any successor, assignee, or transferee

[1] Additional subcategories based on national origin or primary language spoken may be used where appropriate on either a national or a regional basis. Subparagraphs (a) through (e) are in conformity with Directive 15 of the Office of Federal Statistical Policy and Standards, whose function is now in the Office of Information and Regulatory Affairs, Office of Management and Budget. Should that office, or any successor office, change or otherwise amend the categories listed in Directive 15, the categories in this paragraph shall be interpreted to conform with any such changes or amendments.

of a recipient, but excluding the ultimate beneficiary of the assistance.

Section 13 refers to section 13 of the Federal Water Pollution Control Act Amendments of 1972.

United States includes the states of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and all other territories and possessions of the United States; the term *State* includes any one of the foregoing.

Subpart B—Discrimination Prohibited on the Basis of Race, Color, National Origin or Sex

§ 7.30 General prohibition.

No person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, or on the basis of sex in any program or activity receiving EPA assistance under the Federal Water Pollution Control Act, as amended, including the Environmental Financing Act of 1972.

§ 7.35 Specific prohibitions.

(a) As to any program or activity receiving EPA assistance, a recipient shall not directly or through contractual, licensing, or other arrangements on the basis of race, color, national origin or, if applicable, sex:

(1) Deny a person any service, aid or other benefit of the program;

(2) Provide a person any service, aid or other benefit that is different, or is provided differently from that provided to others under the program;

(3) Restrict a person in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, aid, or benefit provided by the program;

(4) Subject a person to segregation in any manner or separate treatment in any way related to receiving services or benefits under the program;

(5) Deny a person or any group of persons the opportunity to participate as members of any planning or advisory body which is an integral part of the program, such as a local sanitation board or sewer authority;

(6) Discriminate in employment on the basis of sex in any program subject to section 13, or on the basis of race, color, or national origin in any program whose purpose is to create employment; or, by means of employment discrimination, deny intended beneficiaries the benefits of the EPA assistance program, or subject the beneficiaries to prohibited discrimination.

(7) In administering a program or activity receiving Federal financial assistance in which the recipient has previously discriminated on the basis of race, color, sex, or national origin, the recipient shall take affirmative action to provide remedies to those who have been injured by the discrimination.

(b) A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex.

(c) A recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies on the grounds of race, color, or national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.

(d) The specific prohibitions of discrimination enumerated above do not limit the general prohibition of § 7.30.

Subpart C—Discrimination Prohibited on the Basis of Handicap

§ 7.45 General prohibition.

No qualified handicapped person shall solely on the basis of handicap be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any

program or activity receiving EPA assistance.

§ 7.50 Specific prohibitions against discrimination.

(a) A recipient, in providing any aid, benefit or service under any program or activity receiving EPA assistance shall not, on the basis of handicap, directly or through contractual, licensing, or other arrangement:

(1) Deny a qualified handicapped person any service, aid or other benefit of a federally assisted program;

(2) Provide different or separate aids, benefits, or services to handicapped persons or to any class of handicapped persons than is provided to others unless the action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others;

(3) Aid or perpetuate discrimination against a qualified handicapped person by providing significant assistance to an entity that discriminates on the basis of handicap in providing aids, benefits, or services to beneficiaries of the recipient's program;

(4) Deny a qualified handicapped person the opportunity to participate as a member of planning or advisory boards; or

(5) Limit a qualified handicapped person in any other way in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving an aid, benefit or service from the program.

(b) A recipient may not, in determining the site or location of a facility, make selections: (1) That have the effect of excluding handicapped persons from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity that receives or benefits from EPA assistance or (2) that have the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the program or activity receiving EPA assistance with respect to handicapped persons.

(c) A recipient shall not use criteria or methods of administering any program or activity receiving EPA assistance which have the effect of subjecting individuals to discrimination because of their handicap, or have the effect of defeating or substantially impairing accomplishment of the objectives of such program or activity with respect to handicapped persons.

(d) Recipients shall take appropriate steps to ensure that communications with their applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

(e) The exclusion of non-handicapped persons or specified classes of handicapped persons from programs limited by Federal statute or Executive Order to handicapped persons or a different class of handicapped persons is not prohibited by this subpart.

§ 7.55 Separate or different programs.

Recipients shall not deny a qualified handicapped person an opportunity equal to that afforded others to participate in or benefit from the aid, benefit, or service in the program receiving EPA assistance. Recipients shall administer programs in the most integrated setting appropriate to the needs of qualified handicapped persons.

§ 7.60 Prohibitions and requirements relating to employment.

(a) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal assistance.

(b) A recipient shall make all decisions concerning employment under any program or activity to which this part applies in a manner which ensures that discrimination on the basis of handicap does not occur, and shall not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of handicap.

(c) The prohibition against discrimination in employment applies to the following activities:

(1) Recruitment, advertising, and the processing of applications for employment;

(2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; or

(9) Any other term, condition, or privilege of employment.

(d) A recipient shall not participate in a contractual or other relationship that has the effect of subjecting qualified handicapped applicants or employees to discrimination prohibited by this subpart. The relationships referred to in this paragraph include relationships with employment and referral agencies, with labor unions, with organizations providing or administering fringe benefits to employees of the recipient, and with organizations providing training and apprenticeship programs.

(e) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program.

(f) A recipient shall not use employment tests or criteria that discriminate against handicapped persons and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(g) A recipient shall not conduct a preemployment medical examination or make a preemployment inquiry as to whether an applicant is a handicapped person or as to the nature or severity of a handicap except as permitted by the Department of Justice in 28 CFR 42.513.

§ 7.65 Accessibility.

(a) *General.* A recipient shall operate each program or activity receiving EPA assistance so that such program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This paragraph does not:

(1) Necessarily require a recipient to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons.

(2) Require a recipient to take any action that the recipient can demonstrate would result in a fundamental alteration in the nature of its program or activity or in undue financial and administrative burdens. If an action would result in such an alternation or such financial and administrative burdens, the recipient shall be required to take any other action that would not result in such an alteration or financial and administrative burdens but would nevertheless ensure that handicapped persons receive the benefits and services of the program or activity receiving EPA assistance.

(b) *Methods of making existing programs accessible.* A recipient may comply with the accessibility requirements of this section by making structural changes, redesigning equipment, reassigning services to accessible buildings, assigning aides to beneficiaries, or any other means that make its program or activity accessible to handicapped persons. In choosing among alternatives, a recipient must give priority to methods that offer program benefits to handicapped persons in the most integrated setting appropriate.

(c) *Deadlines.* (1) Except where structural changes in facilities are necessary, recipients must adhere to the provisions of this section within 60 days after the effective date of this part.

(2) Recipients having an existing facility which does require alterations in order to make a program or activity accessible must prepare a transition plan in accordance with § 7.75 within six months from the effective date of

this part. The recipient must complete the changes as soon as possible, but not later than three years from date of award.

(d) *Notice of accessibility.* The recipient must make sure that interested persons, including those with impaired vision or hearing, can find out about the existence and location of the assisted program services, activities, and facilities that are accessible to and usable by handicapped persons.

(e) *Structural and financial feasibility.* This section does not require structural alterations to existing facilities if making such alterations would not be structurally or financially feasible. An alteration is not structurally feasible when it has little likelihood of being accomplished without removing or altering a load-bearing structural member. Financial feasibility shall take into account the degree to which the alteration work is to be assisted by EPA assistance, the cost limitations of the program under which such assistance is provided, and the relative cost of accomplishing such alterations in manners consistent and inconsistent with accessibility.

§ 7.70 New construction.

(a) *General.* New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to be readily accessible to and usable by handicapped persons.

(b) Any construction for which design is initiated on or after the effective date of this part shall comply with the accessibility requirements of this section. Any construction for which design was initiated prior to the effective date of this part shall comply with accessibility requirements in the Department of Health, Education and Welfare (now the Department of Health and Human Services) nondiscrimination regulation, 45 CFR 84.23, issued June 3, 1977, or with equivalent standards that ensure the facility is readily accessible to and usable by handicapped persons.

(c) Design, construction or alteration of facilities in conformance with the 1980 "American National Standard Specifications for Making Buildings and Facilities Accessible to and Usable by the Physically Haldicapped," published by the American National Standards Institute, Inc., constitutes compliance with this section.[2]

(d) *Exception.* This section shall not apply to the design, construction or alteration of any portion of a building that, because of its intended use, will not require accessibility to the public beneficiaries or result in the employment or residence therein of physically handicapped persons.

§ 7.75 Transition plan.

If structural changes to facilities are necessary to make the program accessible to handicapped persons, a recipient must prepare a transition plan.

(a) *Requirements.* The transition plan must set forth the steps needed tm complete the structural changes required and must be developed with the assistance of interested persons, including handicapped persons or organizations representing handicapped persons. At a minimum, the transition plan must:

(1) Identify the physical obstacles in the recipient's facilities that limit handicapped persons' access to its program or activity,

(2) Describe in detail what the recipient will do to make the facilities accessible,

(3) Specify the schedule for the steps needed to achieve full program accessibility, and include a year-by-year timetable if the process will take more than one year,

(4) Indicate the person responsible for carrying out the plan.

(b) *Availability.* Recipients shall make available a copy of the transition plan to the OCR upon request and to the public for inspection at either the site of the project or at the recipient's main office.

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[2]The American National Standards Institute, Inc., is located at 1430 Broadway, New York, NY 10018. A copy of the document may be purchased from this Institute for $5.00 plus $2.00 shipping cost.

Subpart D—Requirements for Applicants and Recipients

§ 7.80 Applicants.

(a) *Assurances*—(1) *General.* Applicants for EPA assistance shall submit an assurance with their applications stating that, with respect to their programs or activities that receive EPA assistance, they will comply with the requirements of this part. Applicants must also submit any other information that the OCR determines is necessary for preaward review. The applicant's acceptance of EPA assistance is an acceptance of the obligation of this assurance and this part.

(2) *Duration of assurance*—(i) *Real property.* When EPA awards assistance in the form of real property, or assistance to acquire real property, or structures on the property, the assurance will obligate the recipient, or transferee, during the period the real property or structures are used for the purpose for which EPA assistance is extended, or for another purpose in which similar services or benefits are provided. The transfer instrument shall contain a covenant running with the land which assures nondiscrimination. Where applicable, the covenant shall also retain a right of reverter which will permit EPA to recover the property if the covenant is ever broken.

(ii) *Personal property.* When EPA provides assistance in the form of personal property, the assurance will obligate the recipient for so long as it continues to own or possess the property.

(iii) *Other forms of assistance.* In all other cases, the assurance will obligate the recipient for as long as EPA assistance is extended.

(b) *Wastewater treatment project.* EPA Form 4700–4 shall also be submitted with applications for assistance under Title II of the Federal Water Pollution Control Act.

(c) *Compliance information.* Each applicant for EPA assistance shall submit regarding the program or activity that would receive EPA assistance:

(1) Notice of any lawsuit pending against the applicant alleging discrimination on the basis of race, color, sex, handicap, or national origin;

(2) A brief description of any applications pending to other federal agencies for assistance, and of Federal assistance being provided at the time of the application; and

(3) A statement describing any civil rights compliance reviews regarding the applicant conducted during the two-year period before the application, and information concerning the agency or organization performing the reviews.

(Approved by the Office of Management and Budget under control number 2000–0006)

§ 7.85 Recipients.

(a) *Compliance information.* Each recipient shall collect, maintain, and on request of the OCR, provide the following information to show compliance with this part:

(1) A brief description of any lawsuits pending against the recipient that allege discrimination which this part prohibits;

(2) Racial/ethnic, national origin, sex and handicap data, or EPA Form 4700–4 information submitted with its application;

(3) A log of discrimination complaints which identifies the complaint, the date it was filed, the date the recipient's investigation was completed, the disposition, and the date of disposition; and

(4) Reports of any compliance reviews conducted by any other agencies.

(b) *Additional compliance information.* If necessary, the OCR may require recipients to submit data and information specific to certain programs to determine compliance where there is reason to believe that discrimination may exist in a program or activity receiving EPA assistance or to investigate a complaint alleging discrimination in a program or activity receiving EPA assistance. Requests shall be limited to data and information which is relevant to determining compliance and shall be accompanied by a written statement summarizing the complaint or setting forth the basis for the belief that discrimination may exist.

(c) *Self-evaluation.* Each recipient must conduct a self-evaluation of its administrative policies and practices, to consider whether such policies and

practices may involve handicap discrimination prohibited by this part. When conducting the self-evaluation, the recipient shall consult with interested and involved persons including handicapped persons or organizations representing handicapped persons. The evaluation shall be completed within 18 months after the effective date of this part.

(d) Preparing compliance information. In preparing compliance information, a recipient must:

(1) [Reserved]

(2) Use the racial classifications set forth in § 7.25 in determining categories of race, color or national origin.

(e) *Maintaining compliance information.* Recipients must keep records for paragraphs (a) and (b) of this section for three (3) years after completing the project. When any complaint or other action for alleged failure to comply with this part is brought before the three-year period ends, the recipient shall keep records until the complaint is resolved.

(f) Accessibility to compliance information. A recipient shall:

(1) Give the OCR access during normal business hours to its books, records, accounts and other sources of information, including its facilities, as may be pertinent to ascertain compliance with this part;

(2) Make compliance information available to the public upon request; and

(3) Assist in obtaining other required information that is in the possession of other agencies, institutions, or persons not under the recipient's control. If such party refuses to release that information, the recipient shall inform the OCR and explain its efforts to obtain the information.

(g) *Coordination of compliance effort.* If the recipient employs fifteen (15) or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part.

(Approved by the Office of Management and Budget under control number 2000-0006)

§ 7.90 Grievance procedures.

(a) *Requirements.* Each recipient shall adopt grievance procedures that assure the prompt and fair resolution of complaints which allege violation of this part.

(b) *Exception.* Recipients with fewer than fifteen (15) full-time employees need not comply with this section unless the OCR finds a violation of this part or determines that creating a grievance procedure will not significantly impair the recipient's ability to provide benefits or services.

§ 7.95 Notice of nondiscrimination.

(a) *Requirements.* A recipient shall provide initial and continuing notice that it does not discriminate on the basis of race, color, national origin, or handicap in a program or activity receiving EPA assistance or, in programs covered by section 13, on the basis of sex. Methods of notice must accommodate those with impaired vision or hearing. At a minimum, this notice must be posted in a prominent place in the recipient's offices or facilities. Methods of notice may also include publishing in newspapers and magazines, and placing notices in recipient's internal publications or on recipient's printed letterhead. Where appropriate, such notice must be in a language or languages other than English. The notice must identify the responsible employee designated in accordance with § 7.85.

(b) *Deadline.* Recipients of assistance must provide initial notice by thirty (30) calendar days after award and continuing notice for the duration of EPA assistance.

§ 7.100 Intimidation and retaliation prohibited.

No applicant, recipient, nor other person shall intimidate, threaten, coerce, or discriminate against any individual or group, either:

(a) For the purpose of interfering with any right or privilege guaranteed by the Acts or this part, or

(b) Because the individual has filed a complaint or has testified, assisted or participated in any way in an investigation, proceeding or hearing under this part, or has opposed any practice made unlawful by this regulation.

Subpart E—Agency Compliance Procedures

§ 7.105 General policy.

EPA's Administrator, Director of the Office of Civil Rights, Project Officers and other responsible officials shall seek the cooperation of applicants and recipients in securing compliance with this part, and are available to provide help.

§ 7.110 Preaward compliance.

(a) *Review of compliance information.* Within EPA's application processing period, the OCR will determine whether the applicant is in compliance with this part and inform the Award Official. This determination will be based on the submissions required by § 7.80 and any other information EPA receives during this time (including complaints) or has on file about the applicant. When the OCR cannot make a determination on the basis of this information, additional information will be requested from the applicant, local government officials, or interested persons or organizations, including handicapped persons or organizations representing such persons. The OCR may also conduct an on-site review only when it has reason to believe discrimination may be occurring in a program or activity which is the subject of the application.

(b) *Voluntary compliance.* If the review indicates noncompliance, an applicant may agree in writing to take the steps the OCR recommends to come into compliance with this part. The OCR must approve the written agreement before any award is made.

(c) *Refusal to comply.* If the applicant refuses to enter into such an agreement, the OCR shall follow the procedure established by paragraph (b) of § 7.130.

§ 7.115 Postaward compliance.

(a) *Periodic review.* The OCR may periodically conduct compliance reviews of any recipient's programs or activities receiving EPA assistance, including the request of data and information, and may conduct on-site reviews when it has reason to believe that discrimination may be occurring in such programs or activities.

(b) *Notice of review.* After selecting a recipient for review or initiating a complaint investigation in accordance with § 7.120, the OCR will inform the recipient of:

(1) The nature of and schedule for review, or investigation; and

(2) Its opportunity, before the determination in paragraph (d) of this section is made, to make a written submission responding to, rebutting, or denying the allegations raised in the review or complaint.

(c) *Postreview notice.* (1) Within 180 calendar days from the start of the compliance review or complaint investigation, the OCR will notify the recipient in writing by certified mail, return receipt requested, of:

(i) Preliminary findings;

(ii) Recommendations, if any, for achieving voluntary compliance; and

(iii) Recipient's right to engage in voluntary compliance negotiations where appropriate.

(2) The OCR will notify the Award Official and the Assistant Attorney General for Civil Rights of the preliminary findings of noncompliance.

(d) *Formal determination of noncompliance.* After receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may:

(1) Agree to the OCR's recommendations, or

(2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR.

If the recipient does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, the OCR shall, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

(e) *Voluntary compliance time limits.* The recipient will have ten (10) calendar days from receipt of the formal determination of noncompliance in which to come into voluntary compliance. If the recipient fails to meet this deadline, the OCR must

start proceedings under paragraph (b) of § 7.130.

(f) *Form of voluntary compliance agreements.* All agreements to come into voluntary compliance must:

(1) Be in writing;

(2) Set forth the specific steps th recipient has agreed to take, and

(3) Be signed by the Director, OCR or his/her designee and an official with authority to legally bind the recipient.

§ 7.120 Complaint investigations.

The OCR shall promptly investigate all complaints filed under this section unless the complainant and the party complained against agree to a delay pending settlement negotiations.

(a) *Who may file a complaint.* A person who believes that he or she or a specific class of persons has been discriminated against in violation of this part may file a complaint. The complaint may be filed by an authorized representative. A complaint alleging employment discrimination must identify at least one individual aggrieved by such discrimination. Complaints solely alleging employment discrimination against an individual on the basis of race, color, national origin, sex or religion shall be processed under the procedures for complaints of employment discrimination filed against recipients of federal assistance (see 28 CFR part 42, subpart H and 29 CFR part 1691). Complainants are encouraged but not required to make use of any grievance procedure established under § 7.90 before filing a complaint. Filing a complaint through a grievance procedure does not extend the 180 day calendar requirement of paragraph (b)(2 of this section.

(b) *Where, when and how to file complaint.* The complainant may file a complaint at any EPA office. The complaint may be referred to the region in which the alleged discriminatory acts occurred.

(1) The complaint must be in writing and it must describe the alleged discriminatory acts which violate this part.

(2) The complaint must be filed within 180 calendar days of the alleged discriminatory acts, unless the OCR waives the time limit for good cause. The filing of a grievance with the recipient does not satisfy the requirement that complaints must be filed within 180 days of the alleged discriminatory acts.

(c) *Notification.* The OCR will notify the complainant and the recipient of the agency's receipt of the complaint within five (5) calendar days.

(d) *Complaint processing procedures.* After acknowledging receipt of a complaint, the OCR will immediately initiate complaint processing procedures.

(1) *Preliminary investigation.* (i) Within twenty (20) calendar days of acknowledgment of the complaint, the OCR will review the complaint for acceptance, rejection, or referral to the appropriate Federal agency.

(ii) If the complaint is accepted, the OCR will notify the complainant and the Award Official. The OCR will also notify the applicant or recipient complained against of the allegations and give the applicant or recipient opportunity to make a written submission responding to, rebutting, or denying the allegations raised in the complaint.

(iii) The party complained against may send the OCR a response to the notice of complaint within thirty (30) calendar days of receiving it.

(2) *Informal resolution.* (i) OCR shall attempt to resolve complaints informally whenever possible. When a complaint cannot be resolved informally, OCR shall follow the procedures established by paragraphs (c) through (e) of § 7.115.

(e) *Confidentiality.* EPA agrees to keep the complainant's identity confidential except to the extent necessary to carry out the purposes of this part, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder. Ordinarily in complaints of employment discrimination, the name of the complainant will be given to the recipient with the notice of complaint.

(f) [Reserved]

(g) *Dismissal of complaint.* If OCR's investigation reveals no violation of this part, the Director, OCR, will dismiss the complaint and notify the complainant and recipient.

§ 7.125 Coordination with other agencies.

If, in the conduct of a compliance review or an investigation, it becomes evident that another agency has jurisdiction over the subject matter, OCR will cooperate with that agency during the continuation of the review of investigation. EPA will:

(a) Coordinate its efforts with the other agency, and

(b) Ensure that one of the agencies is designated the lead agency for this purpose. When an agency other than EPA serves as the lead agency, any action taken, requirement imposed, or determination made by the lead agency, other than a final determination to terminate funds, shall have the same effect as though such action had been taken by EPA.

§ 7.130 Actions available to EPA to obtain compliance.

(a) General. If compliance with this part cannot be assured by informal means, EPA may terminate or refuse to award or to continue assistance. EPA may also use any other means authorized by law to get compliance, including a referral of the matter to the Department of Justice.

(b) Procedure to deny, annul, suspend or terminate EPA assistance.

(1) *OCR finding.* If OCR determines that an applicant or recipient is not in compliance with this part, and if compliance cannot be achieved voluntarily, OCR shall make a finding of noncompliance. The OCR will notify the applicant or recipient (by registered mail, return receipt requested) of the finding, the action proposed to be taken, and the opportunity for an evidentiary hearing.

(2) *Hearing.* (i) Within 30 days of receipt of the above notice, the applicant or recipient shall file a written answer, under oath or affirmation, and may request a hearing.

(ii) The answer and request for a hearing shall be sent by registered mail, return receipt requested, to the Chief Administrative Law Judge (ALJ) (A-110), United States Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Upon receipt of a request for a hearing, the ALJ will send the applicant or recipient a copy of the ALJ's procedures. If the recipient does not request a hearing, it shall be deemed to have waived its right to a hearing, and the OCR finding shall be deemed to be the ALJ's determination.

(3) *Final decision and disposition.* (i) The applicant or recipient may, within 30 days of receipt of the ALJ's determination, file with the Administrator its exceptions to that determination. When such exceptions are filed, the Administrator may, within 45 days after the ALJ's determination, serve to the applicant or recipient, a notice that he/she will review the determination. In the absence of either exceptions or notice of review, the ALJ's determination shall constitute the Administrator's final decision.

(ii) If the Administrator reviews the ALJ's determination, all parties shall be given reasonable opportunity to file written statements. A copy of the Administrator's decision will be sent to the applicant or recipient.

(iii) If the Administrator's decision is to deny an application, or annul, suspend or terminate EPA assistance, that decision becomes effective thirty (30) days from the date on which the Administrator submits a full written report of the circumstances and grounds for such action to the Committees of the House and Senate having legislative jurisdiction over the program or activity involved. The decision of the Administrator shall not be subject to further administrative appeal under EPA's General Regulation for Assistance Programs (40 CFR part 30, subpart L).

(4) *Scope of decision.* The denial, annulment, termination or suspension shall be limited to the particular applicant or recipient who was found to have discriminated, and shall be limited in its effect to the particular program or the part of it in which the discrimination was found.

§ 7.135 Procedure for regaining eligibility.

(a) *Requirements.* An applicant or recipient whose assistance has been denied, annulled, terminated, or suspended under this part regains eligibility as soon as it:

(1) Provides reasonable assurance that it is complying and will comply with this part in the future, and

(2) Satisfies the terms and conditions for regaining eligibility that are specified in the denial, annulment, termination or suspension order.

(b) *Procedure.* The applicant or recipient must submit a written request to restore eligibility to the OCR declaring that it has met the requirements set forth in paragraph (a) of this section. Upon determining that these requirements have been met, the OCR must notify the Award Official, and the applicant or recipient that eligibility has been restored.

(c) Rights on denial of restoration of eligibility. If the OCR denies a request to restore eligibility, the applicant or recipient may file a written request for a hearing before the EPA Chief Administrative Law Judge in accordance with paragraph (c) § 7.130, listing the reasons it believes the OCR was in error.

APPENDIX A—EPA ASSISTANCE PROGRAMS AS LISTED IN THE "CATALOG OF FEDERAL DOMESTIC ASSISTANCE"

1. Assistance provided by the Office of Air, Noise and Radiation under the Clean Air Act of 1977, as amended; Pub. L. 95-95, 42 U.S.C. 7401 *et seq.* (ANR 66.001)

2. Assistance provided by the Office of Air, Noise and Radiation under the Clean Air Act of 1977, as amended; Pub. L. 95-95, 42 U.S.C. 7401 *et seq.* (ANR 66.003)

3. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; sections 101(e), 109(b), 201-05, 207, 208(d), 210-12, 215-19, 304(d)(3), 313, 501, 502, 511 and 516(b); Pub. L. 97-117; Pub. L. 95-217; Pub. L. 96-483; 33 U.S.C. 1251 *et seq.* (OW 66.418)

4. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; section 106; Pub. L. 95-217; 33 U.S.C. 1251 *et seq.* (OW 66.419)

5. Assistance provided by the Office of Water under the Clean Water Act of 1977, as amended; Pub. L. 95-217; 33 U.S.C. 1251 *et seq.* (OW 66.426)

6. Assistance provided by the Office of Water under the Public Health Service Act, as amended by the Safe Drinking Water Act, Pub. L. 93-523; as amended by Pub. L. 93-190; Pub. L. 96-63; and Pub. L. 93-502. (OW 66.432)

7. Assistance provided by the Office of Water under the Safe Drinking Water Act, Pub. L. 93-523, as amended by Pub. L. 96-63, Pub. L. 95-190, and Pub. L. 96-502. (OW 66.433)

8. Assistance provided by the Office of Water under the Clean Water Act of 1977, section 205(g), as amended by Pub. L. 95-217 and the Federal Water Pollution Control Act, as amended; Pub. L. 97-117; 33 U.S.C. 1251 *et seq.* (OW 66.438)

9. Assistance provided by the Office of Water under the Resource Conservation and Recovery Act of 1976; as amended by the Solid Waste Disposal Act; Pub. L. 94-580; section 3011, 42 U.S.C. 6931, 6947, 6948-49. (OW 66.802).

10. Assistance provided by the Office of Research and Development under the Clean Air Act of 1977, as amended; Pub. L. 95-95; 42 U.S.C. *et seq.*; Clean Water Act of 1977, as amended; Pub. L. 95-217; 33 U.S.C. 1251 *et seq.*, section 8001 of the Solid Water Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976; Pub. L. 94-580; 42 U.S.C. 6901, Public Health Service Act as amended by the Safe Drinking Water Act as amended by Pub. L. 95-190; Federal Insecticide, Fungicide and Rodenticide Act; Pub. L. 95-516; 7 U.S.C. 136 *et seq.*, as amended by Pub. L.'s 94-140 and 95-396; Toxic Substances Control Act; 15 U.S.C. 2609; Pub. L. 94-469. (ORD 66.500)

11. Assistance provided by the Office of Research and Development under the Clean Air Act of 1977, as amended; Pub. L. 95-95; 42 U.S.C. 7401 *et seq.* (ORD 66.501)

12. Assistance provided by the Office of Research and Development under the Federal Insecticide, Fungicide and Rodenticide Act, Pub. L. 95-516, 7 U.S.C. 136 *et seq.*, as amended by Pub. L.'s 94-140 and 95-396. (ORD 66.502)

13. Assistance provided by the Office of Research and Development under the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976; 42 U.S.C. 6901, Pub. L. 94-580, section 8001. (ORD 66.504)

14. Assistance provided by the Office of Research and Development under the Clean Water Act of 1977, as amended; Pub. L. 95-217; 33 U.S.C. 1251 *et seq.* (ORD 66.505)

15. Assistance provided by the Office of Research and Development under the Public Health Service Act as amended by the Safe Drinking Water Act, as amended by Pub. L. 95-190 (ORD 66.506)

16. Assistance provided by the Office of Research and Development under the Toxic Substances Control Act; Pub. L. 94-469; 15 U.S.C. 2609; section 10. (ORD 66.507)

17. Assistance provided by the Office of Administration, including but not limited to: Clean Air Act of 1977, as amended, Pub. L. 95-95; 42 U.S.C. 7401 *et seq.*, Clean Water Act of 1977, as amended; Pub. L. 95-217; 33 U.S.C. 1251 *et seq.;* Solid Waste Disposal

Act, as amended by the Resource Conservation and Recovery Act of 1976; 42 U.S.C. 6901; Pub. L. 94-580; Federal Insecticide, Fungicide and Rodenticide Act; Pub. L. 92-516; 7 U.S.C. 136 *et seq.* as amended by Pub. L's 94-140 and 95-396; Public Health Service Act, as amended by the Safe Drinking Water Act, as amended by Pub. L. 95-190. (OA 66.600)

18. Assistance provided by the Office of Administration under the Clean Water Act of 1977, as amended; Pub. L. 95-217; section 213; 33 U.S.C. 1251 *et seq.* (OA 66.603)

19. Assistance provided by the Office of Enforcement Counsel under the Federal Insecticide and Rodenticide Act, as amended; Pub. L. 92-516; 7 U.S.C. 136 *et seq.*, as amended by Pub. L. 94-140, section 23(a) and Pub. L. 95-396. (OA 66.700)

20. Assistance provided by the Office of Solid Waste and Emergency Response under the Comprehensive Environmental Responses, Compensation and Liability Act of 1980; Pub. L. 96-510, section 3012, 42 U.S.C. 9601, *et seq.* (OSW—number not to be assigned since Office of Management and Budget does not catalog one-year programs.)

21. Assistance provided by the Office of Water under the Clean Water Act as amended; Pub. L. 97-117, 33 U.S.C. 1313. (OW—66.454)

PART 8—EQUAL EMPLOYMENT OPPORTUNITY UNDER EPA CONTRACTS AND EPA ASSISTED CONSTRUCTION CONTRACTS

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8.72 Record.
8.73 Final decision.

AUTHORITY: Section 201, Executive Order 11246, 30 FR 12319; and 41 CFR 60-1.6(c).

SOURCE: 39 FR 3258, Jan. 25, 1974, unless otherwise noted.

Subpart A—Compliance Standards and Procedures

§ 8.1 Purpose.

This part prescribes standards and procedures for the Environmental Protection Agency in discharging its responsibilities under Executive Order 11246 (3 CFR, 1964–1965 Comp., p. 139); the rules and regulations of the Secretary of Labor, codified in 41 CFR part 60, prescribed thereunder; and other rules, orders, instructions, designations, and directives issued by the Office of Federal Contract Compliance, Department of Labor.

§ 8.2 Definitions.

(a) *Administering agency* means any department, agency, and establishment in the Executive Branch of the Government, including any wholly owned Government corporation, which administers a program involving federally assisted construction contracts.

(b) *Administrator* means the Administrator of the Environmental Protection Agency.

(c) *Agency* means the Environmental Protection Agency.

(d) *Applicant* means an applicant for Federal assistance from the Agency involving a construction contract, or other participant in a program involving a construction contract as determined by the regulations of the Agency. The term also includes such persons after they become recipients of such Federal assistance.

(e) *Compliance Agency* means the agency designated by the Director on a geographical, industry, or other basis to conduct compliance reviews and to undertake such other responsibilities in connection with the administration of the order as the Director may determine to be appropriate. In the absence of such a designation the Compliance Agency will be determined as follows:

(1) In the case of a prime contractor not involved in construction work, the Compliance Agency will be the agency whose contracts with the prime contractor have the largest aggregate dollar value;

(2) In the case of a subcontractor not involved in construction work, the Compliance Agency will be the Compliance Agency of the prime contractor with which the subcontractor has the largest aggregate value of subcontracts or purchase orders for the performance of work under contracts;

(3) In the case of a prime contractor or subcontractor involved in construction work, the Compliance Agency for each construction project will be the agency providing the largest dollar value for the construction projects; and

(4) In the case of a contractor who is both a prime contractor and subcontractor, the Compliance Agency will be determined as if such contractor is a prime contractor only.

(f) *Construction work* means the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(g) *Contract* means any Government contract or any federally assisted construction contract.

(h) *Contractor* means, unless otherwise indicated, a prime contractor or subcontractor.

(i) *Director* means the Director, Office of Federal Contract Compliance, U.S. Department of Labor, or any person to whom he delegates authority under the regulations of the Secretary of Labor.

(j) *Equal opportunity clause* means the contract provisions set forth in section 4 (a) or (b), as appropriate.

(k) *Facilities* includes, but it is not limited to, waiting rooms, work areas,

restaurants and other eating areas, time clocks, restrooms, washrooms, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees.

(l) *Federally assisted construction contract* means any agreement or modification thereof between any applicant and any person for construction work which is paid for in whole or in part with funds obtained from the Agency or borrowed on the credit of the Agency pursuant to any Federal program involving a grant, contract, loan, insurance, or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, or any application or modification thereof approved by the Agency for a grant, contract, loan, insurance, or guarantee under which the applicant itself participates in the construction work.

(m) *Government* means the Government of the United States of America.

(n) *Government contract* means any agreement or modification thereof between any contracting agency and any person for the furnishing of supplies or services or for the use of real or personal property, including lease arrangements. The term *services*, as used in this definition includes, but is not limited to, the following services: Utility, construction, transportation, research, insurance, and fund depository. The term *government contract* does not include (1) agreements in which the parties stand in the relationship of employer and employee, and (2) federally assisted construction contracts.

(o) *Hearing officer* means the individual or board of individuals designated to conduct hearings.

(p) *Modification* means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.

(q) *Order* means Parts II, III, and IV of Executive Order 11246, dated September 24, 1965 (30 FR 12319), and any Executive Order amending or superseding such orders.

(r) *Person* means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

(s) *Prime contractor* means any person holding a contract, and for the purposes of subpart B (General Enforcement, Compliance Review, and Complaint Procedure) of the rules, regulations, and relevant orders of the Secretary of Labor, any person who has held a contract subject to the order.

(t) *Recruiting and training agency* means any person who refers workers to any contractor or subcontractor, or who provides or supervises apprenticeship or training for employment by any contractor or subcontractor.

(u) *Rules, regulations, and relevant orders of the Secretary of Labor* used in both paragraph (4) of the equal opportunity clause and elsewhere herein means rules, regulations, and relevant orders of the Secretary of Labor or his designee issued pursuant to the Order.

(v) *Site of construction* means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, and repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract.

(w) *Subcontract* means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of any employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

(x) *Subcontractor* means any person holding a subcontract and, for the purposes of subpart B (General Enforcement; Compliance Review; and Complaint Procedure) of the rules, regula-

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tions, and relevant orders of the Secretary of Labor any person who had held a subcontract subject to the order. The term *First-tier subcontractor* refers to a subcontractor holding a subcontract with a prime contractor.

(y) *United States* as used herein shall include the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Panama Canal Zone, and the possessions of the United States.

(z) *Minority group* as used herein shall include, where appropriate, female employees and prospective female employees.

§ 8.3 Responsibilities.

(a) *General.* The Environmental Protection Agency is primarily responsible for implementing the requirements of the order, and all rules, regulations, and orders issued pursuant thereto for all contracts for which it is the Compliance Agency.

(b) *Contract Compliance Officer (CCO).* The Director of the Office of Civil Rights and Urban Affairs has been designated as the Contract Compliance Officer (CCO), and is responsible for developing and administering the Agency's program under the order.

(c) *Director, Compliance Division.* The Director of the Compliance Division (ADCCO) has been designated to assist the Contract Compliance Officer in the performance of his duties. He is authorized to exercise the authority of the Contract Compliance Officer.

(d) *Deputy Contract Compliance Officer (DCCO).* Each Regional Director of Civil Rights and Urban Affairs has been designated by the Contract Compliance Officer as Deputy Contract Compliance Officer (DCCO) for the Region in which he serves. Deputy Contract Compliance Officers are responsible for field administration of programs of contract compliance in conformity with directives and guidelines promulgated by the Contract Compliance Officer.

(e) *Heads of program areas.* Assistant Administrators and Regional Administrators who are authorized to extend Federal financial assistance which involves construction work shall be responsible for effectuating the order, rules, regulations, and relevant orders of the Secretary of Labor, OFCC directives this part, directives of the Agency, and all other rules, regulations, and orders issued pursuant thereto as they relate to construction contracts financially assisted by the Agency.

§ 8.4 Equal opportunity clause.

(a) *Government contracts.* Except as otherwise provided, the following equal opportunity clause contained in section 202 of the Order shall be included in each Government contract entered into by the Agency (and modification thereof if not included in the original contract):

During the performance of this contract the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this equal opportunity clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract, or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under this equal opportunity clause, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the equal opportunity clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled, terminated, or suspended, in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

(7) The contractor will include the provisions of paragraph (a) (1) through (7) of this section in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

(b) *Federally assisted construction contracts.* Except as otherwise provided, the agency shall include or require the inclusion of the following language as a condition of any grant, contract, loan, insurance, or guarantee involving federally assisted construction which it administers as Administering Agency and which is not exempt from the requirements of the equal opportunity clause:

The applicant hereby agrees that it will incorporate or cause to be incorporated into any contract for construction work, or modification thereof, as defined in the regulations of the Secretary of Labor at 41 CFR Chapter 60, which is paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to a grant, contract, loan, insurance, or guarantee or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance, or guarantee, the following equal opportunity clause:

During the performance of this contract, the contractor agrees as follows:

(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided setting forth the provisions of this equal opportunity (federally assisted construction) clause.

(2) The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(3) The contractor will send to each labor union or representative of workers, with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided advising the said labor union or workers' representative of the contractor's commitments under this section, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(4) The contractor will comply with all provisions of Executive Order No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

(5) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the administering agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(6) In the event of the contractor's noncompliance with the equal opportunity (federally assisted construction) clause of this contract or with any of the said rules, regulations, or orders, this contract may be can-

celed, terminated, or suspended, in whole or in part, and the contractor may be declared ineligible for further Government contracts or federally assisted construction contracts in accordance with procedures authorized in Executive Order No. 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulations, or order of the Secretary of Labor, or as provided by law.

(7) The contractor will include this equal opportunity (federally assisted construction) clause in every subcontract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the administering agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: Provided, however, That in the event a contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor, as a result of such direction by the administering agency the contractor may request the United States to enter into such litigation to protect the interests of the United States.

The applicant further agrees that it will be bound by the above equal opportunity clause with respect to its own employment practices when it participates in federally assisted construction work: *Provided*, That if the applicant so participating is a State or local government, the above equal opportunity clause is not applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract.

The applicant agrees that it will assist and cooperate actively with the Agency and the Secretary of Labor in obtaining the compliance of contractors and subcontractors with the equal opportunity clause and the rules, regulations, and relevant orders of the Secretary of Labor; that it will furnish the Agency and the Secretary of Labor such information as they may require for the supervision of such compliance; and that it will otherwise assist the Agency in the discharge of its primary responsibility for securing compliance.

The applicant further agrees that it will refrain from entering into any contract or contract modification subject to the Order with a contractor debarred from, or who has not demonstrated eligibility for, Government contracts and federally assisted construction contracts pursuant to the Order and will carry out such sanctions and penalties for violation of the equal opportunity clause, as may be imposed upon contractors and subcontractors by the Agency or the Secretary of Labor pursuant to Part II, Subpart D of the Order. In addition, the applicant agrees that if it fails or refuses to comply with these undertakings, the Agency may take any or all of the following actions: Cancel, terminate, or suspend in whole or in part this grant (contract, loan, insurance, guarantee); refrain from extending any further assistance to the applicant under the program with respect to which the failure or refusal occurred until satisfactory assurance of future compliance has been received from such applicant; and refer the case to the Department of Justice for appropriate legal proceedings.

(c) *Subcontracts.* Each nonexempt prime contractor or subcontractor shall include the equal opportunity clause in each of its nonexempt subcontracts.

(d) *Incorporation by reference.* The equal opportunity clause may be incorporated by reference in Government bills of lading, transportation requests, contracts for deposit of Government funds, contracts for issuing and paying U.S. savings bonds and notes, contracts and subcontracts less than $50,000 and such other contracts as the Director may designate.

(e) *Incorporation by operation of the Order and Agency regulations.* By operation of the Order, and these regulations, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by either the Order, the rules, regulations and relevant orders of the Secretary of Labor or these regulations to include such a clause whether or not it is physically incorporated in such contracts. The clause is hereby made a part of every nonexempt contract where there is no written contract between the Agency and the contractor.

(f) *Adaptation of language.* Such necessary changes in language may be made in the equal opportunity clauses as shall be appropriate to identify the parties and their undertakings.

§ 8.5 Exemptions.

(a) *General*—(1) *Transactions of $10,000 or under.* Contracts and subcontracts not exceeding $10,000, other than Government bills of lading, are exempt from the requirements of the equal opportunity clause. In determining the applicability of this exemption

to any federally assisted construction contract, or subcontract thereunder, the amount of such contract or subcontract rather than the amount of the Federal financial assistance shall govern. The equal opportunity clause shall apply to all cases where the Agency, applicants, contractors, or subcontractors procure supplies or services in less than usual quantities to avoid applicability of the equal opportunity clause.

(2) *Contracts and subcontracts for indefinite quantities.* With respect to contracts and subcontracts for indefinite quantities (including, but not limited to, open-end contracts, requirement-type contracts, Federal Supply Schedule contracts, *call-type* contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the purchaser has reason to believe that the amount to be ordered in any year under such contract will not exceed $10,000. The applicability of the equal opportunity clause shall be determined by the purchaser at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds $10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered or reasonably expected to be ordered in any year.

(3) *Work outside the United States.* Contracts and subcontracts are exempt from the requirements of the equal opportunity clause with regard to work performed outside the United States by employees who were not recruited within the United States.

(4) *Contracts with State or local governments.* The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract. In addition, State and local governments are exempt from the requirements of filing the annual compliance report provided for by § 8.11(a) and maintaining a written affirmative action compliance program prescribed in §§ 8.7 and 8.8.

(b) *Specific contracts and facilities not connected with contracts.* The equal opportunity clause will not be required to be included in any contract or subcontract exempted by the Director under the provisions of 41 CFR 60–1.5(b) (1) or (2) provided such exemption has not been withdrawn under the provisions of 41 CFR 60–1.5(d).

(c) *National security.* Any requirement set forth in the regulations in this part shall not apply to any contract or subcontract whenever the Administrator determines that such contract or subcontract is essential to the national security and that its award without complying with such requirement is necessary to the national security. Upon making such a determination, the Administrator will notify the Director in writing within 30 days.

§ 8.6 Pre-bid requirements and conferences.

(a) *Nonconstruction contracts of $1 million or more.* The following notice shall be included in the invitation for bids, or request for proposals for each nonconstruction contract (advertised or negotiated) which may result in an award of $1 million or more:

PREAWARD EQUAL OPPORTUNITY COMPLIANCE REVIEWS

Where the bid (or offer) of the apparent low responsible bidder (or offeror) is in the amount of $1 million or more, the bidder (or offeror) and his known first-tier subcontractors which will be awarded subcontracts of $1 million or more will be subject to full, preaward equal opportunity compliance reviews before the award of the contract for the purpose of determining whether the bidder (or offeror) and his subcontractors are able to comply with the provisions of the equal opportunity clause.

Preaward compliance reviews may be conducted for any nonexempt nonconstruction contract or subcontract if, on the basis of complaint, past performance, investigation, or otherwise, the Agency believes that a prospective contractor or subcontractor is unable or unwilling to comply with the re-

quirements of the equal employment opportunity clause.

(b) *Construction contracts.* (1) In certain designated metropolitan areas, the Office of Federal Contract Compliance has established or approved establishment of, special compliance programs. In each such area special procedures have been made applicable for all direct Federal or federally assisted construction projects. Such rules, regulations, guidelines, and procedures shall be governing in each instance and take precedence over general EPA contract compliance regulations set forth herein for direct and EPA financially assisted construction projects.

(2) Except for the specially designated areas described in paragraph (1) of this paragraph (b), the following notice shall be included in the invitation for bids or request for proposals for all EPA direct construction and EPA financially assisted construction contracts where projects costs reasonably may be expected to exceed $500,000:

PRE-CONSTRUCTION EQUAL OPPORTUNITY COMPLIANCE CONFERENCE

As part of the procedure for determining the ability of contractors to comply with the equal opportunity clause, prospective bidders may be required to attend a meeting scheduled by the Environmental Protection Agency prior to opening of bids where they will be instructed in the equal employment opportunity requirements of the Agency.

§ 8.7 Affirmative action compliance programs—nonconstruction contracts.

Order No. 4 (41 CFR part 60-2), issued by the Secretary of Labor, sets forth requirements for the development of affirmative action compliance programs for nonconstruction contractors.

§ 8.8 Affirmative action compliance programs—construction contracts.

(a) In each area designated by the Office of Federal Contract Compliance for special compliance attention under Federal, State, or locally established compliance plans, the rules, regulations, and relevant orders of the Office of Federal Contract Compliance for the area shall be governing with respect to development, maintenance, and submission of affirmative action programs by bidders and contractors. Copies of such rules, regulations, and relevant orders promulgated by the Office of Federal Contract Compliance shall be furnished contractors by EPA in the instance of direct EPA construction contracting and to EPA's financial assistance recipient for submission to contractors in the instance of an EPA financially assisted construction contract.

(b) Outside the areas referred to in paragraph (a) of this section, and unless otherwise exempted by the Administrator, construction contracts for $500,000 or more, and subcontracts for $100,000 or more under such contracts, shall require that contractors and subcontractors awarded such contracts and subcontracts must engage in affirmative action directed at promoting and ensuring equal employment opportunity in the workforce under the contracts or subcontracts, such affirmative action to include, as appropriate, specific, result-oriented efforts such as:

(1) Notifying community organizations that the contractor has employment opportunities available and maintaining records of the organizations' response. Such organizations may include but shall not be limited to:

(i) Local women's organizations.

(ii) Minority employment agencies.

(iii) Minority construction workers' and contractors' associations.

(iv) Local Human Rights Councils or organizations.

(v) Local Urban League chapter.

(vi) Local high school and college job placement counselors.

(vii) Local minority churches.

(viii) Local Indian Tribal Councils and Indian centers.

(ix) Local Spanish-speaking organizations.

(x) Local National Association for the Advancement of Colored People (NAACP) chapters.

(xi) Local Organization of Industrial Centers.

(xii) Oriental Community centers.

(2) Maintaining a file of the names and addresses of each minority worker referred to the contractor and what action was taken with respect to each

such referred worker, and if the worker was not employed, the reasons therefor. If such worker was not sent to the union hiring hall for referral or if such worker was not employed by the contractor, the contractor's file should document this and the reasons therefor.

(3) Prompt notification to the Environmental Protection Agency when the union or unions with whom the contractor has a collective bargaining agreement has not referred to the contractor a minority worker sent by the contractor or the contractor has other information that the union referral process has impeded him in his efforts to meet his goal.

(4) Participation by the contractor in training programs in the area, especially those funded by the Department of Labor.

(5) Dissemination of the contractor's EEO policy within his own organization by including it in any policy manual; by publicizing it in company newspapers, annual reports, etc.; by conducting staff, employees, and union representatives' meetings to explain and discuss the policy; by posting the policy; and by specific review of the policy with minority employees.

(6) Dissemination of the contractor's EEO policy externally and discussions of it with all recruitment sources; advertising in news media specifically including minority news media; and by notification and discussion of the policy with all subcontractors and suppliers.

(7) Making specific and constant personal (both oral and written) recruitment efforts directed at all minority organizations, schools with minority students, minority recruitment organizations and minority training organizations, within the contractor's recruitment area.

(8) Making specific efforts to encourage present minority employees to recruit their friends and relatives.

(9) Validating all employment specifications, selection requirements, tests, and the like.

(10) Making every effort to promote after school, summer, and vacation employment to minority youths.

(11) Developing on-the-job and participating and assisting in any association or employee-group training programs relevant to the contractor's employee needs consistent with its obligations under this part.

(12) Continual inventorying and evaluating all minority personnel for promotion opportunities and encouraging minority employees to seek such opportunities.

(13) Making sure that seniority practices, job classification, etc., do not have discriminatory effect.

(14) Making certain that all facilities and company activities are nonsegregated.

(15) Continuously monitoring all personnel activities to ensure EEO policy implementation.

(16) Circularizing minority contractor associations and soliciting subcontract work from available minority contractors, and maintaining a file of such effort, including explanations, when qualified, interested contractors are not engaged.

(c) The goal of the affirmative action required herein is insurance of equal employment opportunity. It is recognized that achievement of this goal and appraisal of effort to achieve it pose special problems for construction contractors because of the temporary and shifting nature of the employer-employee relationship in the construction industry, varying labor market conditions, and varying local contracting practices. Still, there are parameters by which effort and achievement can be evaluated. Where a contractor employs no minorities in his entire workforce, a legitimate presumption arises that the contractor has taken no affirmative action to ensure equal employment opportunity as herein required. The burden of refuting this presumption rests with the contractor. Similarily, if the only minorities a contractor employs are in the unskilled trades of his workforce, a legitimate presumption arises that the contractor has taken no affirmative action to ensure equal employment opportunity in his skilled trade workforce. Again the burden of refuting the presumption rests with the contractor. On the other hand, if a contractor employs minorities in every trade of his workforce and maintains such employment among the trades

over the entire life of his contract, a legitimate presumption arises that the contractor has taken affirmative action to achieve equal employment opportunity. The burden of refuting this presumption rests with the Agency.

(d) In connection with evaluating a contractor's affirmative action effort, it shall be no excuse that any union with which a contractor has a collective bargaining agreement providing for exclusive referral fails to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and Title VII of the Civil Rights Act of 1964. The fact that a contractor has delegated the responsibility for some of his employment practices to another organization or agency and that the delegatee organization or agency prevents the contractor from meeting his affirmative action EEO obligations pursuant to the Order does not vitiate the contractor's basic responsibilities under the Order.

(e) Where review of a contractor's workforce discloses an absence of minority employees among all trades, or a disproportionate representation of minorities in the workforce from what reasonably might be expected from the availability of such employees in the serving labor market area, the contractor will be called upon to show what affirmative good faith efforts he has made to ensure equal employment opportunity in his workforce. In this connection, good faith efforts shall be defined as: Contractor's efforts demonstrated by documentation showing his communications with minority community organizations having knowledge of the availability of minority workers or the ability to refer minorities for work. Such organizations shall include but not be limited to the organizations listed under § 8.8(b)(1). An additional ingredient of acceptable good faith efforts by a contractor is any effort made to obtain minority subcontractors for any portion of the work subcontracted.

(f) As evidence of his understanding of and agreement with the affirmative action requirements herein, each bidder on construction contracts where the bid is $500,000 or more shall file a signed certification with his bid acknowledging his understanding of the affirmative action requirements herein and certifying his agreement to make a good faith effort to achieve and maintain equal employment opportunity in the workforce under this contract through affirmative actions as herein specified. The certification also shall contain an estimate prepared by the bidder identifying the trades expected to be used in construction of the contract being bid; an estimate of the total manhours of work to be utilized by each trade in the performance of the contract; and, if determinable, an estimate of the minority manhours of work to be utilized in each trade. The certification also shall contain an undertaking by the bidder that he will obtain from each of his subcontractors a subcontractor's certification required by these regulations. The completed certification must be signed by an official of the bidder capable of binding the company and be filed with the bid as part of the bid.

(g) Prior to award of any subcontract for $100,000 or more for work under a construction contract for $500,000 or more, regardless of tier, the prospective subcontractor must execute and submit to the prime contractor a certification acknowledging his understanding of the affirmative action requirements herein and certifying his agreement to make a good faith effort to achieve and maintain equal employment opportunity in the workforce under his subcontract through affirmative actions as herein specified. The certification also shall contain an estimate prepared by the bidder identifying the trades expected to be used in the work performed under the subcontract; an estimate of the total manhours of work to be utilized by each trade in the performance of the work; and, if determinable, an estimate of the minority manhours of work to be utilized in each trade. The certification also shall contain an undertaking by the subcontractor that he will obtain a certification as required herein from each of his subcontractors and submit it to the prime contractor prior to award of such sub-

contract. The completed and signed subcontractor's certification shall be made a part of the subcontract to which it applies. Any subcontract subject to these requirements which is executed without incorporation of a signed and completed subcontractor's certification shall be ineligible for Agency financial assistance.

(h) Notwithstanding the express exclusion authorized herein, bidders on contracts where the bid is less than $500,000—but in no event below $10,000—may be required to file certifications as described above with their bids whenever circumstances with respect to particular construction or labor market areas make it necessary in the interests of assuring compliance with the requirements of the Order. Subcontractors under such contracts shall be required to file certifications as required herein.

(i) When pursuant to these regulations, submission of a certification is required to be made with bids or proposals for contracting, standards for such certification shall be incorporated in the bid invitations or requests for proposals issued in connection with such contracts.

(j) Where pursuant to § 8.8(a) or § 8.8(b) of these regulations, bidders are required to submit certifications, written and signed affirmative action plans, goals and timetables for minority manpower utilization, or other documents with their bids, such material must be completed in detail exactly as prescribed and be received prior to bid opening. Failure to submit the material prior to bid opening shall render the bid non-responsive insofar as compliance with Agency equal employment opportunity requirements is concerned. Determinations on the question of responsiveness of bids insofar as filing of the required equal employment opportunity submissions described above are concerned shall be made by the Agency.

§ 8.9 Award of contracts.

(a) *Nonconstruction contracts of $1 million or more.* The Contracting Officer shall notify the ADCCO of the proposed contracting. No award shall be made by the Contracting Officer until contract compliance clearance has been received from the ADCCO.

(1) If EPA is the Compliance Agency for the industry concerned in the proposed contracting, the ADCCO will refer the contracting information to the appropriate individual on his staff for the Preaward Equal Opportunity Compliance Review required by § 8.6(a). Directions and advice respecting contract compliance clearance for the proposed contracting will be forwarded to the Contracting Officer by the ADCCO within 30 days following receipt of the contracting information.

(2) If any agency other than EPA is the Compliance Agency for the industry concerned, the ADCCO shall notify the designated Compliance Agency and request it to take appropriate action and make appropriate findings in accordance with § 8.6(a) of these regulations within 30 days following receipt of the ADCCO's request. Replies from the Compliance Agency will be transmitted to the Contracting Officer by the ADCCO.

(b) *Nonconstruction contracts of less than $1 million.* Except for special situations where the Agency believes a prospective contractor or subcontractor is unable or unwilling to comply with the requirements of the equal opportunity clause, as provided for in § 8.6(a) herein, preaward compliance reviews are not required for nonconstruction contracts of less than $1 million.

(c) *Construction contracts in areas designated by the Office of Federal Contract Compliance for special compliance attention under Federal and locally established and approved Compliance Plans.* The Contracting Officer or approving official shall notify the appropriate Regional DCCO of the proposed contracting. The Regional DCCO shall carry out the duties prescribed for contracting agencies by the rules, regulations, guidelines, and procedures promulgated by the Office of Federal Contract Compliance for the affected area. No award shall be made or approved by the Contracting Officer or approving official until contract compliance clearance has been received from the Regional DCCO.

(d) *Construction contracts in areas other than those designated by the*

Office of Federal Contract Compliance for special compliance attention under Federal or locally established and approved Compliance Plans. The Contracting Officer or approving official shall notify the appropriate Regional DCCO of the proposed contracting. The Regional DCCO shall inform the Contracting Officer or approving official of the EPA requirements respecting the proposed contracting. No award shall be made or approved by the Contracting Officer or approving official until contract compliance clearance has been received from the Regional DCCO.

§ 8.10 Participation in areawide equal employment opportunity program.

Any contractor who is a participant in, or is a member of an organization or association which participates in, an areawide equal employment opportunity program which is approved by the Agency and the Office of Federal Contract Compliance for the purpose of effectuating the goals of Executive Order 11246, may be deemed to be in compliance with the Order by virtue of such participation and shall be exempt from the requirement of developing and maintaining a written affirmative action program, unless required to do so under the areawide equal employment opportunity program.

§ 8.11 Reports and other required information.

(a) *Requirements for prime contractors and subcontractors.* (1) Each prime contractor with the Agency shall file, and each such prime contractor shall cause its subcontractors to file, annually, on or before the 31st day of March, complete and accurate reports on Standard Form 100 (EEO–1) promulgated jointly by the Office of Federal Contract Compliance, the Equal Employment Opportunity Commission, and Plans for Progress, or such form as may hereafter be promulgated in its place if such prime contractor or subcontractor (i) is not exempt from the provisions of the *rules, regulations, and relevant orders of the Secretary of Labor* in accordance with 41 CFR 60–1.5; (ii) has 50 or more employees; (iii) is a prime contractor or first-tier subcontractor; and (iv) has a nonexempt contract, subcontract, purchase order *amounting to* $50,000 *or more* according to 41 CFR 60-1.7, or serves as a depository of Government funds, or is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes: *Provided,* That any subcontractor below the first-tier which performs construction work at the site of construction shall be required to file such a report if it meets requirements of paragraphs (a)(1) (i), (ii), and (iv) of this section.

(2) Each person required by paragraph (a)(1) of this section to submit reports shall file such a report with the Agency within 30 days after the award to him of a contract or subcontract, unless such person has submitted such a report within 12 months preceding the date of the award. Subsequent reports shall be submitted annually in accordance with paragraph (a)(1) of this section, or at such other intervals as the CCO or the Director may require. The Agency, with the approval of the Director may extend the time for filing any report.

(3) The Director, the CCO, or the applicant, on his own motion, may require a prime contractor or subcontractor to keep employment or other records and to furnish, in the form requested, within reasonable limits, such information as the Director, CCO, or the applicant deems necessary for the administration of the order.

(4) Failure to file timely, complete and accurate reports as required constitutes noncompliance with the prime contractor's or subcontractor's obligations under the equal opportunity clause and is ground for the imposition by the Agency, the Director, the applicant, prime contractor or subcontractor, of any sanctions as authorized by the Order and the rules, regulations and relevant orders of the Secretary of Labor. Any such failure shall be reported in writing to the Director by the CCO as soon as practicable after it occurs.

(b) *Requirements for bidders or prospective contractors*—(1) *Previous reports.* Each bidder or prospective prime contractor and proposed subcontractor, where appropriate, shall

state in the bid or in writing at the outse of negotiations for the contract:

(i) Whether it has developed and has on file at each establishment affirmative action programs pursuant to 41 CFR part 60–2;

(ii) Whether it has participated in any previous contract or subcontract subject to the equal opportunity clause; and

(iii) If so, whether it has filed with the Joint Reporting Committee, the Director, an agency, or the Equal Employment Opportunity Commission all reports due under the applicable filing requirements.

(2) *Additional information.* A bidder or prospective prime contractor or proposed subcontractor shall be required to submit such information as the CCO, the DCCO, or the Director requests prior to the award of the contract or subcontract. When a determination has been made to award the contract or subcontract to a specific contractor, such contractor shall be required, prior to award, or after the award, or both, to furnish such other information as the Agency, the applicant, or the Director requests.

(c) *Use of reports.* Reports filed pursuant to this section shall be used only in connection with the administration of the Order and the Civil Rights Act of 1964, or in furtherance of the purposes of the Order and said Act.

§ 8.12 Compliance reviews.

(a) *General.* The purpose of a compliance review is to determine if the prime contractor or subcontractor maintains nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and that employees are placed, trained, upgraded, promoted, and otherwise treated during employment without regard to race, color, religion, sex, or national origin. It shall consist of a comprehensive analysis and evaluation of each aspect of the aforementioned practices, policies, and conditions resulting therefrom. Where necessary, recommendations for appropriate sanctions shall be made. Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion. Before the contractor can be found to be in compliance with the Order and these regulations, it must make a specific commitment, in writing, to correct any such deficiencies. The commitment must include the precise action to be taken and dates for completion. The time period allotted shall be no longer than the minimum period necessary to effect such changes. Upon approval of the commitment by the CCO, the ADCCO, the appropriate DCCO, or the Administrator, the contractor may be considered in compliance, on condition that the commitments are faithfully kept. The contractor shall be notified that making such commitments does not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.

(b) *Regular compliance reviews.* Each DCCO shall institute a program of regular compliance reviews of those contractors and subcontractors for which he is assigned responsibility.

(c) *Special compliance reviews.* A special compliance review of bidders, applicants, offerors, contractors, or subcontractors will be conducted at the request of the CCO or the Director to determine compliance or ability to comply with the order, the rules, regulations and relevant orders of the Secretary of Labor, these rules and regulations and directives issued pursuant to each of the above.

(d) *Reports*—(1) *Regular compliance review reports.* A report of each compliance review shall be forwarded to the CCO within 30 days after the regular review is conducted unless otherwise provided.

(2) *Special compliance review reports.* A special compliance review report shall be provided to the CCO or the Director, OFCC, as directed.

(3) *Preaward compliance review report.* A written report, including findings, of every preaward compliance review required by the rules, regulations, and relevant orders of the Secretary of Labor, or otherwise required by the Director, will be forwarded to the Director by the CCO within 10 days after the award for a post-award review.

(4) *Additional reports.* A written report of every other compliance

review or any other matter processed by the Agency involving an apparent violation of the equal opportunity clause shall be submitted to the Director. Such report shall contain a brief summary of the findings, including a statement of conclusions regarding the contractor's compliance or noncompliance with the requirements of the order, and a statement of the disposition of the case, including any corrective action taken or recommended and any sanctions or penalties imposed or recommended.

§ 8.13 Complaint procedure.

(a) *Who may file complaints.* Any interested party, including but not limited to any employee with such contractor may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination in violation of the equal opportunity clause. Such complaint is to be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the CCO or the Director upon good cause shown.

(b) *Where to file.* Complaints may be filed with the Director or at any EPA Regional Office. Any EPA employee receiving a complaint shall forward the complaint directly to the CCO or his designee. The CCO shall transmit a copy of the complaint to the Director within 10 days after the receipt thereof.

(c) *Contents of complaint.* (1) The complaint should include the name, address, and telephone number of the complainant; the name and address of the prime contractor or subcontractor committing the alleged discrimination; a description of the acts considered to be discriminatory; and any other pertinent information which will assist in the investigation and resolution of the complaint. The complaint shall be signed by the complainant or his authorized representative.

(2) Where a complaint contains incomplete information, the CCO shall seek promptly the needed information from the complainant. In the event such information is not furnished to the CCO within 60 days of the date of such request, the case may be closed.

(d) *Investigations.* For each complaint filed against a prime contractor or subcontractor for which EPA is the Compliance Agency, the CCO shall institute a prompt investigation and shall be responsible for developing a complete case record. A complete case record consists of the name and address of each person interviewed and a summary of his statement, copies or summaries of pertinent documents, and a narrative summary of the evidence disclosed in the investigation as it relates to each violation revealed. When a complaint is filed against a prime contractor or subcontractor for which the Agency is not the compliance agency, the CCO shall transmit the complaint to the Director for disposition.

(e) *Resolution of complaints.* (1) If the complaint investigation by the CCO shows no violation of the equal opportunity clause, he shall so inform the Director. The Director may request further investigation by the CCO.

(2) If any complaint investigation or compliance review indicated a violation of the equal opportunity clause, the matter should be resolved by informal means whenever possible. Such informal means may include the holding of a compliance conference. Each prime contractor and subcontractor shall be advised that the resolution is subject to review by the Director, and may be disapproved if he determines that such resolution is not sufficient to achieve compliance.

(3) Where any complaint investigation or compliance review indicates a violation of the equal opportunity clause and the matter has not been resolved by informal means, the CCO with the approval of the Director shall afford the contractor an opportunity for a hearing. If the final decision reached in accordance with the provisions of 41 CFR 60–1.26 is that a violation of the equal opportunity clause has taken place, the CCO with the approval of the Director, may cause the cancellation, termination, or suspension of any contract or subcontract, cause a contractor to be debarred from further contracts or subcontracts, or may impose such other sanctions as are authorized by the order.

(4) When a prime contractor or subcontractor, without a hearing, shall have complied with the recommendations or orders of the CCO or the Director and believes such recommendations or orders to be erroneous, he shall, upon filing a request therefor within 10 days of such compliance, be afforded an opportunity for a hearing and review of the alleged erroneous action by the CCO or the Director.

(5) For reasonable cause shown, the CCO may reconsider or cause to be reconsidered any matter on his own motion or pursuant to a request.

(f) *Report to the Director.* Within 60 days from receipt of a complaint involving a matter for which the Agency is the Compliance Agency or within such additional time as may be allowed by the Director for good cause shown, the CCO shall process the complaint and submit to the Director the case record and a summary report containing the following information:

(1) Name and address of the complainant.

(2) Brief summary of findings, including a statement as the CCO's conclusions regarding the contractor's compliance or noncompliance with the requirements of the equal opportunity clause.

(3) A statement of the disposition of the case, including any corrective action taken and any sanctions or penalties imposed or, whenever appropriate, the recommended corrective action and sanctions or penalties.

§ 8.14 Hearings and sanctions.

(a) The Administrator with the approval of the Director may convene formal or informal hearings as he may deem appropriate for inquiring into the status of compliance by any prime contractor or subcontractor with the terms of the equal opportunity clause.

(b) The Administrator may propose or apply sanctions in the event of noncompliance by a contractor or subcontractor with the requirements of the equal opportunity clause, subject to the limitations of the rules, regulations and relevant orders of the Secretary of Labor, particularly 41 CFR 60-1.27, and of the rules and regulations of the Agency.

(c) The conduct of hearings and the proposal and application of sanctions shall be in accordance with the requirements of the order and of the rules and regulations of the Agency.

§ 8.15 Intimidation and interference.

The sanctions and penalties contained in Subpart D of the order may be exercised by the CCO or the Director against any prime contractor, subcontractor or applicant who fails to take all necessary steps to insure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in an investigation, compliance review, hearing, or any other activity related to the administration of the order or any other Federal, State, or local laws requiring equal employment opportunity.

§ 8.16 Segregated facilities certificate.

Prior to the award of any nonexempt Government contract or subcontract or federally assisted construction contract or subcontract, the Agency or the Applicant shall require the prospective prime contractor, and each prime contractor and subcontractor shall require each subcontractor to submit a certification, in the form approved by the Director, that the prospective prime contractor or subcontractor does not and will not maintain any facilities he provides for his employees in a segregated manner, or permit his employees to perform their services at any location under his control where segregated facilities are maintained; and that he will obtain a similar certification in the form approved by the Director, prior to the award of any nonexempt subcontract.

§ 8.17 Solicitations or advertisements for employees.

In solicitations or advertisements for employees placed by or on behalf of a prime contractor or subcontractor, the requirements of paragraph (2) of the equal opportunity clause shall be satisfied whenever the prime contractor or subcontractor complies with any of the following:

(a) States expressly in the solicitations or advertising that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin;

(b) Uses display or other advertising, and the advertising includes an appropriate insignia prescribed by the Director. The use of the insignia is considered subject to the provisions of 18 U.S.C. 701;

(c) Uses a single advertisement, and the advertisement is grouped with other advertisements under a caption which clearly states that all employers in the group assure all qualified applicants equal consideration for employment without regard to race, color, religion, sex, or national origin;

(d) Uses a single advertisement in which appears in clearly distinguishable type the phrase *an equal opportunity employer.*

§ 8.18 Access to records of employment.

Each prime contractor and subcontractor shall permit access during normal business hours to his books, records, and accounts pertinent to compliance with the order, and all rules and regulations promulgated pursuant thereto, by the Agency or the Director for purposes of investigation to ascertain compliance with the equal opportunity clause of the contract or subcontract. Information obtained in this manner shall be used only in connection with the administration of the Civil Rights Act of 1964, and in furtherance of the purposes of the order and that Act.

§ 8.19 Notices to be posted.

Contractors and subcontractors required to do so by paragraphs (1) and (3) of the equal opportunity clause shall post notices to be provided by the CCO. Such notices shall be in compliance with the requirements of 41 CFR 60-1.42.

§ 8.20 Program directives and instructions.

Appropriate program officials may issue such directives, procedures, and instructions as they consider necessary to achieve equal employment opportunity in programs administered by them, provides such issuances are not inconsistent with the provisions of the order, the rules, regulations, and relevant orders of the Secretary of Labor or the Director, or with these regulations. A copy of such directives, procedures, and instructions shall be submitted to the CCO for approval prior to issuance.

Subpart B—Compliance Hearing and Appeal Procedures

General

§ 8.31 Authority.

These rules of procedure supplement, and are established pursuant to, the provisions of 41 CFR 60-1.26(b).

§ 8.32 Scope of rules.

These rules govern the practice and procedure for proceedings conducted by the Agency to decide whether to impose sanctions on a respondent under section 209(a) (1), (5), and (6) of the Executive Order, for violations of the Executive Order and rules, regulations, and orders thereunder.

§ 8.33 Definitions.

Except as otherwise indicated by the context in which it appears in these regulations, the term:

(a) *Agency* means the Environmental Protection Agency.

(b) *Administrator* means the Administrator of the Environmental Protection Agency.

(c) *Director* means the Director of the Office of Civil Rights and Urban Affairs.

(d) *Executive Order* means Executive Order 11246, 30 FR 12319, as amended.

(e) *Hearing* means a hearing conducted as specified in this subpart to enable the Agency to decide whether to impose sanctions on a respondent for violations of the Executive Order and rules, regulations, and orders thereunder.

(f) *Hearing examiner* means a hearing examiner appointed by the Assistant Administrator for Enforcement and General Counsel.

(g) *Notice* means a notice of hearing.

(h) *Office of Civil Rights* means the Office of Civil Rights and Urban Affairs in the Agency.

(i) *Office of Federal Contract Compliance* means the Office of Federal Contract Compliance, U.S. Department of Labor.

(j) *Office of the Assistant Administrator for Enforcement and General Counsel*, means the Office of the Assistant Administrator for Enforcement and General Counsel in the Agency.

(k) *Party* means a respondent; the Director; and any person or organization participating in a proceeding pursuant to section 8.

(l) *Person* means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality or subdivision of such a government.

(m) *Respondent* means a person against whom sanctions are proposed because of alleged violations of the Executive Order and rules, regulations, and orders thereunder.

§ 8.34 Time computation.

Except as otherwise provided by law, in computing any period of time under these rules or in an order issued hereunder, the time begins with the day following the act or event, which starts the period running, and includes the last day of the period, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event it includes the next following day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the period of time to be computed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays and other nonbusiness days shall be excluded in the computation. In all other cases such days shall be included in the computation.

Designation and Responsibilities of Hearing Examiner

§ 8.35 Designation.

Each hearing shall be held before a hearing examiner designated by the Assistant Administrator for Enforcement and General Counsel.

§ 8.36 Authority and responsibilities.

(a) The hearing examiner shall have all powers necessary to preside over the parties and the proceedings, conduct the hearing and enter recommend findings and conclusions and a recommended determination. His powers shall include, but not be limited to, the power to:

(1) Hold conferences to settle, simplify, or fix the issues involved, or to consider other matters that may aid in the expeditious disposition of the proceedings.

(2) Require parties at any point in the proceedings to state their position with respect to the various issues involved.

(3) Establish rules for media coverage of the proceedings.

(4) Rule on motions and other procedural items.

(5) Regulate the course of the hearing, the conduct of counsel, parties, witnesses and other participants.

(6) Administer oaths and affirmations, call witnesses on his own motion, examine witnesses and direct witnesses to testify.

(7) Receive, rule on, exclude or limit evidence.

(8) Fix time limits for submission of written documents in matters before him.

(9) Take any action authorized by these regulations or the provisions of applicable law.

(b) The hearing examiner shall recommend findings of fact, conclusions of law and a determination of the issues on the basis of the record before him to the Assistant Administrator for Enforcement and General Counsel.

Appearance and Practice

§ 8.37 Participation by a party.

Subject to the provisions contained in § 8.38 of this part, a party may appear in person, by representative, or by counsel, and participate fully in any proceeding held under these regulations.

§ 8.38 Determination of parties.

(a) The respondent and the Director shall be the initial parties to any proceeding. To the extent that proceed-

ings hereunder are based in whole or in part on matters subject to a collective bargaining agreement, any labor organization which is signatory to such agreement shall also have the right to participate as a party.

(b) Other persons may at the discretion of the hearing examiner or of the Assistant Administrator for Enforcement and General Counsel be granted the right to participate as parties if he determines that the final decision could directly and adversely affect them or the class they represent, and that they may contribute materially to the disposition of the proceedings.

(c) Any person wishing to participate as a party under paragraph (b) of this section in any hearing shall submit a petition to the hearing examiner within 15 days after the notice of such hearing has been served. The petition should be filed with the hearing examiner and served on Respondent, on the Director, and on any other person who is a party at the time of filing. Such petition shall concisely state: (1) Petitioner's interest in the proceeding, (2) how his participation as a party will contribute materially to the disposition of the proceeding, (3) who will appear for petitioner, (4) the issues on which petitioner wishes to participate, and (5) whether petitioner intends to present witnesses.

(d) The hearing examiner shall promptly ascertain whether there are objections to the petition. He shall then determine whether the petitioner is qualified in his judgment to be a party in the proceedings, as defined in paragraph (b) of this section, and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the hearing examiner may request all such petitioners to designate a single representative, or he may recognize one or more of such petitioners to represent all such petitioners; provided that the representative of a labor organization qualified to participate under paragraph (a) of this section shall be permitted to participate as a party. The hearing examiner shall give each such petitioner written notice of the decision on his petition. If the petition is denied, he shall briefly state the grounds for denial and shall then treat the petition as a request for participation as amicus curiae. The hearing examiner shall give written notice to each party of each petition granted.

(e) Persons whose petition for party participation is denied may appeal the decision to the Assistant Administrator for Enforcement and General Counsel within 7 days of receipt of notice of denial. The Assistant Administrator for Enforcement and General Counsel will make the final decision for the Agency to grant or deny the petition.

§ 8.39 Determination and participation of amici.

(a) Any interested person wishing to participate as amicus curiae in the proceeding shall file a petition before the commencement of the hearing. Such petition shall concisely state the petitioner's interest in the hearing and who will represent petitioner.

(b) The hearing examiner may grant the petition if he finds that the petitioner has an interest in the proceedings and may contribute materially to the disposition of the proceedings. The hearing examiner shall give the petitioner written notice of the decision on his petition.

(c) An amicus curiae is not a party and may only participate as provided in paragraph (d) of this section.

(d) An amicus curiae may submit a written statement of position to the hearing examiner at any time prior to the beginning of a hearing, and shall serve a copy on each party. He may also file a brief or written statement at such time as the parties submit proposed findings and conclusions and supporting briefs to the hearing examiner and at such time as the parties file exceptions to the recommended determination of the hearing examiner.

Form and Filing of Documents

§ 8.40 Form.

Documents filed in a proceeding subject to this part shall show the docket description and title of the proceeding, the party or amicus submitting the document, the date signed, and the title, if any, and address of the signa-

tory. The original will be signed in ink by the party representing the party or amicus. Copies need not be signed, but the name of the person signing the original shall be reproduced.

§ 8.41 Filing and service.

(a) Copies of all documents submitted in a proceeding shall be served on all parties including amicii, and in addition the original and two copies of each document shall be submitted for filing with the hearing examiner at the address stated in the notice. With respect to exhibits and transcripts of testimony, only originals need be filed.

(b) Service upon a party or amicus shall be made by delivering one copy of each document requiring service in person or by certified mail, return receipt requested, properly addressed with postage prepaid, to the party or amicus or his attorney or designated representative. Filing will be made in person or by certified mail, return receipt requested, to the hearing examiner, at the address stated in the notice of scheduled hearing.

(c) The date of filing or of service of a document shall be the day when the document is deposited in the United States mail or is delivered in person.

§ 8.42 Certificate of service.

The original of every document filed and required to be served upon parties shall be endorsed with a certificate of service signed by the party or amicus curiae making service or by his attorney or representative, stating that such service has been made, the date of service, and the manner of service.

PROCEDURES

§ 8.43 Notice of hearing.

Whenever a respondent requests a hearing, the Director shall serve on the Respondent, as required by 41 CFR 60-1.26(b), a notice of hearing by registered mail, return receipt requested, to Respondent's last known address. Such notice shall contain the time and place of the hearing; a statement or citation of the legal authority under which the proceedings are to be held; and a concise statement of the facts which are thought to justify the sanctions or other actions proposed.

§ 8.44 Answer to notice.

Within 15 days after receipt of the notice of hearing, Respondent shall file an answer. This answer shall admit or deny specifically and in detail matters set forth in each allegation of the notice unless Respondent is without knowledge sufficient to enable him to so admit or deny, in which case his answer should so state, and the statement shall be deemed a denial. Matters not specifically denied shall be deemed admitted. Matters alleged in the answer as affirmative defenses shall be separately stated and numbered. Failure of Respondent to file an answer within the 15-day period following receipt of the notice may be deemed an admission to all facts recited in the notice.

§ 8.45 Amendments.

The Director may amend his notice once as a matter of course before an answer is filed, and Respondent may amend its answer once as a matter of course not later than 15 days after it is filed. Other amendments of the notice or of the answer to the notice shall be made only by leave of the hearing examiner. An amended notice shall be answered within 10 days of its service, or within the time for filing an answer to the original notice, whichever period is longer.

§ 8.46 Motions.

Motions and petitions shall state the relief sought, the basis for relief and the authority relied upon. If made before or after the hearing itself, they shall be in writing. If made at the hearing, they may be stated orally; but the hearing examiner may require that they be reduced to writing and filed and served on all parties. Within 8 days after a written motion or petition is served on a party, that party may file a response. An immediate oral response may be made to an oral motion. Oral argument on motions will be at the discretion of the hearing examiner.

§ 8.47 Disposition of motions.

The hearing examiner may not grant a written motion or petition prior to expiration of the time for

filing responses thereto, but may overrule or deny such motion or petition without awaiting response: *Provided, however,* That prehearing conferences, hearings, and decisions need not be delayed pending disposition of motions or petitions. Oral motions and petitions may be ruled on immediately.

§ 8.48 Interlocutory appeals.

No interlocutory appeals will be permitted from an adverse ruling except as specifically provided in these rules.

§ 8.49 Exhibits.

Proposed exhibits shall be exchanged at the prehearing conference, or otherwise prior to the hearing, if the hearing examiner so directs. If the hearing examiner directs an exchange, proposed exhibits not so exchanged may be denied admission as evidence. The authenticity of all exhibits submitted prior to the hearing under direction of the hearing examiner, will be deemed admitted unless written objection thereto is filed and served on all parties at least fifteen (15) days prior to the date of the hearing, or unless good cause is shown for failure to file such written objection.

§ 8.50 Admissions as to facts and documents.

Not later than 25 days prior to the date of the hearing any party may serve upon an opposing party a written request for the admission of the genuineness and authenticity of any relevant documents described in, and exhibited with, the request, or for the admission of the truth of any relevant matters of fact stated in the request. Each matter as to which an admission is requested shall be deemed admitted unless within a period of 20 days the party to whom the request is directed serves upon the requesting party a statement either (a) denying specifically the matters as to which an admission is requested, or (b) setting forth in detail the reasons why he cannot truthfully either admit or deny such matters.

§ 8.51 Discovery.

(a) *Methods.* Parties may obtain discovery as provided in these rules by deposition, written interrogatories, production of documents, or other items; or by permission to enter property for inspection and other purposes.

(b) *Scope.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the hearing.

(c) *Protective orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the hearing examiner may make any order which justice requires to limit or condition discovery in order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(d) *Sequence and timing.* Methods of discovery may be used in any sequence. The fact that a party is conducting discovery shall not operate to delay any other party's discovery.

(e) *Time limit.* Discovery by all parties will be completed within such time as the examiner directs from the date the notice of hearing is served on Respondent.

§ 8.52 Depositions.

(a) A party may take the testimony of any person, including a party, by disposition upon oral examination. This may be done by stipulation or by notice, as set forth in paragraph (b) of this section. On motion of any party or other person upon whom the notice is served, the hearing examiner may for cause shown enlarge or shorten the time for the deposition, change the place of the deposition, limit the scope of the deposition or quash the notice. Depositions of persons other than parties or their representatives shall be upon consent of the deponent.

(b) (1) The party taking a deposition will give reasonable notice in writing to every other party of the time and place for taking depositions, the name and address of each person to be examined, if known, or, if the name and address of any such person are not known, a general description sufficient to identify him or the particular class or group to which he belongs.

(2) The notice to a deponent may be accompanied by a request for the production of documents and tangible things at the taking of the deposition.

(3) A party may name as the deponent a corporation, partnership, association, or governmental agency and may designate a particular person within the organization whose testimony is desired and the matters on which examination is requested. If no particular person is named, the organization shall designate one or more agents to testify on its behalf, and may set forth the matters on which each will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

(c) Examination and cross-examination of witnesses shall proceed as would be permitted at the hearing. Each witness shall be placed under oath by a disinterested person qualified to administer oaths by the laws of the United States or of the place where the examination is held, and the testimony taken by such person shall be recorded verbatim.

(d) During the taking of a deposition a party or deponent may request suspension of the deposition on grounds of bad faith in the conduct of the examination, annoyance, embarrassment, oppression of deponent or party or improper questions propounded. The deposition will then be adjourned. However, the objecting party or deponent must immediately move the hearing examiner for a ruling on such objections. The hearing examiner may then limit the scope or manner of the taking of the deposition.

(e) The officer shall certify the deposition and promptly file it with the hearing examiner. The originals or true copies of documents and other items produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition as a part thereof.

(f) The party taking the deposition shall give prompt notice of its filing to all other parties.

§ 8.53 Use of depositions at hearing.

(a) Any part or all of a deposition, so far as the statements or other matter in it would be admissible if the deponent were present and testifying in person at the hearing, may be used as follows against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof:

(1) Any deposition may be used for contradiction or impeachment of the deponent as a witness.

(2) The deposition of a party, or of an agent designated by a party to testify on his behalf, may be used by an adverse party for any purpose.

(3) The deposition of any witness may be used for any purpose if the witness is dead; or if the witness is at greater distance than 100 miles from the place of hearing, or is out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; or if the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or, upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open hearing, to allow the deposition to be used.

(b) If only part of a deposition is offered in evidence, the remainder becomes subject to introduction by any party.

(c) Objection may be made at the hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

§ 8.54 Interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories after the notice of hearing has been filed.

(b) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney or other representative making them. Answers and objections shall be made within 30 days after the service of the interrogatories. The party submitting the interrogatories may move for an order under section 26(a)(1) with respect to

any objection to or other failure to answer an interrogatory.

(c) Interrogatories may relate to any matter not privileged which is relevant to the subject matter of the hearing.

§ 8.55 Production of documents and things and entry upon land for inspection and other purposes.

(a) After the notice of hearing has been filed, any party may serve on any other party a request to produce and permit the party, or someone acting on his behalf, to inspect and copy any designated documents, phonorecords, or other data compilations from which information can be obtained and which are in the possession, custody, or control of the party upon whom the request is served. If necessary, translation of data compilations shall be done by the party furnishing the information.

(b) After the notice of hearing has been filed, any party may serve on any other party a request to permit entry upon designated property in the possession or control of the latter party for the purpose of inspection, measuring, surveying or photographing, testing, or sampling the property or any designated object.

(c) Each request shall set forth with reasonable particularity the items to be inspected and shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(d) The party upon whom the request is served shall respond within 15 days after the service of the request. The response shall state, with respect to each item, that inspection and related activities will be permitted as requested, unless there are objections in which case the reason for each objection shall be stated. The party submitting the request may move for an order under section 26(a)(1) with respect to any objection or other failure to respond.

§ 8.56 Sanctions.

(a) A party, upon reasonable notice to other parties, may move for an order as follows:

(1) If a deponent fails to answer a question propounded or submitted under section 22(c) or a corporation or other entity fails to make a designation under section 22(b)(3), or a party fails to answer an interrogatory submitted under section 24, or if a party, under section 25, fails to respond that inspection will be permitted or fails to permit inspection, the discovering party may move for an order compelling an answer, a designation, or inspection.

(2) An evasive or incomplete answer is to be treated as a failure to answer.

(b) If a party or an agent designated to testify fails to obey an order to permit discovery, the hearing examiner may make such orders as are just, including:

(1) That the matters regarding which the order was made or any other designated facts shall be established in accordance with the claim of the party obtaining the order;

(2) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence.

(c) If a party or an agent designated to testify fails after proper service (1) to appear for his deposition, (2) to serve answers or objections to interrogatories submitted under section 24, or (3) to serve a written response to a request for inspection, submitted under section 25, the hearing examiner on motion may make such orders as are just, including those authorized under paragraphs (b) (1) and (2) of this section.

§ 8.57 Ex parte communications.

(a) Written or oral communications involving any substantive or procedural issue in a matter subject to these rules, directed to the hearing examiner, the Director; the Director, Office of Federal Contract Compliance; or the Assistant Administrator for Enforcement and General Counsel, shall be deemed ex parte communications and are not to be considered part of any record or the basis for any official decision, unless the communication is made by motion pursuant to these rules.

(b) The hearing examiner shall not consult any person, or party, on any fact in issue or on the merits of any

matter before him except upon notice and opportunity for all parties to participate.

(c) No employee or agent of the Federal Government engaged in the investigation and prosecution of a proceeding governed by these rules shall participate or advise in the rendering of the recommended or final decision, except as witness or counsel in the proceeding.

PREHEARING

§ 8.58 Prehearing conferences.

(a) Within 15 days after the answer has been filed, the hearing examiner will establish a prehearing conference date for all parties including persons whose petition requesting party status has not been ruled upon. Written notice of the prehearing conference shall be sent by the hearing examiner.

(b) At the prehearing conference the following matters, among others, shall be considered: (1) Simplification and delineation of the issues to be heard; (2) stipulations; (3) limitation of number of witnesses and exchange of witness lists; (4) procedure applicable to the proceeding; (5) offers of settlement; and (6) scheduling of the dates for exchange of exhibits. Additional prehearing conferences may be scheduled at the discretion of the hearing examiner, upon his own motion or the motion of a party.

HEARING

§ 8.59 Appearances.

In the event that a party appears at the hearing and no party appears for the opposing side, the party who is present shall either present all his evidence or shall present such portion thereof as is sufficient to make a prima facie case before the hearing examiner. Failure to appear at a hearing shall be deemed to be a waiver of the right to be served with a copy of the hearing examiner's proposed decision and to file exceptions to it.

§ 8.60 Purpose.

(a) The hearing is directed primarily to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. A hearing will be held in order to determine whether Respondent has failed to comply with one or more applicable requirements of the Executive Order, and rules, regulations, and orders thereunder. However, this shall not prevent the parties from entering into a stipulation of the facts.

(b) If all facts are stipulated, the proceedings shall go to conclusion in accordance with §§ 8.68 through 8.73.

§ 8.61 Evidence.

Formal rules of evidence will not apply to the proceeding. Irrelevant, immaterial, unreliable, and unduly repetitious evidence will be excluded from the record of a hearing. Hearsay evidence shall not be inadmissible as such.

§ 8.62 Official notice.

Whenever a party offers a document, or part thereof, in evidence, and such document, or part thereof, has been shown by the offeror to be reasonably available to the public, such document need not be produced or marked for identification, but may be offered for official notice as a public document item by specifying the document or relevant part thereof. Official notice may also be taken of other matters, at the discretion of the hearing examiner.

§ 8.63 Testimony.

Testimony shall be given under oath by witnesses at the hearing. All witnesses shall be subject to cross-examination, and at the discretion of the hearing examiner, may be cross-examined without regard to the scope of direct examination as to any matter which is material to the proceeding.

§ 8.64 Objections.

Objections to evidence shall be timely, and the party making them shall briefly state the ground relied upon.

§ 8.65 Exceptions.

Exceptions to rulings of the hearing examiner are unnecessary. It is sufficient that a party, at the time the ruling of the hearing examiner is sought, makes known the action which

he desires the hearing examiner to take, or his objection to an action taken, and his ground therefor.

§ 8.66 Offer of proof.

An offer of proof made in connection with an objection taken to any ruling of the hearing examiner excluding proffered oral testimony shall consist of a statement of the substance of the evidence which counsel contends would be adduced by such testimony. If the excluded evidence consists of evidence in written form or consists of reference to documents, a copy of such evidence shall be marked for identification and shall accompany the record as the offer of proof.

§ 8.67 Official transcript.

An official reporter will be designated for all hearings. The official transcripts taken of testimony and argument, together with exhibits, briefs, or memoranda of law filed therewith, shall be filed with the hearing examiner. Transcripts may be obtained by the parties and the public from the official at rates not to exceed the applicable rates fixed by the contract with the reporter. Upon notice to all parties, the hearing examiner may authorize such corrections to the transcript as are necessary to accurately reflect the testimony.

Posthearing Procedures

§ 8.68 Proposed findings of fact and conclusions of law.

Within 30 days after the close of the hearing each party may file, or the hearing examiner may request, proposed findings of fact and conclusions of law together with supporting briefs. Such proposals and briefs shall be served on all parties and amici. Reply briefs may be submitted within 15 days after receipt of the initial proposals and briefs. Reply briefs should be filed and served on all parties and amici.

§ 8.69 Record for decision.

The hearing examiner will make his recommended findings, conclusions, and recommended decision upon the basis of the record before him. The transcript of testimony, exhibits, and all papers, documents, and requests filed in the proceedings except the correspondence section of the docket, shall constitute the record.

§ 8.70 Recommended determination.

The hearing examiner shall, in an expeditious manner, rule on proposed findings and conclusions submitted by the parties and shall make recommended findings, conclusions, and decision. These rulings and recommendations shall be certified, together with the record for decision, to the Assistant Administrator for Enforcement and General Counsel for his decision. The rulings, recommended findings, conclusions and decision of the hearing examiner shall be served on all parties and amici curiae to the proceedings.

§ 8.71 Exceptions to recommended determination.

Within 30 days after receipt of the recommended determination, all parties to the proceeding may file with the Assistant Administrator for Enforcement and General Counsel, exceptions to the recommended findings, conclusions and decision of the hearing examiner, together with supporting briefs. Service of such exceptions and briefs shall be made on all parties and amici. Such briefs may be responded to within 15 days of their receipt. Responses shall be filed with the Assistant Administrator for Enforcement and General Counsel, and served on all parties and amici.

§ 8.72 Record.

After expiration of the time for filing briefs and exceptions, the Assistant Administrator for Enforcement and General Counsel shall make a decision on the basis of the record before him. The record includes the record before the hearing examiner, the rulings, the recommended findings, conclusions and decision of the hearing examiner, and the exceptions and briefs filed subsequent to the hearing examiner's decision.

§ 8.73 Final decision.

The Assistant Administrator for Enforcement and General Counsel may

affirm, modify, or set aside in whole or in part the recommended findings, conclusions, and decision of the hearing examiner. The decision of the Assistant Administrator for Enforcement and General Counsel shall not be final without the approval of the Director.

PART 10—ADMINISTRATIVE CLAIMS UNDER FEDERAL TORT CLAIMS ACT

Subpart A—General

Sec.

10.1 Scope of regulations.

Subpart B—Procedures

10.2 Administrative claim; when presented; place of filing.
10.3 Administrative claims; who may file.
10.4 Evidence to be submitted.
10.5 Investigation, examination, and determination of claims.
10.6 Final denial of claim.
10.7 Payment of approved claim.
10.8 Release.
10.9 Penalties.
10.10 Limitation on Environmental Protection Agency's authority.
10.11 Relationship to other agency regulations.

AUTHORITY: Sec. 1, 80 Stat. 306; 28 U.S.C. 2672; 28 CFR Part 14.

SOURCE: 38 FR 16868, June 27, 1973, unless otherwise noted.

Subpart A—General

§ 10.1 Scope of regulations.

The regulations in this part apply only to claims asserted under the Federal Tort Claims Act, as amended, 28 U.S.C. 2671-2680, for money damages against the United States because of damage to or loss of property or personal injury or death, caused by the negligent or wrongful act or omission of any employee of the Environmental Protection Agency (EPA) while acting within the scope of his/her employment.

[51 FR 25832, July 16, 1986]

Subpart B—Procedures

§ 10.2 Administrative claim; when presented; place of filing.

(a) For purpose of the regulations in this part, a claim shall be deemed to have been presented when the Environmental Protection Agency receives, at a place designated in paragraph (c) of this section, an executed Standard Form 95 or other written notification of an incident accompanied by a claim for money damages in a sum certain for damage to or loss of property, for personal injury, or for death, alleged to have occurred by reason of the incident. A claim which should have been presented to EPA, but which was mistakenly addressed to or filed with another Federal agency, shall be deemed to be presented to EPA as of the date that the claim is received by EPA. A claim mistakenly addressed to or filed with EPA shall forthwith be transferred to the appropriate Federal agency, if ascertainable, or returned to the claimant.

(b) A claim presented in compliance with paragraph (a) of this section may be amended by the claimant at any time prior to final action by the Administrator, or his designee, or prior to the exercise of the claimant's option to bring suit under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, EPA shall have 6 months in which to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until 6 months after the filing of an amendment.

(c) Forms may be obtained and claims may be filed with the EPA office having jurisdiction over the employee involved in the accident or incident, or with the EPA Claims Officer, Office of General Counsel (LE-132G), 401 M Street SW., Washington, DC 20460.

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

§ 10.3 Administrative claims; who may file.

(a) A claim for injury to or loss of property may be presented by the owner of the property interest which is the subject of the claim, his duly authorized agent, or his legal representative.

(b) A claim for personal injury may be presented by the injured person, his duly authorized agent, or his legal representative.

(c) A claim based on death may be presented by the executor or administrator of the decedent's estate or by any other person legally entitled to assert such a claim under applicable State law.

(d) A claim for loss wholly compensated by an insurer with the rights of a subrogee may be presented by the insurer. A claim for loss partially compensated by an insurer with the rights of a subrogee may be presented by the insurer or the insured individually as their respective interests appear, or jointly. Whenever an insurer presents a claim asserting the rights of a subrogee, he shall present with his claim appropriate evidence that he has the rights of a subrogee.

(e) A claim presented by an agent or legal representative shall be presented in the name of the claimant, be signed by the agent or legal representative, show the title or legal capacity of the person signing, and be accompanied by evidence of his authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative.

§ 10.4 Evidence to be submitted.

(a) *Death.* In support of a claim based on death, the claimant may be required to submit the following evidence or information:

(1) An authenticated death certificate or other competent evidence showing cause of death, date of death, and age of the decedent.

(2) Decedent's employment or occupation at time of death, including his monthly or yearly salary or earnings (if any), and the duration of his last employment or occupation.

(3) Full names, addresses, birth dates, kinship, and marital status of the decedent's survivors, including identification of those survivors who were dependent for support upon the decedent at the time of his death.

(4) Degree of support afforded by the decedent to each survivor dependent upon him for support at the time of his death.

(5) Decedent's general physical and mental condition before death.

(6) Itemized bills for medical and burial expenses incurred by reason of the incident causing death, or itemized receipts of payments for such expenses.

(7) If damages for pain and suffering prior to death are claimed, a physician's detailed statement specifying the injuries suffered, duration of pain and suffering, any drugs administered for pain and the decedent's physical condition in the interval between injury and death.

(8) Any other evidence or information which may have a bearing on either the responsibility of the United States for the death or the damages claimed.

(b) *Personal Injury.* In support of a claim for personal injury, including pain and suffering, the claimant may be required to submit the following evidence or information:

(1) A written report by his attending physician or dentist setting forth the nature and extent of the injury, nature and extent of treatment, any degree of temporary or permanent disability, the prognosis, period of hospitalization, and any diminished earning capacity. In addition, the claimant may be required to submit to a physical or mental examination by a physician employed or designated by EPA. A copy of the report of the examining physician shall be made available to the claimant upon the claimant's written request provided that the claimant has, upon request, furnished the report referred to in the first sentence of this subparagraph and has made or agrees in writing to make available to EPA any other physician's reports previously or thereafter made of the physical or mental condition which is the subject matter of his claim.

(2) Itemized bills for medical, dental, hospital and related expenses incurred, or itemized receipts of payment for such expenses.

(3) If the prognosis reveals the necessity for future treatment, a statement of expected duration of and expenses for such treatment.

(4) If a claim is made for loss of time from employment, a written statement from his employer showing actual time lost from employment, whether he is a full or part-time employee, and wages or salary actually lost.

(5) If a claim is made for loss of income and the claimant is self-employed, documentary evidence showing the amount of earnings actually lost.

(6) Any other evidence or information which may have a bearing on the responsibility of the United States for either the personal injury or the damages claimed.

(c) *Property Damage.* In support of a claim for damage to or loss of property, real or personal, the claimant may be required to submit the following evidence or information:

(1) Proof of ownership.

(2) A detailed statement of the amount claimed with respect to each item of property.

(3) An itemized receipt of payment for necessary repairs or itemized written estimates of the cost of such repairs.

(4) A statement listing date of purchase, purchase price, market value of the property as of date of damage, and salvage value, where repair is not economical.

(5) Any other evidence or information which may have a bearing on the responsibility of the United States either for the injury to or loss of property or for the damage claimed.

(d) *Time limit.* All evidence required to be submitted by this section shall be furnished by the claimant within a reasonable time. Failure of a claimant to furnish evidence necessary to a determination of his claim within three months after a request therefor has been mailed to his last known address may be deemed an abandonment of the claim. The claim may be thereupon disallowed.

§ 10.5 Investigation, examination, and determination of claims.

The EPA Claims Officer adjusts, determines, compromises and settles all administrative tort claims filed with EPA. In carrying out these functions, the EPA Claims Officer makes such investigations as are necessary for a determination of the validity of the claim. The decision of the EPA Claims Officer is a final agency decision of purposes of 28 U.S.C. 2675.

[51 FR 25832, July 16, 1986]

§ 10.6 Final denial of claim.

(a) Final denial of an administrative claim shall be in writing and sent to the claimant, his attorney, or legal representative by certified or registered mail. The notification of final denial may include a statement of the reasons for the denial and shall include a statement that, if the claimant is dissatisfied with EPA's action, he may file suit in an appropriate U.S. District Court not later than 6 months after the date of mailing of the notification.

(b) Prior to the commencement of suit and prior to the expiration of the 6-month period after the date of mailing by certified or registered mail of notice of final denial of the claim as provided in 28 U.S.C. 2401(b), a claimant, his duly authorized agent, or legal representative, may file a written request with the EPA for reconsideration of a final denial of a claim under paragraph (a) of this section. Upon the timely filing of a request for reconsideration, EPA shall have 6 months from the date of filing in which to make a final disposition of the claim and the claimant's option under 28 U.S.C. 2675(a) to bring suit shall not accrue until 6 months after the filing of a request for reconsideration. Final action on a request for reconsideration shall be effected in accordance with the provisions of paragraph (a) of this section.

§ 10.7 Payment of approved claim.

(a) Upon allowance of his claim, claimant or his duly authorized agent shall sign the voucher for payment, Standard Form 1145, before payment is made.

(b) When the claimant is represented by an attorney, the voucher for payment (SF 1145) shall designate both the claimant and his attorney as "payees." The check shall be delivered

to the attorney whose address shall appear on the voucher.

(c) No attorney shall charge fees in excess of 25 percent of a judgment or settlement after litigation, or in excess of 20 percent of administrative settlements (28 U.S.C. 2678).

§ 10.8 Release.

Acceptance by the claimant, his agent or legal representative of any award, compromise or settlement made hereunder, shall be final and conclusive on the claimant, his agent or legal representative and any other person on whose behalf or for whose benefit the claim has been presented, and shall constitute a complete release of all claims against either the United States or any employee of the Government arising out of the same subject matter.

§ 10.9 Penalties.

A person who files a false claim or makes a false or fraudulent statement in a claim against the United States may be liable to a fine of not more than $10,000 or to imprisonment of not more than 5 years, or both (18 U.S.C. 287,1001), and, in addition, to a forfeiture of $2,000 and a penalty of double the loss or damage sustained by the United States (31 U.S.C. 3729).

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

§ 10.10 Limitation on Environmental Protection Agency's authority.

(a) An award, compromise or settlement of a claim hereunder in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee. For the purposes of this paragraph, a principal claim and any derivative or subrogated claim shall be treated as a single claim.

(b) An administrative claim may be adjusted, determined, compromised or settled hereunder only after consultation with the Department of Justice when, in the opinion of the Environmental Protection Agency:

(1) A new precedent or a new point of law is involved; or

(2) A question of policy is or may be involved; or

(3) The United States is or may be entitled to indemnity or contribution from a third party and the Agency is unable to adjust the third party claim; or

(4) The compromise of a particular claim, as a practical matter, will or may control the disposition of a related claim in which the amount to be paid may exceed $25,000.

(c) An administrative claim may be adjusted, determined, compromised, or settled by EPA hereunder only after consultation with the Department of Justice when EPA is informed or is otherwise aware that the United States or an employee, agent, or cost-plus contractor of the United States is involved in litigation based on a claim arising out of the same incident or transaction.

§ 10.11 Relationship to other agency regulations.

The regulations in this part supplement the Attorney General's regulations in part 14 of Chapter 1 of title 28, CFR, as amended. Those regulations, including subsequent amendments thereto, and the regulations in this part apply to the consideration by the Environmental Protection Agency of administrative claims under the Federal Tort Claims Act.

[38 FR 16868, June 27, 1973, as amended at 51 FR 25832, July 16, 1986]

PART 11—SECURITY CLASSIFICATION REGULATIONS PURSUANT TO EXECUTIVE ORDER 11652

Sec.

11.1 Purpose.
11.2 Background.
11.3 Responsibilities.
11.4 Definitions.
11.5 Procedures.
11.6 Access by historical researchers and former Government officials.

AUTHORITY: Executive Order 11652 (37 FR 5209, March 10, 1972) and the National Security Directive of May 17, 1972 (37 FR 10053, May 19, 1972).

SOURCE: 37 FR 23541, Nov. 4, 1972, unless otherwise noted.

§ 11.1 Purpose.

These regulations establish policy and procedures governing the classification and declassification of national security information. They apply also to information or material designated under the Atomic Energy Act of 1954, as amended, as "Restricted Data," or "Formerly Restricted Data" which, additionally, is subject to the provisions of the Act and regulations of the Atomic Energy Commission.

§ 11.2 Background.

While the Environmental Protection Agency does not have the authority to originally classify information or material in the interest of the national security, it may under certain circumstances downgrade or declassify previously classified material or generate documents incorporating classified information properly originated by other agencies of the Federal Government which must be safeguarded. Agency policy and procedures must conform to applicable provisions of Executive Order 11652, and the National Security Council Directive of May 17, 1972, governing the safeguarding of national security information.

§ 11.3 Responsibilities.

(a) Classification and Declassification Committee: This committee, appointed by the Administrator, has the authority to act on all suggestions and complaints with respect to EPA's administration of this order. It shall establish procedures to review and act within 30 days upon all applications and appeals regarding requests for declassification. The Administrator, acting through the committee, shall be authorized to overrule previous determinations in whole or in part when, in its judgment, continued protection is no longer required. If the committee determines that continued classification is required under section 5(B) of Executive Order 11652, it shall promptly so notify the requester and advise him that he may appeal the denial to the Interagency Classification Review Committee.

(b) Director, Security and Inspection Division, Office of Administration: The Director, Security and Inspection Division, is responsible for the overall management and direction of a program designed to assure the proper handling and protection of classified information, and that classified information in the Agency's possession bears the appropriate classification markings. He also will assure that the program operates in accordance with the policy established herein, and will serve as Secretary of the Classification and Declassification Committee.

(c) Assistant Administrators, Regional Administrators, Heads of Staff Offices, Directors of National Environmental Research Centers are responsible for designating an official within their respective areas who shall be responsible for:

(1) Serving as that area's liaison with the Director, Security and Inspection Division, for questions or suggestions concerning security classification matters.

(2) Reviewing and approving, as the representative of the contracting offices, the DD Form 254, Contract Security Classification Specification, issued to contractors.

(d) Employees; (1) Those employees generating documents incorporating classified information properly originated by other agencies of the Federal Government are responsible for assuring that the documents are marked in a manner consistent with security classification assignments.

(2) Those employees preparing information for public release are responsible for assuring that such information is reviewed to eliminate classified information.

(3) All employees are responsible for bringing to the attention of the Director, Security and Inspection Division, any security classification problems needing resolution.

§ 11.4 Definitions.

(a) *Classified information.* Official information which has been assigned a security classification category in the interest of the national defense or foreign relations of the United States.

(b) *Classified material.* Any document, apparatus, model, film, recording, or any other physical object from which classified information can be

derived by study, analysis, observation, or use of the material involved.

(c) *Marking.* The act of physically indicating the classification assignment on classified material.

(d) *National security information.* As used in this order this term is synonymous with "classified information." It is any information which must be protected against unauthorized disclosure in the interest of the national defense or foreign relations of the United States.

(e) *Security classification assignment.* The prescription of a specific security classification for a particular area or item of information. The information involved constitutes the sole basis for determining the degree of classification assigned.

(f) *Security classification category.* The specific degree of classification (Top Secret, Secret or Confidential) assigned to classified information to indicate the degree of protection required.

(1) *Top Secret.* Top Secret refers to national security information or material which requires the highest degree of protection. The test for assigning Top Secret classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(2) *Secret.* Secret refers to that national security information or material which requires a substantial degree of protection. The test for assigning Secret classification shall be whether its unauthorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of scientific or technological developments relating to national security. The classification Secret shall be sparingly used.

(3) *Confidential.* Confidential refers to that national security information or material which requires protection. The test for assigning Confidential classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

§ 11.5 Procedures.

(a) *General.* Agency instructions on access, marking, safekeeping, accountability, transmission, disposition, and destruction of classification information and material will be found in the EPA Security Manual for Safeguarding Classified Material. These instructions shall conform with the National Security Council Directive of May 17, 1972, governing the classification, downgrading, declassification, and safeguarding of National Security Information.

(b) *Classification.* (1) When information or material is originated within EPA and it is believed to require classification, the person or persons responsible for its origination shall protect it in the manner prescribed for protection of classified information. The information will then be transmitted under appropriate safeguards to the Director, Security and Inspection Division, who will forward it to the department having primary interest in it with a request that a classification determination be made.

(2) A holder of information or material which incorporates classified information properly originated by other agencies of the Federal Government shall observe and respect the classification assigned by the originator.

(3) If a holder believes there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification, he shall so advise the Director, Security and Inspection Division,

who will be responsible for obtaining a resolution.

(c) *Downgrading and declassification.* Classified information and material officially transferred to the Agency during its establishment, pursuant to Reorganization Plan No. 3 of 1970, shall be declassified in accordance with procedures set forth below. Also, the same procedures will apply to the declassification of any information in the Agency's possession which originated in departments or agencies which no longer exist, except that no declassification will occur in such cases until other departments having an interest in the subject matter have been consulted. Other classified information in the Agency's possession may be downgraded or declassified by the official authorizing its classification, by a successor in capacity, or by a supervisory official of either.

(1) *General Declassification Schedule.*—(i) *Top Secret.* Information or material originally classified Top Secret shall become automatically downgraded to Secret at the end of the second full calendar year following the year in which it was originated, downgraded to Confidential at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the 10th full calendar year following the year in which it was originated.

(ii) *Secret.* Information and material originally classified Secret shall become automatically downgraded to Confidential at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(iii) *Confidential.* Information and material originally classified Confidential shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(2) *Exemption from the General Declassification Schedule.* Information or material classified before June 1, 1972, assigned to Group 4 under Executive Order No. 10501, as amended, shall be subject to the General Declassification Schedule. All other information or material classified before June 1, 1972, whether or not assigned to Groups 1, 2, or 3, of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of 10 years after the date of origin it shall be subject to a mandatory classification review and disposition in accordance with the following criteria and conditions:

(i) It shall be declassified unless it falls within one of the following criteria:

(*a*) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(*b*) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(*c*) Classified information or material disclosing a system, plan, installation, project, or specific foreign relations matter, the continuing protection of which is essential to the national security.

(*d*) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(ii) *Mandatory review of exempted material.* All classified information and material originated after June 1, 1972, which is exempted under any of the above criteria shall be subject to a classification review by the originating department at any time after the expiration of 10 years from the date of origin provided:

(*a*) A department or member of the public requests a review;

(*b*) The request describes the document or record with sufficient particularity to enable the department to identify it; and

(*c*) The record can be obtained with a reasonable amount of effort.

(*d*) Information or material which no longer qualifies for exemption under any of the above criteria shall be declassified. Information or material which continues to qualify under any of the above criteria shall be so marked, and, unless impossible, a date for automatic declassification shall be set.

(iii) All requests for "mandatory review" shall be directed to:

Director, Security and Inspection Division, Environmental Protection Agency, Washington, DC 20460.

The Director, Security and Inspection Division shall promptly notify the action office of the request, and the action office shall immediately acknowledge receipt of the request in writing.

(iv) *Burden of proof for administrative determinations.* The burden of proof is on the originating Agency to show that continued classification is warranted within the terms of this paragraph (c)(2).

(v) *Availability of declassified material.* Upon a determination under paragraph (ii) of this paragraph (c)(2), that the requested material no longer warrants classification, it shall be declassified and made promptly available to the requester, if not otherwise exempt from disclosure under section 552(b) of Title 5 U.S.C. (Freedom of Information Act) or other provision of law.

(vi) *Classification review requests.* As required by paragraph (ii) of this paragraph (c)(2) of this order, a request for classification review must describe the document with sufficient particularity to enable the Department or Agency to identify it and obtain it with a reasonable amount of effort. Whenever a request is deficient in its description of the record sought, the requester should be asked to provide additional identifying information whenever possible. Before denying a request on the ground that it is unduly burdensome, the requester should be asked to limit his request to records that are reasonably obtainable. If nonetheless the requester does not describe the records sought with sufficient particularity, or the record requested cannot be obtained with a reasonable amount of effort, the requester shall be notified of the reasons why no action will be taken and of his right to appeal such decision.

§ 11.6 Access by historical researchers and former Government officials.

(a) Access to classified information or material may be granted to historical researchers or to persons who formerly occupied policymaking positions to which they were appointed by the President: *Provided, however,* That in each case the head of the originating Department shall:

(1) Determine that access is clearly consistent with the interests of the national security; and

(2) Take appropriate steps to assure that classified information or material is not published or otherwise compromised.

(b) Access granted a person by reason of his having previously occupied a policymaking position shall be limited to those papers which the former official originated, reviewed, signed, or received while in public office, except as related to the "Declassification of Presidential Papers," which shall be treated as follows:

(1) *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential library. Such declassification shall only be undertaken in accord with:

(i) The terms of the donor's deed of gift;

(ii) Consultations with the Departments having a primary subject-matter interest; and

(iii) The provisions of § 11.5(c).

PART 12—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS OR ACTIVITIES CONDUCTED BY THE ENVIRONMENTAL PROTECTION AGENCY

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AUTHORITY: 29 U.S.C. 794.

SOURCE: 52 FR 30606, Aug. 14, 1987, unless otherwise noted.

§ 12.101 Purpose.

The purpose of this part is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the U.S. Postal Service. Section 504 regulations applicable to recipients of financial assistance from the Environmental Protection Agency (EPA) may be found at 40 CFR part 7 (1986).

§ 12.102 Application.

This part applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

§ 12.103 Definitions.

For purposes of this part, the term—

Agency means Environmental Protection Agency.

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, U.S. Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive, digestive, genitourinary; hemic and lymphatic; skin, and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term *physical or mental impairment* includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional ill-

ness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in subparagraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to any agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity, without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature; or

(2) With respect to any other program or activity an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity.

(3) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this part by § 12.140.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93-516, 88 Stat. 1617); and the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95-602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99-506, 100 Stat. 1810). As used in this part, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

§§ 12.104—12.109 [Reserved]

§ 12.110 Self-evaluation.

(a) The agency shall, by November 13, 1987, begin a nationwide evaluation, of its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this part. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to, participate in the self-evaluation process by submitting comments (both oral and written).

(b) The evaluation shall be concluded by September 14, 1988, with a written report submitted to the Administrator that states the findings of the self-evaluation, any remedial action taken, and recommendations, if any, for further remedial action.

(c) The Administrator shall, within 60 days of the receipt of the report of the evaluation and recommendations, direct that certain remedial actions be taken as he/she deems appropriate.

(d) The agency shall, for at least three years following completion of the evaluation required under paragraph (b) of this section, maintain on file and make available for public inspection:

(1) A list of the interested persons consulted;

(2) A description of the areas examined and any problems identified; and

(3) A description of any modifications made.

§ 12.111 Notice.

The agency shall make available to employees, unions representing employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provi-

sions of this part and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the agency head finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 12.112—12.129 [Reserved]

§ 12.130 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b) (1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards; or

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the program or activities of entities that are licensed or certified by the agency are not, themselves, covered by this part.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal

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statute or Executive order to a different class of individuals with handicaps is not prohibited by this part.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 12.131—12.139 [Reserved]

§ 12.140 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 12.141—12.148 [Reserved]

§ 12.149 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 12.150, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

§ 12.150 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps; or

(2) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 12.150(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 13, 1987, except that where

structural changes in facilities are undertaken, such changes shall be made by September 14, 1990, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 14, 1988, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

§ 12.151 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151-4157), as established in 41 CFR 101-19.600 to 101-19.607, apply to buildings covered by this section.

§§ 12.152—12.159 [Reserved]

§ 12.160 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individuals with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 12.160 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or designee after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written state-

ment of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

§§ 12.161—12.169 [Reserved]

§ 12.170 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs or activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) Responsibility for coordinating implementation of this section shall be vested in the Director of the Office of Civil Rights, EPA or his/her designate.

(d) The complainant may file a complete complaint at any EPA office. All complete complaints must be filed within 180 days of the alleged act of discrimination. The agency may extend this time period for good cause. The agency shall accept and investigate all complete complaints for which it has jurisdiction.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building of facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151-4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by paragraph (g) of this section. The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the Administrator or a designee.

(j) The Administrator or a designee shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the Administrator or designee determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section above may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

§§ 12.171—12.999 [Reserved]

PART 13—CLAIMS COLLECTION STANDARDS

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AUTHORITY: Federal Claims Collection Act of 1966, as amended, 31 U.S.C. 3711 *et seq.*; the Federal Claims Collection Standards, 4 CFR parts 101-105; 5 U.S.C. 552a, 5512, and 5514.

SOURCE: 53 FR 37270, Sept. 23, 1988, unless otherwise noted.

Subpart A—General

§ 13.1 Purpose and scope.

This regulation prescribes standards and procedures for the Environmental Protection Agency's (EPA's) collection and disposal of debts. These standards and procedures are applicable to all debts for which a statute, regulation or contract does not prescribe different standards or procedures. This regulation covers EPA's collection, compromise, suspension, termination, and referral of debts.

§ 13.2 Definitions.

(a) *Debt* means an amount owed to the United States from sources which include loans insured or guaranteed by the United States and all other amounts due the United States from fees, grants, contracts, leases, rents, royalties, services, sales of real or personal property, overpayments, fines, penalties, damages, interest, forfeitures (except those arising under the Uniform Code of Military Justice), and all other similar sources. As used in this regulation, the terms *debt* and *claim* are synonymous.

(b) *Delinquent debt* means any debt which has not been paid by the date specified by the Government for payment or which has not been satisfied in accordance with a repayment agreement.

(c) *Debtor* means an individual, organization, association, corporation, or a State or local government indebted to the United States or a person or entity with legal responsibility for assuming the debtor's obligation.

(d) *Agency* means the United States Environmental Protection Agency.

(e) *Administrator* means the Administrator of EPA or an EPA employee or official designated to act on the Administrator's behalf.

(f) *Administrative offset* means the withholding of money payable by the United States to, or held by the United States for, a person to satisfy a debt the person owes the Government.

(g) *Creditor agency* means the Federal agency to which the debt is —wed.

(h) *Disposable pay* means that part of current basic pay, special pay, incentive pay, retired pay, retainer pay, or in the case of an employee not entitled to basic pay, other authorized pay remaining after the deduction of any amount described in 5 CFR 581.105 (b) through (f). These deductions include,

but are not limited to: Social security withholdings; Federal, State and local tax withholdings; health insurance premiums; retirement contributions; and life insurance premiums.

(i) *Employee* means a current employee of the Federal Government including a current member of the Armed Forces.

(j) *Person* means an individual, firm, partnership, corporation, association and, except for purposes of administrative offsets under subpart C and interest, penalty and administrative costs under subpart B of this regulation, includes State and local governments and Indian tribes and components of tribal governments.

(k) *Employee salary offset* means the administrative collection of a debt by deductions at one or more officially established pay intervals from the current pay account of an employee without the employee's consent.

(l) *Waiver* means the cancellation, remission, forgiveness or non-recovery of a debt or debt-related charge as permitted or required by law.

§ 13.3 Interagency claims.

This regulation does not apply to debts owed EPA by other Federal agencies. Such debts will be resolved by negotiation between the agencies or by referral to the General Accounting Office (GAO).

§ 13.4 Other remedies.

(a) This regulation does not supersede or require omission or duplication of administrative proceedings required by contract, statute, regulation or other Agency procedures, *e.g.*, résolution of audit findings under grants or contracts, informal grant appeals, formal appeals, or review under a procurement contract.

(b) The remedies and sanctions available to the Agency under this regulation for collecting debts are not intended to be exclusive. The Agency may impose, where authorized, other appropriate sanctions upon a debtor for inexcusable, prolonged or repeated failure to pay a debt. For example, the Agency may stop doing business with a grantee, contractor, borrower or lender; convert the method of payment under a grant or contract from an advance payment to a reimbursement method; or revoke a grantee's or contractor's letter-of-credit.

§ 13.5 Claims involving criminal activities or misconduct.

(a) The Administrator will refer cases of suspected criminal activity or misconduct to the EPA Office of Inspector General. That office has the responsibility for investigating or referring the matter, where appropriate, to the Department of Justice (DOJ), and/or returning it to the Administrator for further actions. Examples of activities which should be referred are matters involving fraud, anti-trust violations, embezzlement, theft, false claims or misuse of Government money or property.

(b) The Administrator will not administratively compromise, terminate, suspend or otherwise dispose of debts involving criminal activity or misconduct without the approval of DOJ.

§ 13.6 Subdivision of claims not authorized.

A claim will not be subdivided to avoid the $20,000 limit on the Agency's authority to compromise, suspend, or terminate a debt. A debtor's liability arising from a particular transaction or contract is a single claim.

§ 13.7 Omission not a defense.

Failure by the Administrator to comply with any provision of this regulation is not available to a debtor as a defense against payment of a debt.

Subpart B—Collection

§ 13.8 Collection rule.

(a) The Administrator takes action to collect all debts owed the United States arising out of EPA activities and to reduce debt delinquencies. Collection actions may include sending written demands to the debtor's last known address. Written demand may be preceded by other appropriate action, including immediate referral to DOJ for litigation, when such action is necessary to protect the Government's interest. The Administrator may contact the debtor by telephone, in person and/or in writing to demand

prompt payment, to discuss the debtor's position regarding the existence, amount or repayment of the debt, to inform the debtor of its rights (*e.g.*, to apply for waiver of the indebtedness or to have an administrative review) and of the basis for the debt and the consequences of nonpayment or delay in payment.

(b) The Administrator maintains an administrative file for each debt and/or debtor which documents the basis for the debt, all administrative collection actions regarding the debt (including communications to and from the debtor) and its final disposition. Information from a debt file relating to an individual may be disclosed only for purposes which are consistent with this regulation, the Privacy Act of 1974 and other applicable law.

§13.9 Initial notice.

(a) When the Administrator determines that a debt is owed EPA, he provides a written initial notice to the debtor. Unless otherwise provided by agreement, contract or order, the initial notice informs the debtor:

(1) Of the amount, nature and basis of the debt;

(2) That payment is due immediately upon receipt of the notice;

(3) That the debt is considered delinquent if it is not paid within 30 days of the date mailed or hand-delivered;

(4) That interest charges and, except for State and local governments and Indian tribes, penalty charges and administrative costs may be assessed against a delinquent debt;

(5) Of any rights available to the debtor to dispute the validity of the debt or to have recovery of the debt waived (citing the available review or waiver authority, the conditions for review or waiver, and the effects of the review or waiver request on the collection of the debt), and of the possibility of assessment of interest, penalty and administrative costs; and

(6) The address, telephone number and name of the person available to discuss the debt.

(b) EPA will respond promptly to communications from the debtor. Response generally will be within 20 days of receipt of communication from the debtor.

(c) Subsequent demand letters also will advise the debtor of any interest, penalty or administrative costs which have been assessed and will advise the debtor that the debt may be referred to a credit reporting agency (see § 13.14), a collection agency (see § 13.13) or to DOJ (see § 13.33) if it is not paid.

§13.10 Aggressive collection actions; documentation.

(a) EPA takes actions and effective follow-up on a timely basis to collect all claims of the United States for money and property arising out of EPA's activities. EPA cooperates with other Federal agencies in their debt collection activities.

(b) All administrative collection actions are documented in the claim file, and the bases for any compromise, termination or suspension of collection actions is set out in detail. This documentation, including the Claims Collection Litigation Report required § 13.33, is retained in the appropriate debt file.

§13.11 Interest, penalty and administrative costs.

(a) *Interest*

EPA will assess interest on all delinquent debts unless prohibited by statute, regulation or contract.

(1) Interest begins to accrue on all debts from the date of the initial notice to the debtor. EPA will not recover interest where the debt is paid within 30 days of the date of the notice. EPA will assess an annual rate of interest that is equal to the rate of the current value of funds to the United States Treasury (*i.e.*, the Treasury tax and loan account rate) as prescribed and published by the Secretary of the Treasury in the FEDERAL REGISTER and the Treasury Fiscal Requirements Manual Bulletins, unless a different rate is necessary to protect the interest of the Government. EPA will notify the debtor of the basis for its finding that a different rate is necessary to protect the interest of the Government.

(2) The Administrator may extend the 30-day period for payment where he determines that such action is in

the best interest of the Government. A decision to extend or not to extend the payment period is final and is not subject to further review.

(3) The rate of interest, as initially assessed, remains fixed for the duration of the indebtedness. If a debtor defaults on a repayment agreement, interest may be set at the Treasury rate in effect on the date a new agreement is executed.

(4) Interest will not be assessed on interest charges, administrative costs or later payment penalties. However, where a debtor defaults on a previous repayment agreement and interest, administrative costs and penalties charges have been waived under the defaulted agreement, these charges can be reinstated and added to the debt principal under any new agreement and interest charged on the entire amount of the debt.

(b) *Administrative costs of collecting overdue debts.* The costs of the Agency's administrative handling of overdue debts, based on either actual or average cost incurred, will be charged on all debts except those owed by State and local governments and Indian tribes. These costs include both direct and indirect costs. Administrative costs will be assessed monthly throughout the period the debt is overdue except as provided by § 13.12.

(c) *Penalties.* As provided by 31 U.S.C. 3717(e)(2), a penalty charge will be assessed on all debts, except those owned by State and local governments and Indian tribes, more than 90 days delinquent. The penalty charge will be at a rate not to exceed 6% per annum and will be assessed monthly.

(d) *Allocation of payments.* A partial payment by a debtor will be applied first to outstanding administrative costs, second to penalty assessments, third to accrued interest and then to the outstanding debt principal.

(e) *Waiver.* (1) The Administrator may (without regard to the amount of the debt) waive collection of all or part of accrued interest, penalty or administrative costs, where he determines that—

(i) Waiver is justified under the criteria of § 13.25;

(ii) The debt or the charges resulted from the Agency's error, action or inaction, and without fault by the debtor; or

(iii) Collection of these charges would be against equity and good conscience or not in the best interest of the United States.

(2) A decision to waive interest, penalty charges or administrative costs may be made at any time prior to payment of a debt. However, where these charges have been collected prior to the waiver decision, they will not be refunded. The Administrator's decision to waive or not waive collection of these charges is a final agency action.

§ 13.12 Interest and charges pending waiver or review.

Interest, penalty charges and administrative costs will continue to accrue on a debt during administrative appeal, either formal or informal, and during waiver consideration by the Agency; *except,* that interest, penalty charges and administrative costs will not be assessed where a statute or a regulation specifically prohibits collection of the debt during the period of the administrative appeal or the Agency review.

§ 13.13 Contracting for collection services.

EPA will use private collection services where it determines that their use is in the best interest of the Government. Where EPA determines that there is a need to contract for collection services it will—

(a) Retain sole authority to resolve any dispute by the debtor of the validity of the debt, to compromise the debt, to suspend or terminate collection action, to refer the debt to DOJ for litigation, and to take any other action under this part which does not result in full collection of the debt;

(b) Require the contractor to comply with the Privacy Act of 1974, as amended, to the extent specified in 5 U.S.C. 552a(m), with applicable Federal and State laws pertaining to debt collection practices (*e.g.,* the Fair Debt Collection Practices Act (15 U.S.C. 1692 *et seq.*)), and with applicable regulations of the Internal Revenue Service;

(c) Require the contractor to account accurately and fully for all amounts collected; and

(d) Require the contractor to provide to EPA, upon request, all data and reports contained in its files relating to its collection actions on a debt.

§ 13.14 Use of credit reporting agencies.

EPA reports delinquent debts to appropriate credit reporting agencies.

(a) EPA provides the following information to the reporting agencies:

(1) A statement that the claim is valid and is overdue;

(2) The name, address, taxpayer identification number and any other information necessary to establish the identity of the debtor;

(3) The amount, status and history of the debt; and

(4) The program or pertinent activity under which the debt arose.

(b) Before disclosing debt information, EPA will:

(1) Take reasonable action to locate the debtor if a current address is not available; and

(2) If a current address is available, notify the debtor by certified mail, return receipt requested, that:

(i) The designated EPA official has reviewed the claim and has determined that it is valid and overdue;

(ii) That within 60 days EPA intends to disclose to a credit reporting agency the information authorized for disclosure by this subsection; and

(iii) The debtor can request a complete explanation of the claim, can dispute the information in EPA's records concerning the claim, and can file for an administrative review, waiver or reconsideration of the claim, where applicable.

(c) Before information is submitted to a credit reporting agency, EPA will provide a written statement to the reporting agency that all required actions have been taken. Additionally, EPA will, thereafter, ensure that the credit reporting agency is promptly informed of any substantive change in the conditions or amounts of the debt, and promptly verify or correct information relevant to the claim.

(d) If a debtor disputes the validity of the debt, the credit reporting agency will refer the matter to the appropriate EPA official. The credit reporting agency will exclude the debt from its reports until EPA certifies in writing that the debt is valid.

§ 13.15 Taxpayer information.

(a) The Administrator may obtain a debtor's current mailing address from the Internal Revenue Service.

(b) Addresses obtained from the Internal Revenue Service will be used by the Agency, its officers, employees, agents or contractors and other Federal agencies only to collect or dispose of debts, and may be disclosed to credit reporting agencies only for the purpose of their use in preparing a commercial credit report on the taxpayer for use by EPA.

§ 13.16 Liquidation of collateral.

Where the Administrator holds a security instrument with a power of sale or has physical possession of collateral, he may liquidate the security or collateral and apply the proceeds to the overdue debt. EPA will exercise this right where the debtor fails to pay within a reasonable time after demand, unless the cost of disposing of the collateral is disproportionate to its value or special circumstances require judicial foreclosure. However, collection from other businesses, including liquidation of security or collateral, is not a prerequisite to requiring payment by a surety or insurance company unless expressly required by contract or statute. The Administrator will give the debtor reasonable notice of the sale and an accounting of any surplus proceeds and will comply with any other requirements of law or contract.

§ 13.17 Suspension or revocation of license or eligibility.

When collecting statutory penalties, forfeitures, or debts for purposes of enforcement or compelling compliance, the Administrator may suspend or revoke licenses or other privileges for any inexcusable, prolonged or repeated failure of a debtor to pay a claim. Additionally, the Administrator may suspend or disqualify any contractor, lender, broker, borrower, grantee or other debtor from doing

business with EPA or engaging in programs EPA sponsors or funds if a debtor fails to pay its debts to the Government within a reasonable time. Debtors will be notified before such action is taken and applicable suspension or debarment procedures will be used. The Administrator will report the failure of any surety to honor its obligations to the Treasury Department for action under 6 U.S.C. 11.

§ 13.18 Installment payments.

(a) Whenever, feasible, and except as otherwise provided by law, debts owed to the United States, together with interest, penalty and administrative costs, as required by § 13.11, will be collected in a single payment. However, where the Administrator determines that a debtor is financially unable to pay the indebtedness in a single payment or that an alternative payment mechanism is in the best interest of the United States, the Administrator may approve repayment of the debt in installments. The debtor has the burden of establishing that it is financially unable to pay the debt in a single payment or that an alternative payment mechanism is warranted. If the Administrator agrees to accept payment by installments, the Administrator may require a debtor to execute a written agreement which specifies all the terms of the repayment arrangement and which contains a provision accelerating the debt in the event of default. The size and frequency of installment payments will bear a reasonable relation to the size of the debt and the debtor's ability to pay. The installment payments will be sufficient in size and frequency to liquidate the debt in not more than 3 years, unless the Administrator determines that a longer period is required. Installment payments of less than $50 per month generally will not be accepted, but may be accepted where the debtor's financial or other circumstances justify. If the debt is unsecured, the Administrator may require the debtor to execute a confess-judgment note with a tax carry-forward and a tax carry-back provision. Where the Administrator secures a confess-judgment note, the Administrator will provide the debtor a written explanation of the consequences of the debtor's signing the note.

(b) If a debtor owes more than one debt and designates how a voluntary installment payment is to be applied among the debts, that designation will be approved if the Administrator determines that the designation is in the best interest of the United States. If the debtor does not designate how the payment is to be applied, the Administrator will apply the payment to the various debts in accordance with the best interest of the United States, paying special attention to applicable statutes of limitations.

§ 13.19 Analysis of costs; automation; prevention of overpayments, delinquencies or defaults.

(a) The Administrator may periodically compare EPA's costs in handling debts with the amounts it collects.

(b) The Administrator may periodically consider the need, feasibility, and cost effectiveness of automated debt collection operations.

(c) The Administrator may establish internal controls to identify the causes of overpayments and delinquencies and may issue procedures to prevent future occurrences of the identified problems.

Subpart C—Administrative Offset

§ 13.20 Administrative offset of general debts.

This subpart provides for EPA's collection of debts by administrative offset under section 5 of the Debt Collection Act of 1982 (31 U.S.C. 3716), other statutory authorities and the common law. It does not apply to offsets against employee salaries covered by §§ 13.21, 13.22 and 13.23 of this subpart. EPA will collect debts by administrative offsets where it determines that such collections are feasible and are not otherwise prohibited by statute or contract.

EPA will decide, on a case-by-case basis, whether collection by administrative offset is feasible and that its use furthers and protects the interest of the United States.

(a) *Standards.* (1) The Administrator collects debts by administrative offset if—

(i) The debt is certain in amount;

(ii) Efforts to obtain direct payment from the debtor have been, or would most likely be, unsuccessful or the Administrator and the debtor agree to the offset;

(iii) Offset is not expressly or implicitly prohibited by statute, regulation or contract;

(iv) Offset is cost-effective or has significant deterrent value;

(v) Offset does not substantially impair or defeat program objectives; and

(vi) Offset is best suited to further and protect the Government's interest.

(2) The Administrator may, in determining the method and amount of the offset, consider the financial impact on the debtor.

(b) *Interagency offset.* The Administrator may offset a debt owed to another Federal agency from amounts due or payable by EPA to the debtor, or may request another Federal agency to offset a debt owed to EPA. The Administrator may request the Internal Revenue Service to offset an overdue debt from a Federal income tax refund due a debtor where reasonable attempts to obtain payment have failed. Interagency offsets from employee salaries will be made in accordance with the procedures contained in §§ 13.22 and 13.23.

(c) *Multiple debts.* Where moneys are available for offset against multiple debts of a debtor, it will be applied in accordance with the best interest of the Government as determined by the Administrator on a case-by-case basis.

(d) *Statutory bar to offset.* Administrative offset will not be made more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not have been known through the exercise of reasonable care by the officer responsible for discovering or collecting the debt. For purposes of offset, the right to collect a debt accrues when the appropriate EPA official determines that a debt exists (e.g., contracting officer, grant award official, etc.), when it is affirmed by an administrative appeal or a court having jurisdiction, or when a debtor defaults on a payment agreement, whichever is latest. An offset occurs when money payable to the debtor is first withheld or when EPA requests offset from money held by another agency.

(e) *Pre-offset notice.* Before initiating offset, the Administrator sends the debtor written notice of:

(1) The basis for and the amount of the debt as well as the Agency's intention to collect the debt by offset if payment or satisfactory response has not been received within 30 days of the notice;

(2) The debtor's right to submit an alternative repayment schedule, to inspect and copy agency records pertaining to the debt, to request review of the determination of indebtedness or to apply for waiver under any available statute or regulation; and

(3) Applicable interest, penalty charges and administrative costs.

(f) *Alternative repayment.* The Administrator may, at the Administrator's discretion, enter into a repayment agreement with the debtor in lieu of offset. In deciding whether to accept payment of the debt by an alternative repayment agreement, the Administrator may consider such factors as the amount of the debt, the length of the proposed repayment period, whether the debtor is willing to sign a confess-judgment note, past Agency dealings with the debtor, documentation submitted by the debtor indicating that an offset will cause undue financial hardship, and the debtor's financial ability to adhere to the terms of a repayment agreement. The Administrator may require financial documentation from the debtor before considering the repayment arrangement.

(g) *Review of administrative determination.* (1) A debt will not be offset while a debtor is seeking either formal or informal review of the validity of the debt under this section or under another statute, regulation or contract. However, interest, penalty and administrative costs will continue to accrue during this period, unless otherwise waived by the Administrator.

The Administrator may initiate offset as soon as practical after completion of review or after a debtor waives the opportunity to request review.

(2) The Administrator may administratively offset a debt prior to the completion of a formal or informal review where the determines that:

(i) Failure to take the offset would substantially prejudice EPA's ability to collect the debt; and

(ii) The time before the first offset is to be made does not reasonably permit the completion of the review procedures. (Offsets taken prior to completion of the review process will be followed promptly by the completion of the process. Amounts recovered by offset but later found not to be owed will be refunded promptly.)

(3) The debtor must provide a written request for review of the decision to offset the debt no later than 15 days after the date of the notice of the offset unless a different time is specifically prescribed. The debtor's request must state the basis for the request for review.

(4) The Administrator may grant an extension of time for filing a request for review if the debtor shows good cause for the late filing. A debtor who fails timely to file or to request an extension waives the right to review.

(5) The Administrator will issue, no later than 60 days after the filing of the request, a written final decision based on the evidence, record and applicable law.

§ 13.21 Employee salary offset—general.

(a) *Purpose.* This section establishes EPA's policies and procedures for recovery of debts owed to the United States by installment collection from the current pay account of an employee.

(b) *Scope.* The provisions of this section apply to collection by salary offset under 5 U.S.C. 5514 of debts owed EPA and debts owed to other Federal agencies by EPA employees. This section does not apply to debts owed EPA arising from travel advances under 5 U.S.C. 5705, employee training expenses under 5 U.S.C. 4108 and to other debts where collection by salary offset is explicitly provided for or prohibited by another statute.

(c) *References.* The following statutes and regulations apply to EPA's recovery of debts due the United States by salary offset:

(1) 5 U.S.C. 5514, as amended, governing the installment collection of debts;

(2) 31 U.S.C. 3716, governing the liquidation of debts by administrative offset;

(3) 5 CFR part 550, subpart K, setting forth the minimum requirements for executive agency regulations on salary offset; and

(4) 4 CFR parts 101-105, the Federal Claims Collection Standards.

§ 13.22 Salary offset when EPA is the creditor agency.

(a) *Entitlement to notice, hearing, written response and decision.* (1) Prior to initiating collection action through salary offset, EPA will first provide the employee with the opportunity to pay in full the amount owed, unless such notification will compromise the Government's ultimate ability to collect the debt.

(2) Except as provided in paragraph (b) of this section, each employee from whom the Agency proposes to collect a debt by salary offset under this section is entitled to receive a written notice as described in paragraph (c) of this section.

(3) Each employee owing a debt to the United States which will be collected by salary offset is entitled to request a hearing on the debt. This request must be filed as prescribed in paragraph (d) of this section. The Agency will make appropriate hearing arrangements which are consistent with law and regulations. Where a hearing is held, the employee is entitled to a written decision on the following issues:

(i) The determination of the Agency concerning the existence or amount of the debt; and

(ii) The repayment schedule, if it was not established by written agreement between the employee and the Agency.

(b) *Exceptions to entitlement to notice, hearing, written response and final decision.* The procedural requirements of paragraph (a) of this section

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are not applicable to any adjustment of pay arising out of an employee's election of coverage or a change in coverage under a Federal benefits program (such as health insurance) requiring periodic deductions from pay, if the amount to be recovered was accumulated over four pay periods or less. However, if the amount to be recovered was accumulated over more than four pay periods the full procedures prescribed under paragraph (d) of this section will be extended to the employee.

(c) *Notification before deductions begin.* Except as provided in paragraph (b) of this section, deductions will not be made unless the employee is first provided with a minimum of 30 calendar days written notice. Notice will be sent by certified mail (return receipt requested), and must include the following:

(1) The Agency's determination that a debt is owed, including the origin, nature, and amount of the debt;

(2) The Agency's intention to collect the debt by means of deductions from the employee's current disposable pay account;

(3) The amount, frequency, proposed beginning date and duration of the intended deductions. (The proposed beginning date for salary offset cannot be earlier than 30 days after the date of notice, unless this would compromise the Government's ultimate ability to resolve the debt);

(4) An explanation of the requirements concerning interest, penalty and administrative costs;

(5) The employee's right to inspect and copy all records relating to the debt or to request and receive a copy of such records;

(6) If not previously provided, the employee's right to enter into a written agreement for a repayment schedule differing from that proposed by the Agency where the terms of the proposed repayment schedule are acceptable to the Agency. (Such an agreement must be in writing and signed by both the employee and the appropriate EPA official and will be included in the employee's personnel file and documented in the EPA payroll system);

(7) The right to a hearing conducted by a hearing official not under the control of the Administrator, if a request is filed;

(8) The method and time for requesting a hearing;

(9) That the filing of a request for hearing within 15 days of receipt of the original notification will stay the assessment of interest, penalty and administrative costs and the commencement of collection proceedings;

(10) That a final decision on the hearing (if requested) will be issued at the earliest practical date, but no later than 60 days after the filing of the request, unless the employee requests and the hearing official grants a delay in the proceedings;

(11) That knowingly false or frivolous statements, representations or evidence may subject the employee to—

(i) Disciplinary procedures under 5 U.S.C. Chapter 75 or any other applicable statutes or regulations;

(ii) Criminal penalties under 18 U.S.C. 286, 287, 1001 and 1002 or other applicable statutory authority; or

(iii) Penalties under the False Claims Act, 31 U.S.C. 3729-3731, or any other applicable statutory authority;

(12) Any other rights and remedies available under statutes or regulations governing the program for which the collection is being made; and

(13) That amounts paid or deducted for the debt, except administrative costs and penalty charges where the entire debt is not waived or terminated, which are later waived or found not owed to the United States will be promptly refunded to the employee.

(d) *Request for hearing.* An employee may request a hearing by filing a written request directly with the Director, Financial Management Division (PM-226F), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. The request must state the bases upon which the employee disputes the proposed collection of the debt. The request must be signed by the employee and be received by EPA within 15 days of the employee's receipt of the notification of proposed deductions. The employee should submit in writing all facts, evidence

and witnesses which support his/her position to the Director, Financial Management Division, within 15 days of the date of the request for a hearing. The Director, Financial Management Division, will arrange for the services of a hearing official not under the control of the Administrator and will provide the hearing official with all documents relating to the claim.

(e) *Requests for hearing made after time expires.* Late requests for a hearing may be accepted if the employee can show that the delay in filing the request for a hearing was due to circumstances beyond the employee's control.

(f) *Form of hearing, written response and final decision.* (1) Normally, a hearing will consist of the hearing official making a decision based upon a review of the claims file and any materials submitted by the debtor. However, in instances where the hearing official determines that the validity of the debt turns on an issue of veracity or credibility which cannot be resolved through review of documentary evidence, the hearing official at his discretion may afford the debtor an opportunity for an oral hearing. Such oral hearings will consist of an informal conference before a hearing official in which the employee and the Agency will be given the opportunity to present evidence, witnesses and argument. If desired, the employee may be represented by an individual of his/her choice. The Agency shall maintain a summary record of oral hearings provided under these procedures.

(2) Written decisions provided after a request for hearing will, at a minimum, state the facts evidencing the nature and origin of the alleged debt; and the hearing official's analysis, findings and conclusions.

(3) The decision of the hearing official is final and binding on the parties.

(g) *Request for waiver.* In certain instances, an employee may have a statutory right to request a waiver of overpayment of pay or allowances, e.g., 5 U.S.C. 5584 or 5 U.S.C. 5724(i). When an employee requests waiver consideration under a right authorized by statute, further collection on the debt will be suspended until a final administrative decision is made on the waiver request. However, where it appears that the Government's ability to recover the debt may be adversely affected because of the employee's resignation, termination or other action, suspension of recovery is not required. During the period of the suspension, interest, penalty charges and administrative costs will not be assessed against the debt. The Agency will not duplicate, for purposes of salary offset, any of the procedures already provided the debtor under a request for waiver.

(h) *Method and source of collection.* A debt will be collected in a lump-sum or by installment deductions at established pay intervals from an employee's current pay account, unless the employee and the Agency agree to alternative arrangements for payment. The alternative payment schedule must be in writing, signed by both the employee and the Administrator and will be documented in the Agency's files.

(i) *Limitation on amount of deduction.* The size and frequency of installment deductions generally will bear a reasonable relation to the size of the debt and the employee's ability to pay. However, the amount deducted for any period may not exceed 15 percent of the disposable pay from which the deduction is made, unless the employee has agreed in writing to the deduction of a greater amount. If possible, the installment payments will be in amounts sufficient to liquidate the debt in three years or less. Installment payments of less than $25 normally will be accepted only in the most unusual circumstances.

(j) *Duration of deduction.* If the employee is financially unable to pay a debt in a lump-sum or the amount of the debt exceeds 15 percent of disposable pay, collection will be made in installments. Installment deductions will be made over the period of active duty or employment except as provided in paragraph (a)(1) of this section.

(k) *When deductions may begin.* (1) Deductions to liquidate an employee's debt will begin on the date stated in the Agency's notice of intention to collect from the employee's current pay unless the debt has been repaid or the employee has filed a timely request

for hearing on issues for which a hearing is appropriate.

(2) If the employee has filed a timely request for hearing with the Agency, deductions will begin after the hearing official has provided the employee with a final written decision indicating the amount owed the Government. Following the decision by the hearing official, the employee will be given 30 days to repay the amount owed prior to collection through salary offset, unless otherwise provided by the hearing official.

(l) *Liquidation from final check.* If the employee retires, resigns, or the period of employment ends before collection of the debt is completed, the remainder of the debt will be offset from subsequent payments of any nature due the employee (e.g., final salary payment, lump-sum leave, etc.).

(m) *Recovery from other payments due a separated employee.* If the debt cannot be liquidated by offset from any final payment due the employee on the date of separation, EPA will liquidate the debt, where appropriate, by administrative offset from later payments of any kind due the former employee (*e.g.*, retirement pay). Such administrative offset will be taken in accordance with the procedures set forth in § 13.20.

(n) *Employees who transfer to another Federal agency.* If an EPA employee transfers to another Federal agency prior to repaying a debt owed to EPA, the following action will be taken:

(1) The appropriate debt-claim form specified by the Office of Personnel Management (OPM) will be completed and certified to the new paying office by EPA. EPA will certify: That the employee owes a debt; the amount and the basis for the debt; the date on which payment is due; the date the Government's rights to collect the debt first accrued; and that EPA's regulations implementing 5 U.S.C. 5514 have been approved by OPM.

(2) The new paying agency will be advised of the amount which has already been collected, the number of installments and the commencement date for the first installment, if other than the next officially established pay period. EPA will also identify to the new paying agency the actions it has taken and the dates of such actions.

(3) EPA will place or will arrange to have placed in the employee's official personnel file the information required by paragraphs (n) (1) and (2) of this section.

(4) Upon receipt of the official personnel file from EPA, the new paying agency will resume collection from the employee's current pay account and will notify both the employee and EPA of the resumption.

(o) *Interest, penalty and administrative cost.* EPA will assess interest and administrative costs on debts collected under these procedures. The following guidelines apply to the assessment of these costs on debts collected by salary offset:

(1) A processing and handling charge will be assessed on debts collected through salary offset under this section. Where offset begun prior to the employee's receipt of the 30-day written notice of the proposed offset, processing and handling costs will only be assessed after the expiration of the 30-day notice period and after the completion of any hearing requested under paragraph (d) of this section or waiver consideration under paragraph (g) of this section.

(2) Interest will be assessed on all debts not collected within 30 days of either the date of the notice where the employee has not requested a hearing within the allotted time, completion of a hearing pursuant to paragraph (d) of this section, or completion of waiver consideration under paragraph (g) of this section, whichever is later. Interest will continue to accrue during the period of the recovery.

(3) Deductions by salary offset normally begin prior to the time for assessment of a penalty. Therefore, a penalty charge will not be assessed unless deductions occur more than 120 days from the date of notice to the debtor and penalty assessments have not been suspended because of waiver consideration by EPA.

(p) *Non-waiver of right by payment.* An employee's payment under protest of all or any portion of a debt does not waive any rights which the employee

may have under either these procedures or any other provision of law.

(q) *Refunds.* EPA will promptly refund to the employee amounts paid or deducted pursuant to this section, the recovery of which is subsequently waived or otherwise found not owing to the United States. Refunds do not bear interest unless specifically authorized by law.

(r) *Time limit for commencing recovery by salary setoff.* EPA will not initiate salary offset to collect a debt more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the right to collect the debt were not known and could not have been known through the exercise of reasonable care by the Government official responsible for discovering and collecting such debts.

§ 13.23 Salary offset when EPA is not the creditor agency.

The requirements below apply when EPA has been requested to collect a debt owed by an EPA employee to another Federal agency.

(a) *Format for the request for recovery.* (1) The creditor agency must complete fully the appropriate claim form specified by OPM.

(2) The creditor agency must certify to EPA on the debt claim form: The fact that the employee owes a debt; the date that the debt first accrued; and that the creditor agency's regulations implementing 5 U.S.C. 5514 have been approved by OPM and send it to the Director, Financial Management Division (PM-226F), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

(3) If the collection is to be made in installments, the creditor agency must also advise EPA of the number of installments to be collected, the amount of each installment, and the commencement date of the first installment, if a date other than the next established pay period.

(4) Unless the employee has consented in writing to the salary deductions or signed a statement acknowledging receipt of the required procedures and this information is attached to the claim form, the creditor agency must indicate the actions it took under its procedures for salary offset and the dates of such actions.

(b) *Processing of the claim by EPA.*—(1) *Incomplete claims.* If EPA receives an improperly completed claim form, the claim form and all accompanying material will be returned to the requesting (creditor) agency with notice that OPM procedures must be followed and a properly completed claim form must be received before any salary offset can be taken. The notice should identify specifically what is needed from the requesting agency for the claim to be processed.

(2) *Complete claims.* If the claim procedures in paragraph (a) of this section have been properly completed, deduction will begin on the next established pay period. EPA will not review the merits of the creditor agency's determinations with respect to the amount or validity of the debt as stated in the debt claim form. EPA will not assess a handling or any other related charge to cover the cost of its processing the claim.

(c) *Employees separating from EPA before a debt to another agency is collected.*—(1) *Employees separating from Government service.* If an employee begins separation action before EPA collects the total debt due the creditor agency, the following actions will be taken:

(i) To the extent possible, the balance owed the creditor agency will be liquidated from subsequent payments of any nature due the employee from EPA in accordance with § 13.22(1);

(ii) If the total amount of the debt cannot be recovered, EPA will certify to the creditor agency and the employee the total amount of EPA's collection; and

(iii) If EPA is aware that the employee is entitled to payments from the Civil Service Retirement and Disability Fund or other similar payments, it will forward a copy of the claim form to the agency responsible for making such payments as notice that a debt is outstanding. EPA will also send a copy of the claim form to the creditor agency so that it can file a certified claim against the payments.

(2) *Employees who transfer to another Federal agency.* If an EPA employee transfers to another Federal

agency before EPA collects the total amount due the creditor agency, the following actions will be taken:

(i) EPA will certify the total amount of the collection made on the debt; and

(ii) The employee's official personnel folder will be sent to the new paying agency. (It is the responsibility of the creditor agency to ensure that the collection is resumed by the new paying agency.)

Subpart D—Compromise of Debts

§ 13.24 General.

EPA may compromise claims for money or property where the claim, exclusive of interest, penalty and administrative costs, does not exceed $20,000. Where the claim exceeds $20,000, the authority to accept the compromise rests solely with DOJ. The Administrator may reject an offer of compromise in any amount. Where the claim exceeds $20,000 and EPA recommends acceptance of a compromise offer, it will refer the claim with its recommendation to DOJ for approval. The referral will be in the form of the Claims Collection Litigation Report (CCLR) and will outline the basis for EPA's recommendation. EPA refers compromise offers for claims in excess of $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530, unless otherwise provided by Department of Justice delegations or procedures. EPA refers offers of compromise for claims of $20,000 to $100,000 to the United States Attorney in whose judicial district the debtor can be found. If the Administrator has a debtor's firm written offer for compromise which is substantial in amount but the Administrator is uncertain as to whether the offer should be accepted, he may refer the offer and the supporting data to DOJ or GAO for action.

§ 13.25 Standards for compromise.

(a) EPA may compromise a claim pursuant to this section if EPA cannot collect the full amount because the debtor does not have the financial ability to pay the full amount of the debt within a reasonable time, or the debtor refuses to pay the claim in full and the Government does not have the ability to enforce collection in full within a reasonable time by enforced collection proceedings. In evaluating the acceptability of the offer, the Administrator may consider, among other factors, the following:

(1) *Individual debtors.* (i) Age and health of the debtor;

(ii) Present and potential income;

(iii) Inheritance prospects;

(iv) The possibility that assets have been concealed or improperly transferred by the debtor;

(v) The availability of assets or income which may be realized by enforced collection proceedings; or

(vi) The applicable exemptions available to the debtor under State and Federal law in determining the Government's ability to enforce collection.

(2) *Municipal and quasi-municipal debtors.* (i) The size of the municipality or quasi-municipal entity;

(ii) The availability of current and future resources sufficient to pay the debt (*e.g.*, bonding authority, rate adjustment authority, or taxing authority); or

(iii) The ratio of liabilities (both short and long term) to assets.

(3) *Commercial debtors.* (i) Ratio of assets to liabilities;

(ii) Prospects of future income or losses; or

(iii) The availability of assets or income which may be realized by enforced collection proceedings.

(b) EPA may compromise a claim, or recommend acceptance of a compromise to DOJ, where there is substantial doubt concerning the Government's ability to prove its case in court for the full amount of the claim, either because of the legal issues involved or a bona fide dispute as to the facts. The amount accepted in compromise in such cases will fairly reflect the probability of prevailing on the legal issues involved, considering fully the availability of witnesses and other evidentiary data required to support the Government's claim. In determining the litigative risks involved, EPA will give proportionate weight to the likely amount of court costs and attorney fees the Government may incur if it is unsuccessful in litigation.

(c) EPA may compromise a claim, or recommend acceptance of a compromise to DOJ, if the cost of collection does not justify the enforced collection of the full amount of the debt. The amount accepted in compromise in such cases may reflect an appropriate discount for the administrative and litigative costs of collection, taking into consideration the time it will take to effect collection. Costs of collection may be a substantial factor in the settlement of small claims, but normally will not carry great weight in the settlement of large claims. In determining whether the cost of collection justifies enforced collection of the full amount, EPA may consider the positive effect that enforced collection of the claim may have on the collection of other similar claims.

(d) Statutory penalties, forfeitures or debts established as an aid to enforcement and to compel compliance may be compromised where the Administrator determines that the Agency's enforcement policy, in terms of deterrence and securing compliance (both present and future), will be adequately served by accepting the offer.

§ 13.26 Payment of compromised claims.

The Administrator normally will not approve a debtor's request to pay a compromised claim in installments. However, where the Administrator determines that payment of a compromise by installments is necessary to effect collection, a debtor's request to pay in installments may be approved. Normally, where installment repayment is approved, the debtor will be required to execute a confess-judgment agreement which accelerates payment of the balance due upon default.

§ 13.27 Joint and several liability.

When two or more debtors are jointly and severally liable, collection action will not be withheld against one debtor until the other or others pay their proportionate share. The amount of a compromise with one debtor is not precedent in determining compromises from other debtors who have been determined to be jointly and severally liable on the claim.

§ 13.28 Execution of releases.

Upon receipt of full payment of a claim or the amount compromised, EPA will prepare and execute a release on behalf of the United States. The release will include a provision which voids the release if it was procured by fraud, misrepresentation, a false claim or by mutual mistake of fact.

Subpart E—Suspension of Collection Action

§ 13.29 Suspension—general.

The Administrator may suspend the Agency's collection actions on a debt where the outstanding debt principal does not exceed $20,000, the Government cannot presently collect or enforce collection of any significant sum from the debtor, the prospects of future collection justify retention of the debt for periodic review and there is no risk of expiration of the statute of limitations during the period of suspension. Additionally, the Administrator may waive the assessment of interest, penalty charges and administrative costs during the period of the suspension. Suspension will be for an established time period and generally will be reviewed at least every six months to ensure the continued propriety of the suspension. DOJ approval is required to suspend debts exceeding $20,000. Unless otherwise provided by DOJ delegations or procedures, the Administrator refers requests for suspension of debts of $20,000 to $100,000 to the United States Attorney in whose district the debtor resides. Debts exceeding $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval.

§ 13.30 Standards for suspension.

(a) *Inability to locate debtor.* The Administrator may suspend collection on a debt where he determines that the debtor cannot be located presently but that there is a reasonable belief that the debtor can be located in the future.

(b) *Financial condition of debtor.* The Administrator may suspend collection action on a claim when the

debtor owns no substantial equity in real or personal property and is unable to make payment on the claim or effect a compromise but the debtor's future financial prospects justify retention of the claim for periodic review, provided that:

(1) The applicable statute of limitations will not expire during the period of the suspension, can be tolled or has started running anew;

(2) Future collection can be effected by offset, notwithstanding the 10-year statute of limitations for administrative offsets; or

(3) The debtor agrees to pay interest on the debt and suspension is likely to enhance the debtor's ability to fully pay the principal amount of the debt with interest at a later date.

(c) *Request for waiver or administrative review—mandatory.* The Administrator will suspend collection activity where a statute provides for mandatory waiver consideration or administrative review prior to agency collection of a debt. The Administrator will suspend EPA's collection actions during the period provided for the debtor to request review or waiver and during the period of the Agency's evaluation of the request.

(d) *Request for waiver or administrative review—permissive.* The Administrator may suspend collection activities on debts of $20,000 or less during the pendency of a permissive waiver or administrative review where he determines that:

(1) There is a reasonable possibility that waiver will be granted and the debtor may be found not owing the debt (in whole or in part);

(2) The Government's interest is protected, if suspension is granted, by the reasonable assurance that the debt can be recovered if the debtor does not prevail; or

(3) Collection of the debt will cause undue hardship to the debtor.

(e) *Refund barred by statute or regulation.* The Administrator will ordinarily suspend collection action during the pendency of his consideration of a waiver request or administrative review where statute and regulation preclude refund of amounts collected by the Agency should the debtor prevail. The Administrator may decline to suspend collection where he determines that the request for waiver or administrative review is frivolous or was made primarily to delay collection.

Subpart F—Termination of Debts

§ 13.31 Termination—general.

The Administrator may terminate collection actions and write-off debts, including accrued interest, penalty and administrative costs, where the debt principal does not exceed $20,000. If the debt exceeds $20,000, EPA obtains the approval of DOJ in order to terminate further collection actions. Unless otherwise provided for by DOJ regulations or procedures, requests to terminate collection on debts in excess of $100,000 are referred to the Commercial Litigation Branch, Civil Division, Department of Justice, for approval. Debts in excess of $20,000 but $100,000 or less are referred to the United States Attorney in whose judicial district the debtor can be found.

§ 13.32 Standards for termination.

A debt may be terminated where the Administrator determines that:

(a) The Government cannot collect or enforce collection of any significant sum from the debtor, having due regard for available judicial remedies, the debtor's ability to pay, and the exemptions available to the debtor under State and Federal law;

(b) The debtor cannot be located, there is no security remaining to be liquidated, the applicable statute of limitations has expired, and the prospects of collecting by offset are too remote to justify retention of the claim;

(c) The cost of further collection action is likely to exceed the amount recoverable;

(d) The claim is determined to be legally without merit; or

(e) The evidence necessary to prove the claim cannot be produced or the necessary witnesses are unavailable and efforts to induce voluntary payment have failed.

Subpart G—Referrals

§ 13.33 Referrals to the Department of Justice.

(a) *Prompt referral.* The Administrator refers to DOJ for litigation all claims on which aggressive collection actions have been taken but which could not be collected, compromised, suspended or terminated. Referrals are made as early as possible, consistent with aggressive agency collection action, and within the period for bringing a timely suit against the debtor.

(1) Unless otherwise provided by DOJ regulations or procedures, EPA refers for litigation debts of more than $100,000 to the Commercial Litigation Branch, Civil Division, Department of Justice, Washington, DC 20530.

(2) Unless otherwise provided by DOJ regulations or procedures, EPA refers for litigation debts of $100,000 or less to the United States Attorney in whose judicial district the debtor can be found.

(b) *Claims Collection Litigation Report (CCLR).* Unless an exception has been granted by DOJ, the CCLR is used for referrals of all administratively uncollectible claims to DOJ and is used to refer all offers of compromise.

PART 14—EMPLOYEE PERSONAL PROPERTY CLAIMS

Sec.

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AUTHORITY: Military Personnel and Civilian Employees' Claims Act of 1964, as amended (31 U.S.C. 3721).

SOURCE: 51 FR 24146, July 2, 1986, unless otherwise noted.

§ 14.1 Scope and purpose.

This part prescribes regulations for the Military Personnel and Civilian Employees' Claims Act of 1964 (the Act), 31 U.S.C. 3721. The Act allows the Administrator of the U.S. Environmental Protection Agency (EPA) to settle and pay claims of EPA employees for damage to or loss of their personal property which was incident to service. A claim under the Act is allowed only where the claim is substantiated and the Administrator determines that possession of the property was reasonable or proper under the circumstances existing at the time and place of the loss and no part of the loss was caused by any negligent or wrongful act or omission of the employee or his/her agent.

§ 14.2 Definitions.

As used in this part:

(a) *EPA Claims Officer* is the Agency official delegated the responsibility by the Administrator to carry out the provisions of the Act.

(b) *Claim* means a demand for payment by an employee or his/her representative for the value or the repair cost of an item of personal property damaged, lost or destroyed as an incident to government service.

(c) *Employee* means a person appointed to a position with EPA.

(d) *Settle* means the act of considering, ascertaining, adjusting, determining or otherwise resolving a claim.

(e) *Accrual date* means the date of the incident causing the loss or damage or the date on which the loss or damage should have been discovered by the employee through the exercise of reasonable care.

(f) *Depreciation* is the reduction in value of an item caused by the elapse of time between the date of acquisition and the date of loss or damage.

§ 14.3 Incident to service.

In order for a claim to be allowed under this part, the EPA Claims Officer must determine that the item of personal property, at the time of damage or loss, was used by the employee as an incident to government service. An item is incident to service when possession of the item by the

employee had substantial relationship to the employee's performance of duty. Whether an item is incident to service is determined by the facts of each claim. The employee has the burden of showing that the item was incident to his/her governmental service.

§ 14.4 Reasonable and proper.

EPA does not insure its employees from every loss or damage to personal property they may sustain. In order for a claim to be allowed, the item must not only have been incident to service, it must also have been reasonable and proper for the employee to possess the item at the time and place of its loss or damage. Generally, the possession of an item is reasonable and proper when the item is of a type and quantity which EPA reasonably expected its employees to possess at the time and place of the loss or damage. Consequently, items which are exceptionally expensive, excessive quantities of otherwise allowable items, personal items which are used in place of items usually provided to employees by EPA or items which are primarily of aesthetic value are not considered reasonable or proper items and are unallowable.

§ 14.5 Who may file a claim.

A claim may be filed by an employee or by his/her authorized agent or legal representative. If a claim is otherwise allowable under this part, a claim can be filed by a surviving spouse, child, parent, brother or sister of a deceased employee.

§ 14.6 Time limits for filing a claim.

A claim under this part is considered by the EPA Claims Officer only if it is in writing and received within two years after the claim accrues. The EPA Claims Officer may consider a claim not filed within this period when the claim accrued during a period of armed conflict and the requirements of 31 U.S.C. 3721(g) are met.

§ 14.7 Where to file a claim.

An employee or his/her representative may file a claim with his/her Administrative Office or the Safety Office for the facility. The employee should complete and submit to the Administrative Office or the Safety Office a completed EPA Form 3370-1, "Employee Claim for Loss of or Damage to Personal Property." That Office then forwards the form and any other relevant information to the EPA Claims Officer, Office of General Counsel (LE-132G), 401 M Street SW., Washington, DC 20460.

§ 14.8 Investigation of claims.

The EPA Claims Officer investigates claims filed under this part. The EPA Claims Officer may request additional documentation from an employee (e.g., repair estimates and receipts), interview witnesses, and conduct any further investigation he believes is warranted by the facts of the claim.

§ 14.9 Approval and payment of claims.

(a) EPA's approval and payment of a claim is limited by the Act to $25,000. The EPA Claims Officer considers, adjusts, determines, compromises and settles all claims filed under this part. The decision of the EPA Claims Officer is final unless reconsideration under § 14.10 is granted.

(b) The EPA Claims Officer will approve and pay claims filed for a deceased employee by persons specified in § 14.5 in the following order:

(1) The spouse's claim.
(2) A child's claim.
(3) A parent's claim.
(4) A brother's or sister's claim.

§ 14.10 Procedures for reconsideration.

The EPA Claims Officer, at his discretion, may reconsider a decision when the employee establishes that an error was made in the computation of the award or that evidence or material facts were unavailable to the employee at the time of the filing of the claim and the failure to provide the information was not the result of the employee's lack of care. An employee seeking reconsideration of a decision must file, within 30 days of the date of the decision, a written request with the EPA Claims Officer for reconsideration. The request for reconsideration must specify, where applicable, the error, the evidence or material facts not previously considered by the EPA Claims

Officer and the reason why the employee believes that the evidence or facts previously were not available.

§ 14.11 Principal types of allowable claims.

(a) *General.* A claim under this part is allowed for tangible personal property of a type and quantity that was reasonable and proper for the employee to possess under the circumstances at the time of the loss or damage. In evaluating whether a claim is allowable, the EPA Claims Officer may consider such factors as: The employee's use of the item; whether EPA generally is aware that such items are used by its employees; or whether the loss was caused by a failure of EPA to provide adequate protection against the loss.

(b) *Examples of claims which are allowable.* Claims which are ordinarily allowed include loss or damage which occurred:

(1) In a place officially designated for storage of property such as a warehouse, office, garage, or other storage place;

(2) In a marine, rail, aircraft, or other common disaster or natural disaster such as a fire, flood, or hurricane;

(3) When the personal property was subjected to an extraordinary risk in the employee's performance of duty, such as in connection with an emergency situation, a civil disturbance, common or natural disaster, or during efforts to save government property or human life;

(4) When the property was used for the benefit of the government at the specific direction of a supervisor;

(5) When the property was money or other valuables deposited with an authorized government agent for safekeeping; and

(6) When the property was a vehicle which was subjected to an extraordinary risk in the employee's performance of duty and the use of the vehicle was at the specific direction of the employee's supervisor.

(c) *Claims for articles of clothing.* Claims for loss or damage to clothing and accessories worn by an employee may be allowed where:

(1) The damage or loss occurred during the employee's performance of official duty in an unusual or extraordinary risk situation;

(2) The loss or damage occurred during the employee's response to an emergency situation, to a natural disaster such as fire, flood, hurricane, or to a man-made disaster such as a chemical spill;

(3) The loss or damage was caused by faulty or defective equipment or furniture maintained by EPA; or

(4) The item was stolen even though the employee took reasonable precautions to protect the item from theft.

(d) *Claims for loss or damage to household items.* (1) Claims for damages to household goods may be allowed where:

(i) The loss or damages occurred while the goods were being shipped pursuant to an EPA authorized change in duty station;

(ii) The employee filed a claim for the damages with the appropriate carrier; and

(iii) The employee substantiates that he/she has suffered a loss in excess of the amount paid by the carrier.

(2) Where a carrier has refused to make an award to an employee because of his/her failure to comply with the carrier's claims procedures, any award by EPA will be reduced by the maximum amount payable for the item by the carrier under its contract of shipment. Where an employee fails to notify the carrier of damages or loss, either at the time of delivery of the household goods or within a reasonable time after discovery, any award by EPA will be reduced by the amount of the carrier's maximum contractual liability for the damage or loss. The employee has the burden of proving his/her entitlement to reimbursement from EPA for amounts in excess of that allowed by the carrier.

§ 14.12 Principal types of unallowable claims.

Claims that ordinarily will not be allowed include:

(a) Loss or damage totaling less than $25;

(b) Money or currency, except when deposited with an authorized government agency for safekeeping;

(c) Loss or damage to an item of extraordinary value or to an antique where the item was shipped with household goods, unless the employee filed a valid appraisal or authentication with the carrier prior to shipment of the item;

(d) Loss of bankbooks, checks, notes, stock certifications, money orders, or travelers checks;

(e) Property owned by the United States unless the employee is financially responsible for it to another government agency;

(f) Claims for loss or damage to a bicycle or a private motor vehicle, unless allowable under § 14.11(b)(6);

(g) Losses of insurers or subrogees;

(h) Losses recoverable from insurers or carriers;

(i) Losses recovered or recoverable pursuant to contract;

(j) Claims for damage or loss caused, in whole or in part, by the negligent or wrongful acts of the employee or his/her agent;

(k) Property used for personal business or profit;

(l) Theft from the possession of the employee unless the employee took reasonable precautions to protect the item from theft;

(m) Property acquired, possessed or transported in violation of law or regulations;

(n) Unserviceable property; or

(o) Damage or loss to an item during shipment of household goods where the damage or loss was caused by the employee's negligence in packing the item.

§ 14.13 Items fraudulently claimed.

Where the EPA Claims Officer determines that an employee has intentionally misrepresented the cost, condition, cost of repair or a material fact concerning a claim, he/she may, at his discretion, deny the entire amount claimed for the item. Further, where the EPA Claims Officer determines that the employee intentionally has materially misrepresented the costs, conditions or nature of repairs of the claim, he will refer it to appropriate officials (e.g., Inspector General, the employee's supervisor, etc.) for action.

§ 14.14 Computation of award.

(a) The amount awarded on any item may not exceed its adjusted cost. Adjusted cost is either the purchase price of the item or its value at the time of acquisition, less appropriate depreciation. The amount normally payable for property damaged beyond economical repair is its depreciated value immediately before the loss or damage, less any salvage value. If the cost of repair is less than the depreciated value, it will be considered to be economically repairable and only the cost of repair will be allowable.

(b) Notwithstanding a contract to the contrary, the representative of an employee is limited by 31 U.S.C. 3721(i) to receipt of not more than 10 percent of the amount of an award under this part for services related to the claim. A person violating this paragraph is subject to a fine of not more than $1,000. 31 U.S.C. 3721(i).

PART 15—ADMINISTRATION OF THE CLEAN AIR ACT AND THE CLEAN WATER ACT WITH RESPECT TO CONTRACTS, GRANTS, AND LOANS—LIST OF VIOLATING FACILITIES

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AUTHORITY: 42 U.S.C. 7401 *et seq.;* 33 U.S.C. 1251 *et seq.;* E.O. 11738 of September 10, 1973 (38 FR 28161).

SOURCE: 50 FR 36191, Sept. 5, 1985, unless otherwise noted.

Subpart A—Administrative Matters

§ 15.1 Policy and purpose.

(a) It is the policy of the Federal Government to improve and enhance environmental quality. This regulation is issued to ensure that each agency in the Executive Branch of the Federal Government that is empowered to enter into contracts for the procurement of goods, materials, or services or to extend Federal assistance by way of grant, loan, or contract undertakes such procurement and assistance activities in a manner that will result in effective enforcement of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, and the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, and does not favor firms where production costs may be lower due to noncompliance.

(b) This part establishes the List of Violating Facilities, procedures for placing a facility on the List of Violating Facilities, removing a facility from the List of Violating Facilities, and procedures for ensuring that agencies in the Executive Branch of the Federal Government undertake their procurement and assistance activities in a manner that will result in effective enforcement of the CAA and the CWA.

§ 15.2 Scope.

(a) This regulation applies to all agencies in the Executive Branch of the Federal Government which award contracts, grants, or loans. This regulation also applies to government contractors and subcontractors and to recipients of funds under government grants and loans. The debarment or suspension that results from a mandatory or discretionary listing is facility-specific and does not apply to other facilities of the same company.

(b) This regulation only applies to contracts, grants, or loans involving the use of facilities located within the United States.

(c) The rights and remedies of the Government under these regulations are not exclusive and do not affect any other rights or remedies provided by law.

§ 15.3 Administrative responsibility.

(a) Except for the power to issue rules and regulations, the Assistant Administrator for Enforcement and Compliance Monitoring and the General Counsel are delegated authority and assigned responsibility to carry out the responsibilities assigned to the Administrator of the Environmental Protection Agency under Executive Order 11738.

(b) The Assistant Administrator and the General Counsel are authorized to redelegate the authority conferred by this regulation.

§ 15.4 Definitions.

Administrator means the Administrator of the United States Environmental Protection Agency or his or her designee.

Agency means any department, agency, establishment, or instrumentality in the Executive Branch of the Federal Government, including corporations wholly owned by the Federal

Government which award contracts, grants, or loans.

Air Pollution Control Agency means any agency which is defined in section 302(b) or section 302(c) of the CAA.

Applicant means any person who has applied for but has not yet received a contract, grant, or loan and includes a bidder or proposer for a contract which is not yet awarded.

Assistant Administrator means the Assistant Administrator for Enforcement and Compliance Monitoring, United States Environmental Protection Agency, or his or her designee.

Borrower means any recipient of a loan as defined below.

Case Examiner means an EPA official familiar with pollution control issues who is designated by the Assistant Administrator to conduct a listing or removal proceeding and to determine whether a facility will be placed on the List of Violating Facilities or removed from such list. The Case Examiner may not be: (1) The Listing Official; (2) the Recommending Person or anyone subordinate to the Recommending Person; or (3) closely involved in the underlying enforcement action.

Clean air standards means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted pursuant to the CAA or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the CAA, an approved implementation procedure or plan under section 111(c) or section 111(d), respectively, of the CAA or an approved implementation procedure under section 112(d) of the CAA.

Clean water standards means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is established pursuant to the CWA or contained in a permit issued to a discharger by the United States Environmental Protection Agency, or by a State under an approved program, as authorized by section 402 of the CWA, or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Clean Water Act.

Compliance means compliance with clean air standards or clean water standards. For the purpose of these regulations, compliance also shall mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the United States Environmental Protection Agency, or an air or water pollution control agency, in accordance with the requirements of the CAA or the CWA and regulations issued pursuant thereto.

Contract means any contract or other agreement made with an Executive Branch agency for the procurement of goods, materials, or services (including construction), and includes any subcontract made thereunder.

Contractor means any person with whom an Executive Branch agency has entered into, extended, or renewed a contract as defined above, and includes subcontractors or any person holding a subcontract.

Facility means any building, plant, installation, structure, mine, vessel or other floating craft, location or site of operations owned, leased, or supervised by an applicant, contractor, grantee, or borrower to be used in the performance of a contract, grant, or loan. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility, except where the Assistant Administrator determines that independent facilities are located in one geographic area.

General Counsel means the General Counsel of the U.S. Environmental Protection Agency, or his or her designee.

Governor means the governor or principal executive officer of a state.

Grant means any grant or cooperative agreement awarded by an Executive Branch agency including all subagreements awarded thereunder. This includes grants-in-aid, except where such assistance is solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C. 1221 *et seq.*

Grantee means any person with whom an Executive Branch agency has entered into, extended, or renewed

a grant, subgrant, or other assistance agreement defined under *grant* above.

List of Violating Facilities means a list of facilities which are ineligible for any agency contract, grant or loan.

List Official means an EPA official designated by the Assistant Administrator to maintain the List of Violating Facilities.

Listing proceeding means an informal hearing, conducted by the Case Examiner, held to determine whether a facility should be placed on the List of Violating Facilities.

Loan means an agreement or other arrangement under which any portion of a business, activity, or program is assisted under a loan issued by an agency and includes any subloan issued under a loan issued by an agency.

Person means any natural person, corporation, partnership, unincorporated association, State or local government, or any agency, instrumentality, or subdivision of such a government or any interstate body.

Recommendation to list means a written request which has been signed and sent by a recommending person to the Listing Official asking that EPA place a facility on the List of Violating Facilities.

Recommending person means a Regional Administrator, the Associate Enforcement Counsel for Air or the Associate Enforcement Counsel for Water or their successors, the Assistant Administrator for Air and Radiation or the Assistant Administrator for Water or their successors, a Governor, or a member of the public.

State means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territories of the Pacific Islands.

Water pollution control agency means any agency which is defined in section 502(1) or section 502(2), 33 U.S.C. 1362 (1) or (2), of the CWA.

§ 15.5 Exemptions.

(a) (1) *Transactions of $100,000 and less.* Except as provided in § 15.5(b) below, contracts, grants, and loans not exceeding $100,000 are exempt from these regulations. This exemption includes contracts for indefinite quantities or service as long as the purchaser has reason to believe that the amount to be ordered in any year under such an agreement will not exceed $100,000.

(2) *Assistance to abate, control, or prevent environmental pollution.* Except as provided in § 15.5(b) below, a contract, grant, or loan will be exempt from these regulations when the principal purpose of a contract, grant, or loan is to assist the facility or facilities to comply with any Federal, State, or local law, regulation, limitation, guideline, standard, or other requirement relating to the abatement, control or prevention of environmental pollution.

(b) The exemption in § 15.5(a) do not apply where work under the contract is to be performed at a facility that has been placed on the List of Violating Facilities on the basis of a criminal conviction under section 113(c)(1) of the CAA or section 309(c) of the CWA and the person convicted owns, supervises, or leases the facility.

(c) *Authority of Agency Head to Grant Exemptions*—(1) *Individual exemptions.* Where an Agency head determines that it is in the paramount interest of the United States to enter into, renew, or extend a contract, grant, or loan in connection with any facility that is on the List of Violating Facilities, he or she may exempt the agreement from the provisions of this regulation for a period of one year. The Agency head granting the exemption shall notify the Assistant Administrator of the exemption as soon before or after granting the exemption, as may be practicable. The justification for such an exemption, or any renewal thereof, shall fully describe the purpose of the contract, grant, or loan and shall show why the paramount interest of the United States requires the exemption.

(2) *Class exemptions.* Where an agency head determines that it is in the paramount interest of the United States for the agency to enter into, extend, or renew any class of contracts, grants, or loans, he or she may exempt the class of agency contracts, grants, or loans from the provisions of this regulation by rule or regulation

after consultation with the Administrator.

Subpart B—Procedures for Placing a Facility on the List of Violating Facilities

§ 15.10 Mandatory listing.

The Listing Official shall place a facility on the List of Violating Facilities if the facility which gave rise to the conviction is owned, leased, or supervised by any person who has been convicted of a criminal offense under section 113(c)(1) of the CAA or section 309(c) of the CWA. The mandatory listing is automatically effective upon conviction.

§ 15.11 Discretionary listing.

(a) The Listing Official shall place a facility on the List of Violating Facilities if there is a final agency action under § 15.12(d), § 15.13(c) § 15.14(c), or § 15.14(d) which determines that there is a record of continuing or recurring noncompliance with clean air standards or clean water standards at the facility recommended for listing and that:

(1) A Federal court has convicted any person under section 113(c)(2) of the CAA if that person owns, leases, or supervises a facility recommended for listing;

(2) A State or local court has convicted any person of a criminal offense on the basis of noncompliance with clean air standards or clean water standards if that person owns, leases, or supervises a facility recommended for listing;

(3) A Federal, State, or local court has issued an injunction, order, judgment, decree (including consent decrees), or other form of civil ruling as a result of noncompliance with clean air or clean water standards at a facility recommended for listing;

(4) The facility has violated any administrative order issued under section 113(a), 113(d), 167, or 303 of the CAA, or section 309(a) of the CWA, if the violator owns, leases, or supervises a facility recommended for listing;

(5) EPA has issued to the facility a Notice of Noncompliance under section 120 of the CAA; or

(6) EPA has filed an enforcement action in Federal court under sections 113(b), 167, 204, 205, or 211 of the CAA or section 309(b) of the CWA due to noncompliance with clean air standards or clean water standards at the facility recommended for listing.

(b) A recommendation to list from a recommending person initiates the process for discretionary listing. A recommendation to list must contain:n

(1) The name, address, and telephone number of the person filing the recommendation;

(2) A description of the facility alleged to be in noncompliance with clean air standards or clean water standards, including the name and address of the facility;

(3) A description of the alleged continuing or recurring noncompliance, including any available data and any other pertinent information supporting the allegation of noncompliance; and

(4) A description of the criminal, civil, or administrative action or conviction under § 15.11 (a)(1), (a)(2), (a)(3), (a)(4), or (a)(5) which is pertinent to the facility and the alleged continuing or recurring noncompliance.

(c) The Listing Official shall review each recommendation to list to ensure that it complies with all of the requirements under § 15.11(b). If there is a deficiency in a recommendation the Listing Official must return it to the recommending person for correction. If there is no deficiency in the recommendation to list, the Listing Official shall transmit the recommendation to the Assistant Administrator. The Assistant Administrator, in his or her discretion, may:

(1) Decline to list, or

(2) Designate a Case Examiner in accordance with § 15.12(a), or

(3) Decide to list the facility in accordance with § 15.12(d).

(d) A recommending person may withdraw a recommendation list at any time before the conclusion of the listing proceeding. The recommending person shall withdraw the recommendation to list if the recommending person determines that the conditions which gave rise to the recommendation to list have been corrected or if

the facility recommended for listing is on an EPA-approved plan for compliance, which will ensure that the conditions(s) which gave rise to the recommendation to list will be corrected.

§ 15.12 Notice of filing of recommendation to list and opportunity to have a listing proceeding.

(a) The Listing Official shall send to the owner, operator or supervisor of the facility named in the recommendation to list written notice that a recommendation that the facility be placed on the List of Violating Facilities has been filed with the Listing Official and has been transmitted to the Assistant Administrator. Within thirty (30) calendar days of the receipt of the notice, any person who owns, leases, or supervises the facility may request the Assistant Administrator to designate a Case Examiner to hold a listing proceeding for the purpose of determining the propriety of the proposed listing.

(b) If a listing proceeding is requested, the Listing Official shall schedule a listing proceeding and notify in writing the recommending person and the person requesting the listing proceeding of the date, time, and location of the listing proceeding.

(c) The Listing Official shall respond to any requests from the recommending person and the person requesting the listing proceeding concerning the procedures for discretionary listing.

(d) If there is no timely request for a listing proceeding under § 15.12(a) above, the Listing Official will place the facility named in the recommendation to list on the List of Violating Facilities on the basis of discretionary listing if, upon reviewing the recommendation to list and any other available information, the Assistant Administrator determines that there is a record of continuing or recurring noncompliance with clean air standards or clean water standards at the facility recommended for listing and the requisite criminal, civil, or administrative enforcement action has been taken or criminal conviction under CAA section 113(a)(2) or under State law has occurred. Such a determination by the Assistant Administrator constitute final agency action.

§ 15.13 Listing proceeding.

(a) *No listing proceeding for mandatory listing.* Mandatory listing is effective upon conviction and no listing proceeding will be provided when a facility is listed on this basis. For purposes of updating the List of Violating Facilities, the Associate Enforcement Counsel for Criminal Enforcement shall notify the Listing Official of the conviction as soon as it occurs.

(b) *Listing proceeding for discretionary listing.* (1) A listing proceeding for discretionary listing shall be conducted in an informal manner without formal rules of evidence or procedure. The EPA and the person requesting the listing proceeding under § 15.12(a) above may be represented by legal counsel, present oral and written evidence relevant to the proposed listing and, with the approval of the Case Examiner, may call, ask questions of, and cross-examine witnesses, except to the extent any testimony would prematurely reveal sensitive enforcement information which the government may legally withhold or would unduly extend the proceedings in light of the usefulness of any additional information likely to be produced. The Case Examiner may take official notice of facts, law, and any other information available to him or her. The Case Examiner may also request any party to supplement the record by submitting additional information.

(2) The listing proceeding shall be transcribed, and EPA shall make available at cost a transcribed record of the proceeding upon request by any person.

(3) To demonstrate an adequate basis for listing a facility, the record must show by a preponderance of the evidence that there is a record of continuing or recurring noncompliance at the facility named in the recommendation to list and that the requisite enforcement action has been taken.

(c) *Case Examiner's decision.* Not later than thirty (30) calendar days after conclusion of the listing proceeding and any supplementation of the record, the Case Examiner shall issue

a written decision on whether or not to list the facility based on the record of the listing proceeding and shall file that decision with the Listing Official.

(d) *Notification of Case Examiner's decision.* The Listing Official shall notify in writing the recommending person and the person who requested the listing proceeding of the Case Examiner's decision and of the opportunity to request the General Counsel to review the Case Examiner's decision under § 15.14.

§ 15.14 Review of the Case Examiner's decision.

(a) Within thirty (30) calendar days after notice of the Case Examiner's decision, the owner, operator or supervisor of the facility may file with the Listing Official a written request asking the General Counsel to review the Case Examiner's decision. The request to review the Case Examiner's decision must contain:

(1) A statement of the case and the facts involved in the recommendation to list;

(2) A statement of the issues presented by the recommendation to list; and

(3) A statement showing why the decision of the Case Examiner is not correct based on the record of the listing proceeding considered as a whole.

(b) The owner, operator or supervisor of the facility may raise on review only those issues raised before the Case Examiner, unless the General Counsel determines that there is good cause to include consideration of any new issues.

(c) If the Listing Official receives a timely request for review of the Case Examiner's decision, the General Counsel shall review the record of the listing proceeding to determine if the decision of the Case Examiner is correct based on the record of the listing proceeding considered as a whole. As soon as practicable after receiving the request for review, the General Counsel shall issue a final decision in writing which explains the basis for the final decision. The General Counsel's decision shall constitute final agency action. The General Counsel shall file the decision with the Listing Official.

(d) The Case Examiner's decision constitutes a final agency action for purposes of discretionary listing unless a timely request for review of the Case Examiner's decision is filed with the Listing Official in accordance with § 15.14(a).

§ 15.15 Effective date of discretionary listing.

(a) Discretionary lising is effective immediately upon the issuance of a final agency action filed with the Listing Official to place the facility recommended for listing on the List of Violating Facilities, or upon a determination of the Assistant Administrator under § 15.12(d).

(b) Discretionary listing remains effective until a removal occurs under § 15.26.

§ 15.16 Notice of listing.

(a) *Mandatory listing.* The Listing Official shall send written notice to the owner, operator or supervisor of the facility which shall state that the facility has been placed on the List of Violating Facilities on the basis of mandatory listing and the effective date of such listing.

(b) *Discretionary listing.* The Listing Official shall send written notice to the recommending person and any person who requested a listing proceeding informing them of the effective date of the discretionary listing. The Listing Official shall send written notice to the owner, operator or supervisor of the facility if no listing proceeding was requested.

(c) *Federal Register notice.* The Listing Official shall publish the effective date of the placement of the facility on the List of Violating Facilities in the FEDERAL REGISTER in accordance with § 15.40.

Subpart C—Procedures for Removing a Facility From the List of Violating Facilities

§ 15.20 Removal of a mandatory listing.

When the Listing Official has placed a facility on the List of Violating Facilities on the basis of mandatory listing under § 15.10, the facility shall remain on the List of Violating Facili-

ties until the Assistant Administrator certifies that the condition giving rise to mandatory listing has been corrected. Where a conviction has been overturned, removal shall be automatic.

§ 15.21 Removal of a discretionary listing.

(a) When the Listing Official has placed a facility on the List of Violating Facilities on the basis of discretionary listing under § 15.11, the Listing Official shall remove the facility from the List of Violating Facilities as provided below:

(1) If the conviction, decree, order, judgment, or other form of civil ruling or finding which formed the basis for discretionary listing under § 15.11(a) has been reversed or otherwise modified to remove the basis for discretionary listing;

(2) If the Assistant Administrator has determined that the condition(s) which gave rise to discretionary listing have been corrected; or,

(3) Automatically after one year of a discretionary listing under § 15.11 (a)(4), (a)(5) or (a)(6), unless before the expiration of the one-year period a basis for mandatory listing arises under § 15.10 or a basis for discretionary listing arises under § 15.11 (a)(1), (a)(2), or (a)(3).

(b) The Listing Official shall remove a facility from the List of Violating Facilities at the direction of the Assistant Administrator if the Assistant Administrator determines that the facility is on a plan for compliance which will ensure that the condition(s) which gave rise to discretionary listing will be corrected.

§ 15.22 Request for removal from the list of violating facilities.

(a) The original recommending person or any person who owns, operates or supervises a facility that is on the List of Violating Facilities may file with the Listing Official a request to remove the facility from the List. This request must set forth the proposed basis for removal from the List under § 15.20 or § 15.21.

(b) The Assistant Administrator shall review the request for removal and shall issue a decision as expeditiously as practicable after receiving the request as to whether the facility will be removed from the List of Violating Facilities. Failure of the Agency to make a decision within 45 calendar days constitutes a denial of the request.

(c) The Listing Official shall send written notice to the person requesting removal informing that person of the Assistant Administrator's decision and of the opportunity to request a removal hearing under § 15.23 if the Assistant Administrator denies the request for removal.

§ 15.23 Request for removal hearing.

(a) Within thirty (30) calendar days after the Assistant Administrator denies a request for removal from the List of Violating Facilities, the owner, operator or supervisor of the facility or the original recommending person may file with the Listing Official a written request for a removal hearing under § 15.24.

(b) If a timely request for a removal hearing under § 15.23(a) is not filed, any person who may make a request for removal under § 15.22(a) may file a new request for removal under § 15.22(a) based on new information.

§ 15.24 Removal hearing.

(a) A removal hearing shall be conducted by a Case Examiner designated by the Assistant Administrator. The person requesting the removal hearing must demonstrate at the removal hearing by a preponderance of the evidence that a basis for removal is present.

(1) The person requesting the removal hearing and the Agency may be represented by legal counsel, present oral and written evidence relevant to the proposed removal, and, with the approval of the Case Examiner, call, ask questions of, and confront witnesses to the extent it is relevant to the issue of removal and to the extent that any additional information produced will be useful in light of the additional time such procedures will take.

(2) The removal hearing shall be transcribed and a transcribed record of the proceeding shall be made available at cost upon request by the owner, operator, or lessee of the facili-

ty or any person represented at the hearing.

(b) The Federal, State, or local authority responsible for the enforcement of clean air standards or clean water standards with respect to the listed facility may participate in the removal hearing.

(c) The Case Examiner's decision concerning removal shall be based solely upon the record in the removal hearing.

(d) The Listing Official shall send written notice to the person requesting the removal hearing and the Federal, State, or local authority responsible for the enforcement of clean air standards or clean water standards with respect to the listed facility, informing them of the decision of the Case Examiner and of the opportunity to request the Administrator to review the Case Examiner's decision under § 15.25.

§ 15.25 Request for review of the decision of the Case Examiner.

(a) Within thirty (30) calendar days after the date of the Case Examiner's decision under § 15.24, the owner, operator or supervisor of the facility may file with the Listing Official a request for the Administrator to review the Case Examiner's decision. The request shall contain:

(1) A statement of the issues presented by the request for removal;

(2) A statement of the case and the facts involved in the request for removal; and

(3) A statement showing why the decision of the Case Examiner is not correct based upon the record of the removal hearing considered as a whole.

(b) Upon receiving a timely request for review of the decision of the Case Examiner, the Administrator shall review the record of the removal hearing to determine if the decision of the Case Examiner is correct based upon the record of the removal hearing considered as a whole. As soon as practicable after receiving the request for review, the Administrator shall issue a final decision in writing which shall set forth the reasons for the decision. The decision shall constitute final agency action.

(c) If the timely request for the Administrator to review the Case Examiner's decision under § 15.25(a) is not filed, the Case Examiner's decision constitutes final agency action at the expiration of such period.

(d) If the request for removal is denied upon review, any person who may file a request for removal under § 15.22(a) may file a new request for removal under § 15.22(a) based on new information.

§ 15.26 Effective date of removal.

(a) *Mandatory listing.* Removal of a facility placed on the List of Violating Facilities on the basis of mandatory listing shall be effective immediately upon the certification by the Assistant Administrator that the condition(s) which gave rise to the mandatory listing under § 15.10 has been corrected, or upon the issuance of a final agency action filed with the Listing Official to remove the listed facility from the List of Violating Facilities following a decision by a Case Examiner under § 15.24 or by the Administrator under § 15.25.

(b) *Discretionary listing.* Removal of a facility placed on the List of Violating Facilities on the basis of discretionary listing shall be effective immediately upon the expiration of one year under § 15.21(a)(3), or upon the Assistant Administrator's decision to remove the listed facility based upon a timely written request for removal under § 15.22(a), or upon the issuance of a final agency action filed with the Listing Official to remove the listed facility from the List of Violating Facilities under § 15.24 or § 15.25.

§ 15.27 Notice of removal.

The Listing Official shall send written notice to the owner, operator or supervisor of the facility, the recommending person, and any person who made a timely written request for removal under § 15.22(a), informing them of the effective date of the removal of the facility from the List of Violating Facilities. The Listing Official shall publish the effective date of the removal in the FEDERAL REGISTER in accordance with § 15.40.

Subpart D—Agency Coordination

§ 15.30 Agency responsibilities.

Each agency shall take appropriate steps to ensure that all officers and employees whose duties include ensuring that all agency contracts, grants, and loans are in compliance with applicable requirements are familiar with the requirements set forth in Executive Order 11738, this regulation, the Federal Acquisition Regulations (48 FR 42102, September 19, 1983), and the EPA Acquisition Regulations (49 FR 8834, March 8, 1984).

§ 15.31 Agency regulations.

Any agency responsible for promulgating contract, grant, or loan regulations, shall ensure that its regulations require every nonexempt agency contract, grant, or loan and every subagreement issued thereunder to include the following provisions:

(a) A promise by the contractor, grantee, or borrower that he or she will not use any facility on the List of Violating Facilities in the performance of any nonexempt contract, grant, or loan for the duration of time that the facility remains on the List.

(b) A promise by the contractor, grantee, or borrower that he or she will notify the awarding agency if a facility he or she intends to use in the performance of the contract, grant, or loan is on the List of Violating Facilities or knows that it has been recommended to be placed on the List of Violating Facilities.

(c) A promise by the contractor, grantee, or borrower that in the performace of the contract, grant, or loan, he or she will comply with all requirements of the CAA and the CWA, including the requirements of section 114 of the CAA and section 308 of the CWA, and all applicable clean air standards and clean water standards. *See* Federal Acquisition Regulation, 48 CFR 52.223-1 and 52.223-2.

§ 15.32 Contacting the Assistant Administrator.

(a) Any agency contracting officer or awarding official shall promptly report, to his or her agency head, or the designee of the Agency head any condition which may involve noncompliance with clean air standards or clean water standards at any facility that is being used, or will be used in an agency contract, grant, or loan. The report shall include at a minimum the following information:

(1) The name, telephone number, and agency of the employee discovering the condition.

(2) The name of the facility at which the condition exists.

(3) A description of the condition.

(4) The contract, grant, or loan the agency has issued or may issue, extend, or renew to the facility at which the condition exists.

(b) The agency head, or his or her designee, shall transmit any reports made under § 15.32(a) to the Assistant Administrator as soon as practicable, after he or she receives the report. In response to the report, the Assistant Administrator shall take any action that is consistent with the policy and purpose of this regulation.

§ 15.33 Investigation by the Assistant Administrator prior to awarding a contract, grant, or loan.

(a) If the Assistant Administrator is notified under § 15.32(b) that a condition which may involve noncompliance with clean air standards or clean water standards exists at a facility that is or may be used in the performance of any nonexempt agency contract, grant, or loan, the Assistant Administrator may, after consultation with the awarding agency involved, request that the award, extension, or renewal of the nonexempt contract, grant, or loan be withheld for fifteen (15) working days to determine if a basis exists for placing the facility on the List of Violating Facilities under § 15.10 or § 15.11.

(b) If the Assistant Administrator requests that an award, extension, or renewal of a contract, grant, or loan be withheld under § 15.33(a), the awarding agency shall comply with the Assistant Administrator's request unless it determines that the delay is substantially contrary to the best interests of the government. The awarding agency shall promptly notify the Assistant Administrator of any such determination.

(c) At the end of the fifteen (15) working-day period, the Assistant Administrator shall notify the awarding agency and the applicant of the results of any investigation undertaken under § 15.33(a).

§ 15.34 Referral by the Assistant Administrator to the Department of Justice.

The Assistant Administrator may recommend to the Department of Justice or other appropriate agency that legal proceedings be brought or other appropriate action be taken whenever the Assistant Administrator becomes aware of a breach of any provision required to be included in a contract, grant, or loan under § 15.31.

Subpart E—Miscellaneous

§ 15.40 Distribution of the List of Violating Facilities.

The List of Violating Facilities shall be transmitted to the General Services Administration and Federal agencies with assistance responsibilities and published in the FEDERAL REGISTER on or about February 1 and August 1 of each year, and updated in the FEDERAL REGISTER as necessary to reflect changes to the List as they occur. The list shall contain the following information:

(a) The name of each facility on the List;

(b) The location of the facility;

(c) The basis for the listing;

(d) The effective date of the listing; and

(e) Any removal of any facility from the List.

§ 15.41 Reports.

(a) *Agency reports.* Each Agency head will report to the Administrator each exemption granted under § 15.5(b) to the Administrator. Reports should be made by November 1 of each year and should indicate all exemptions granted during the previous fiscal year.

(b) *Reports by the Administrator.* (1) The Administrator shall report annually to the President on the measures he or she has taken toward implementing the purpose and intent of section 306 of the CAA, section 508 of the CWA, Executive Order 11738, and this regulation, including but not limited to the progress and problems associated with such implementation.

(2) The Administrator shall notify the President and the Congress annually of all exemptions granted or in effect under § 15.5 during the preceding year.

PART 16—IMPLEMENTATION OF PRIVACY ACT OF 1974

Sec.

16.1 Purpose and scope.
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AUTHORITY: 5 U.S.C. 552a.

SOURCE: 40 FR 53582, Nov. 19, 1975, unless otherwise noted.

§ 16.1 Purpose and scope.

(a) This part sets forth the Environmental Protection Agency procedures under the Privacy Act of 1974 as required by 5 U.S.C. 552a(f).

(b) These procedures describe how an individual may request notification of whether EPA maintains a record pertaining to him or her in any of its systems of records, request access to the record or to an accounting of its disclosure, request that the record be amended or corrected, and appeal an initial adverse determination concerning any such request.

(c) These procedures apply only to requests by individuals and only to records maintained by EPA, excluding those systems specifically exempt

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under §§ 16.13 and 16.14 and those determined as government-wide and published by the Civil Service Commission in 5 CFR parts 293 and 297.

§ 16.2 Definitions.

As used in this part:

(a) The terms *individual, maintain, record, system of records,* and *routine use* shall have the meaning given them by 5 U.S.C. 552a (a)(2), (a)(3), (a)(4), (a)(5) and (a)(7), respectively.

(b) *EPA* means the Environmental Protection Agency.

(c) *Working days* means calendar days excluding Saturdays, Sundays, and legal public holidays.

§ 16.3 Procedures for requests pertaining to individual records in a record system.

Any individual who wishes to have EPA inform him or her whether a system of records maintained by EPA contains any record pertaining to him or her which is retrieved by name or personal identifier, or who wishes to request access to any such record, shall submit a written request in accordance with the instructions set forth in EPA's annual notice of systems for that system of records. This request shall include:

(a) The name of the individual making the request;

(b) The name of the system of records (as set forth in the EPA notice of systems) to which the request relates;

(c) Any other information which the system notice indicates should be included; and

(d) If the request is for access, a statement as to whether a personal inspection or a copy by mail is desired.

§ 16.4 Times, places, and requirements for identification of individuals making requests.

(a) If an individual submitting a request for access under § 16.3 has asked that EPA authorize a personal inspection of records, and EPA has granted the request, he or she may present himself or herself at the time and place specified in EPA's response or arrange another time with the appropriate agency official.

(b) Prior to inspection of records, an individual shall present sufficient identification (e.g., driver's license, employee identification card, social security card, credit card) to establish that he or she is the individual to whom the records pertain. An individual who is unable to provide such identification shall complete and sign, in the presence of an agency official, a statement declaring his or her identity and stipulating that he or she understands it is a misdemeanor punishable by fine up to $5,000 to knowingly and willfully seek or obtain access to records about another individual under false pretenses.

(c) If an individual, having requested personal inspection of his or her records, wishes to have another person accompany him or her during inspection, he or she shall submit a written statement authorizing disclosure in the presence of the other person(s).

(d) An individual who has made a personal inspection of records may then request copies of those records. Such requests may be granted, but fees may be charged in accordance with § 16.11.

(e) If an individual submitting a request under § 16.3 wishes to have copies furnished by mail, he or she must include with the request sufficient data to allow EPA to verify his or her identity. Should sensitivity of the records warrant it, EPA may require a requester to submit a signed and notarized statement indicating that he or she is the individual to whom the records pertain and that he or she understands it is a misdemeanor punishable by fine up to $5,000 to knowingly and willfully seek or obtain access to records about another individual under false pretenses. Such mail requests may be granted, but fees may be charged in accordance with § 16.11.

(f) No verification of identity will be required where the records sought are publicly available under the Freedom of Information Act, as EPA procedures under 40 CFR part 2 will then apply.

§ 16.5 Disclosure of requested information to individuals.

(a) Each request received will be acted upon promptly.

(b) Within 10 working days of receipt of a request, the system manager shall acknowledge the request. Whenever practicable, the acknowledgment will indicate whether or not access will be granted and, if so, when and where. When access is to be granted, it shall be provided within 30 working days of first receipt. If the agency is unable to meet this deadline, the records system manager shall so inform the requester stating reasons for the delay and an estimate of when access will be granted.

(c) If a request pursuant to § 16.3 for access to a record is in a system of records which is exempted, the records system manager will determine whether the information will nonetheless be made available. If the determination is to deny access, the reason for denial and the appeal procedure will be given to the requester.

(d) Any person whose request is initially denied may appeal that denial to the Privacy Act Officer, who shall make an appeal determination within 10 working days.

(e) If the appeal under paragraph (d) of this section is denied, the requester may bring a civil action under 5 U.S.C. 552a(g) to seek review of the denial.

§ 16.6 Special procedures: Medical records.

Should EPA receive a request for access to medical records (including psychological records) disclosure of which the system manager determines would be harmful to the individual to whom they relate, EPA may refuse to disclose the records directly to the individual and instead offer to transmit them to a physician designated by the individual.

§ 16.7 Request for correction or amendment of record.

(a) An individual may request correction or amendment of any record pertaining to him or her in a system of records maintained by EPA by submitting to the system manager, in writing, the following:

(1) The name of the individual making the request;

(2) The name of the system, as described in the notice of systems;

(3) A description of the nature and substance of the correction or amendment request; and

(4) Any additional information specified in the system notice.

(b) Any person submitting a request under this section shall include sufficient information in support of that request to allow EPA to apply the standards set forth in 5 U.S.C. 552a (e)(1) and (e)(5).

(c) Any person whose request is denied may appeal that denial to the Privacy Act Officer.

(d) In the event that appeal is denied, the requester may bring a civil action to seek review of the denial, under 5 U.S.C. 552a(g).

§ 16.8 Initial determination on request for correction or amendment of record.

(a) Within 10 working days of receipt of a request for amendment or correction, the system manager shall acknowledge the request, and promptly either:

(1) Make any correction, deletion, or addition which the requester believes should be made; or

(2) Inform the requester of his or her refusal to correct or amend the record, the reason for refusal, and the procedures for appeal.

(b) If the system manager is unable to comply with the preceding paragraphs within 30 working days of his or her receipt of a request, he or she will inform the requester of that fact, the reasons, and an estimate of when a determination will be reached.

(c) In conducting the review of the request, the system manager will be guided by the requirements of 5 U.S.C. 552a (e)(1) and (e)(5).

(d) If the system manager determines to grant all or any portion of the request, he or she will:

(1) Advise the individual of that determination;

(2) Make the correction or amendment; and

(3) So inform any person or agency outside EPA to whom the record has been disclosed, and, where an accounting of that disclosure is maintained in accordance with 5 U.S.C. 552a(c), note the occurrence and substance of the

correction or amendment in the accounting.

(e) If the system manager determines not to grant all or any portion of a request for correction or amendment, he or she will:

(1) Comply with paragraph (d)(3) of this section (if necessary);

(2) Advise the individual of the determination and its basis;

(3) Inform the individual that an appeal may be made; and

(4) Describe the procedures for making the appeal.

(f) If EPA receives from another Federal agency a notice of correction or amendment of information furnished by that agency and contained in one of EPA's systems of records, the system manager shall advise the individual and make the correction as if EPA had originally made the correction or amendment.

§ 16.9 Appeal of initial adverse agency determination on request for correction or amendment.

(a) Any individual whose request for correction or amendment is initially denied by EPA and who wishes to appeal may do so by letter to the Privacy Act Officer. The appeal shall contain a description of the initial request sufficient to identify it.

(b) The Privacy Act Officer shall make a final determination not later than 30 working days from the date on which the individual requests the review, unless, for good cause shown, the Privacy Act Officer extends the 30-day period and notifies the requester. Such extension will be utilized only in exceptional circumstances.

(c) In conducting the review of an appeal, the Privacy Act Officer will be guided by the requirements of 5 U.S.C. 552a (e)(1) and (e)(5).

(d) If the Privacy Act Officer determines to grant all or any portion of an appeal he or she shall so inform the requester and EPA shall make the correction or amendment and comply with § 16.8(d)(3).

(e) If the Privacy Act Officer determines not to grant all or any portion of an appeal he or she shall inform the requester:

(1) Of the determination and its basis;

(2) Of the requester's right to file a concise statement of reasons for disagreeing with EPA's decision;

(3) Of the procedures for filing such statement of disagreement;

(4) That such statements of disagreements will be made available in subsequent disclosures of the record, together with an agency statement (if deemed appropriate) summarizing its refusal;

(5) That prior recipients of the disputed record will be provided with statements as in paragraph (e)(4) of this section, to the extent that an accounting of disclosures is maintained under 5 U.S.C. 552a(c); and

(6) Of the requester's right to seek judicial review under 5 U.S.C. 552a(g).

§ 16.10 Disclosure of record to person other than the individual to whom it pertains.

EPA shall not disclose any record which is contained in a system of records it maintains except pursuant to a written request by, or with the written consent of, the individual to whom the record pertains, unless the disclosure is authorized by one or more of the provisions of 5 U.S.C. 552a(b).

§ 16.11 Fees.

No fees shall be charged for providing the first copy of a record or any portion to an individual to whom the record pertains. The fee schedule for reproducing other records is the same as that set forth in 40 CFR 2.120.

§ 16.12 Penalties.

The Act provides, in pertinent part:

"Any person who knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses shall be guilty of a misdemeanor and fined not more than $5,000." (5 U.S.C. 552a(i)(3).)

§ 16.13 General exemptions.

(a) *Systems of records affected.*

¶ EPA-4 OIG Criminal Investigative Index and Files—EPA/OIG.

¶ EPA-17 NEIC Criminal Investigative Index and Files—EPA/NEIC/OCI.

(b) *Authority.* Under 5 U.S.C. 552a(j)(2), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is maintained by an agency or component thereof which performs as its principal function any activity pertaining to the enforcement of criminal laws and which consists of:

(1) Information compiled for the purpose of identifying individual criminal offenders and alleged offenders and consisting only of identifying data and notations of arrests, the nature and disposition of criminal charges, sentencing, confinement, release, and parole and probation status;

(2) Information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual; or

(3) Reports identifiable to an individual compiled at any stage of the process of enforcement of the criminal laws from arrest or indictment through release from supervision.

(c) *Scope of exemption.* (1) The EPA-4 system of records identified in § 16.13(a) is maintained by the Office of Investigations of the Office of Inspector General (OIG), a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities of the OIG's Office of Investigations is the Inspector General Act of 1978, 5 U.S.C. app.

(2) The EPA-17 system of records identified in § 16.13(a) is maintained by the Office of Criminal Investigations (OCI) of the National Enforcement Investigations Center (NEIC), a component of EPA which performs as its principal function activities pertaining to the enforcement of criminal laws. Authority for the criminal law enforcement activities of the NEIC's Office of Criminal Investigations is 28 U.S.C. 533, with appointment letter from Benjamin Civiletti, Attorney General, to Douglas Costle, Administrator, EPA, dated January 16, 1981.

(3) The systems of records identified in § 16.13(a) are exempted from the following provisions of the Privacy Act of 1974: 5 U.S.C. 552a(c) (3) and (4); (d); (e) (1), (2), (3), (4) (G), (H), and (I), (5), and (8); (f); and (g).

(4) To the extent that the exemption claimed under 5 U.S.C. 552a(j)(2) is held to be invalid for the systems of records identified in § 16.13(a), then an exemption under 5 U.S.C. 552a(k)(2) is claimed for these systems of records.

(d) *Reasons for exemption.* The systems of records identified in § 16.13(a) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, this section is inapplicable and is exempted to the extent that these systems of records are exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such

records. Granting access to records in these systems of records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his jurisdiction. In the interest of effective law enforcement, the EPA investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation of the existence of the investigation, enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances the subject of an investigation cannot be required to provide information to investigators, and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation, which could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise on undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4) (G) and (H) require an agency to publish a FEDERAL

REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record, and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(c) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(9) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines *maintain* to include the collection of information, complying with this provision would prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which may seem unrelated, irrelevant, or incomplete when collected may take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(10) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby on an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation was able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f) (2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that these systems of records are exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might

be appropriate for an individual to have access to all or a portion of his records in these systems of records. These procedures are described elsewhere in this part.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d) (1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since EPA is claiming that these systems of records are exempt from subsections (c) (3) and (4), (d), (e) (1), (2), (3), (4) (G), (H), and (I), (5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act are inapplicable and are exempted to the extent that these systems of records are exempted from those subsections of the Act.

(e) *Exempt records provided by another agency.* Individuals may not have access to records maintained by the EPA if such records were provided by another agency which has determined by regulation that such records are subject to general exemption under 5 U.S.C. 552a(j). If an individual requests access to such exempt records, EPA will consult with the source agency.

(f) *Exempt records included in a nonexempt system of records.* All records obtained from a system of records which has been determined by regulation to be subject to general exemption under 5 U.S.C. 552a(j) retain their exempt status even if such records are also included in a system of records for which a general exemption has not been claimed.

[51 FR 24146, July 2, 1986]

§ 16.14 Specific exemptions.

(a) *Exemption under 5 U.S.C. 552a(k)(2)—(1) Systems of records affected.*

¶ EPA-2 General Personnel Records—EPA.

¶ EPA-4 OIG Criminal Investigative Index and Files—EPA/OIG.

¶ EPA-5 OIG Personnel Security Files—EPA/OIG.

¶ EPA-17 NEIC Criminal Investigative Index and Files— EPA/NEIC/OCI.

(2) *Authority.* Under 5 U.S.C. 552a(k)(2), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is investigatory material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2).

(3) *Scope of exemption.* (i) The systems of records identified in § 16.14(a)(1) are exempted from the following provisions of the Privacy Act of 1974, subject to the limitations set forth in 5 U.S.C. 552a(k)(2): 5 U.S.C. 552a (c)(3); (d); (e)(1), (4) (G), (H), and (I); and (f).

(ii) An individual is *denied any right, privilege, or benefit that he would otherwise be entitled by Federal law, or for which he would otherwise be eligible, as a result of the maintenance of such material,* only if the Agency actually uses the material in denying or proposing to deny such right, privilege, or benefit.

(iii) To the extent that records contained in the systems of records identified in § 16.14(a)(1) are maintained by the Office of Investigations of the OIG or by the Office of Criminal Investigations of the NEIC, components of EPA which perform as their principal function activities pertaining to the enforcement of criminal laws, then an exemption under 5 U.S.C. 552a(j)(2) is claimed for these records.

(4) *Reasons for exemption.* The systems of records identified in § 16.14(a)(1) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such infor-

nation to the subjects of an investigation would provide them with significant information concerning the nature of the investigation, and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in these systems of records could inform the subject of an investigation of an actual or potential criminal violation of the existence of that investigation, of the nature and scope of the information and evidence obtained as to his activities, of the identity of confidential sources, witnesses, and law enforcement personnel, and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigation but which may relate to matters under the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within the scope of his jurisdiction. In the interest of effective law enforcement, EPA investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(iv) 5 U.S.C. 552a(e)(4) (G) and (f) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record, and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physi-

cal safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this reaquirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a record pertaining to him. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation was able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject or others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f) (2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that these systems of records are exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f), EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in these systems of records. These procedures are described elsewhere in this part.

(b) *Exemption under 5 U.S.C. 552a(k)(5)—(1) Systems of records affected.*

¶ EPA-2 General Personnel Records—EPA.

¶ EPA-4 OIG Criminal Investigative Index and Files—EPA/OIG.

¶ EPA-5 OIG Personnel Security Files—EPA/OIG.

(2) *Authority.* Under 5 U.S.C. 552a(k)(5), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity would be held in confidence.

(3) *Scope of exemption.* (i) The systems of records identified in § 16.14(b)(1) are exempted from the following provisions of the Privacy Act of 1974, subject to the limitations of 5 U.S.C. 552a(k)(5): 5 U.S.C. 552a (c)(3); (d); (e)(1), (4) (H) and (I); and (f) (2) through (5).

(ii) To the extent that records contained in the systems of records identified in § 16.14(b)(1) reveal a violation or potential violation of law, then an exemption under 5 U.S.C. 552a(k)(2) is also claimed for these records.

(4) *Reasons for exemption.* The systems of records identified in § 16.14(b)(1) are exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Making such an accounting could cause the identity of a confidential source to be revealed, endangering the physical safety of the confidential source, and could impair the future ability of the EPA to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting such access could cause the identity of a confidential source to be revealed, endangering the physical safety of the confidential source, and could impair the future ability of the EPA to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations, because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(iv) 5 U.S.C. 552a(e)(4)(H) requires an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request how he can gain access to any record pertaining to him and how he can contest its content. Since EPA is claiming that these systems of records are exempt from subsections (f) (2) through (5) of the Act, concerning agency rules, and subsection (b) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that these systems of records are exempted from subsections (f) (2) through (5) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such notice concerning its access and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in these systems of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources, and to avoid the disclosure of investigative techniques and procedures. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552a(f) (2) through (5) require an agency to promulgate rules for obtaining access to records. Since EPA is claiming that these systems of records are exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f) (2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsections (f) (2) through (5) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in this system of records. These procedures are described elsewhere in this part.

(c) *Exemption under 5 U.S.C. 552a(k)(1)—(1) System of records affected.*

¶ EPA-5 OIG Personnel Security Files—EPA/OIG.

(2) *Authority.* Under 5 U.S.C. 552a(k)(1), the head of any agency may by rule exempt any system of records within the agency from certain provisions of the Privacy Act of 1974, if the system of records is subject to the provisions of 5 U.S.C. 552(b)(1). A system of records is subject to the provisions of 5 U.S.C. 552(b)(1) if it contains records that are specifically authorized under criteria established by an Executive order to

be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive order. Executive Order 12356 establishes criteria for classifying records which are to be kept secret in the interest of national defense or foreign policy.

(3) *Scope of exemption.* To the extent that the system of records identified in § 16.14(c)(1) contains records provided by other Federal agencies that are specifically authorized under criteria established by Executive Order 12356 to be kept secret in the interest of national defense or foreign policy and are in fact properly classified by other Federal agencies pursuant to that Executive order, the system of records is exempted from the following provisions of the Privacy Act of 1974: 5 U.S.C. 552a (c)(3); (d); (e)(1), (4) (G), (H), and (I); and (f).

(4) *Reasons for exemption.* The system of records identified in § 16.14(c)(1) is exempted from the above provisions of the Privacy Act of 1974 for the following reasons:

(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Making such an accounting could result in the release of properly classified information, which would compromise the national defense or disrupt foreign policy.

(ii) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting such access could cause the release of properly classified information, which would compromise the national defense or disrupt foreign policy.

(iii) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair personnel security investigations which use properly classified information, because it is not always possible to know the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established.

(iv) 5 U.S.C. 552a(e)(4) (G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual at his request if the system of records contains a record pertaining to him, how he can gain access to such a record and how he can contest its content. Since EPA is claiming that this system of records is exempt from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable and are exempted to the extent that this system of records is exempted from subsections (f) and (d) of the Act. Although EPA is claiming exemption from these requirements, EPA has published such a notice concerning its notification, access, and contest procedures because, under certain circumstances, EPA might decide it is appropriate for an individual to have access to all or a portion of his records in this system of records.

(v) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to prevent the release of properly classified information which would compromise the national defense or disrupt foreign policy. Although EPA is claiming exemption from this requirement, EPA has published such a notice in broad generic terms in the belief that this is all subsection (e)(4)(I) of the Act requires.

(vi) 5 U.S.C. 552(a)(f)(1) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to his request if any system of records named by the individual contains a

record pertaining to him. The application of this provision could result in the release of properly classified information, which would compromise the national defense or disrupt foreign policy. Since EPA is claiming that this system of records is exempt from subsection (d) of the Act, concerning access to records, the requirements of subsections (f) (2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable and are exempted to the extent that this system of records is exempted from subsection (d) of the Act. Although EPA is claiming exemption from the requirements of subsection (f) of the Act, EPA has promulgated rules which establish Agency procedures because, under certain circumstances, it might be appropriate for an individual to have access to all or a portion of his records in this system of records. These procedures are described elsewhere in this part.

(d) *Exempt records provided by another agency.* Individuals may not have access to records maintained by the EPA if such records were provided by another agency which has determined by regulation that such records are subject to general exemption under 5 U.S.C. 552a(j) or specific exemption under 5 U.S.C. 552a(k). If an individual requests access to such exempt records, EPA will consult with the source agency.

(e) *Exempt records included in a nonexempt system of records.* All records obtained from a system of records which has been determined by regulation to be subject to specific exemption under 5 U.S.C. 552a(k) retain their exempt status even if such records are also included in a system of records for which a specific exemption has not been claimed.

[51 FR 24147, July 2, 1986]

PART 17—IMPLEMENTATION OF THE EQUAL ACCESS TO JUSTICE ACT IN EPA ADMINISTRATIVE PROCEEDINGS

Subpart A—General Provisions

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AUTHORITY: Section 504, Title 5 U.S.C., as amended by sec. 203(a)(1), Equal Access to Justice Act (Title 2 of Pub. L. 96-481, 94 Stat. 2323).

SOURCE: 48 FR 39936, Sept. 2, 1983, unless otherwise noted.

Subpart A—General Provisions

§ 17.1 Purpose of these rules.

These rules are adopted by EPA pursuant to section 504 of Title 5 United States Code, as added by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481. Under the Act, an eligible party may receive an award for attorney's fees and other expenses when it prevails over EPA in an adversary adjudication before EPA unless EPA's position as a party to the proceeding was substantially justified or special circumstances make an award unjust. The purpose of these

rules is to establish procedures for the submission and consideration of applications for awards against EPA when the underlying decision is not reviewed by a court.

§ 17.2 Definitions.

As used in this part:

(a) *The Act* means section 504 of Title 5, United States Code, as amended by section 203(a)(1) of the Equal Access to Justice Act, Pub. L. No. 96-481.

(b) *Administrator* means the Administrator of the Environmental Protection Agency.

(c) *Adversary adjudication* means an adjudication required by statute to be held pursuant to 5 U.S.C. 554 in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of granting or renewing a license.

(d) *EPA* means the Environmental Protection Agency, an Agency of the United States.

(e) *Presiding officer* means the official, without regard to whether he is designated as an administrative law judge or a hearing officer or examiner, who presides at the adversary adjudication.

(f) *Proceeding* means an adversary adjudication as defined in § 17.2(b).

§ 17.3 Proceedings covered.

(a) These rules apply to adversary adjudications required by statute to be conducted by EPA under 5 U.S.C. 554. To the extent that they are adversary adjudications, the proceedings conducted by EPA to which these rules apply include:

(1) A hearing to consider the assessment of a noncompliance penalty under section 120 of the Clean Air Act as amended (42 U.S.C. 7420);

(2) A hearing to consider the termination of an individual National Pollution Discharge Elimination System permit under section 402 of the Clean Water Act as amended (33 U.S.C. 1342);

(3) A hearing to consider the assessment of any civil penalty under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(4) A hearing to consider ordering a manufacturer of hazardous chemical substances or mixtures to take actions under section 6(b) of the Toxic Substances Control Act (15 U.S.C. 2605(b)), to decrease the unreasonable risk posed by a chemical substance or mixture;

(5) A hearing to consider the assessment of any civil penalty under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1361);

(6) A hearing to consider suspension of a registrant for failure to take appropriate steps in the development of registration data under section 3(c)(2)(B) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 136a);

(7) A hearing to consider the suspension or cancellation of a registration under section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 136d);

(8) A hearing to consider the assessment of any civil penalty or the revocation or suspension of any permit under section 105(a) or 105(f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a), 33 U.S.C. 1415(f));

(9) A hearing to consider the issuance of a compliance order or the assessment of any civil penalty conducted under section 3008 of the Resource Conservation and Recovery Act as amended (42 U.S.C. 6928);

(10) A hearing to consider the issuance of a compliance order under section 11(d) of the Noise Control Act as amended (42 U.S.C. 4910(d)).

(b) If a proceeding includes both matters covered by the Act and matters specifically excluded from coverage, any award made will include only fees and expenses related to covered issues.

§ 17.4 Applicability to EPA proceedings.

The Act applies to an adversary adjudication pending before EPA at any time between October 1, 1981 and September 30, 1984. This includes proceedings begun before October 1, 1981 if final EPA action has not been taken before that date, and proceedings pending on September 30, 1984.

§ 17.5 Eligibility of applicants.

(a) To be eligible for an award of attorney's fees and other expenses under the Act, the applicant must be a prevailing party in the adversary adjudication for which it seeks an award. The term *party* is defined in 5 U.S.C. 551(3). The applicant must show that it meets all conditions of eligibility set out in this subpart and in subpart B.

(b) The types of eligible applicants are as follows:

(1) An individual with a net worth of not more than $1 million;

(2) The sole owner of an unincorporated business which has a net worth of not more than $5 million and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, or public or private organization with a net worth of not more than $5 million and not more than 500 employees.

(c) For the purpose of eligibility, the net worth and number of employees of an applicant shall be determined as of the date of adversary adjudication was initiated.

(d) An applicant who owns an unincorporated business will be considered as an *individual* rather than a *sole owner of an unincorporated business* if the issues on which the applicant prevails are related primarily to personal interests rather than to business interest.

(e) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant under the applicant's direction and control. Part-time employees shall be included.

(f) The net worth and number of employees of the applicant and all of its affiliates shall be aggregated to determine eligibility. An individual or group of individuals, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares of another business' board of directors, trustees, or other persons exercising similar functions, shall be considered an affiliate of that business for purposes of this part. In addition, the Presiding Officer may determine that financial relationships of the applicant other than those described in this paragraph constitute special circumstances that would make an award unjust.

(g) An applicant is not eligible if it has participated in the proceeding on behalf of other persons or entities that are ineligible.

§ 17.6 Standards for awards.

(a) A prevailing applicant may receive an award for fees and expenses incurred in connection with a proceeding unless the position of the EPA as a party to the proceeding was substantially justified or unless special circumstances make the award sought unjust. No presumption arises that the agency's position was not substantially justified simply because the agency did not prevail.

(b) An award shall be reduced or denied if the applicant has unduly or unreasonably protracted the proceeding.

§ 17.7 Allowable fees and other expenses.

(a) The following fees and other expenses are allowable under the Act:

(1) Reasonable expenses of expert witnesses;

(2) The reasonable cost of any study, analysis, engineering report, test, or project which EPA finds necessary for the preparation of the party's case;

(3) Reasonable attorney or agent fees;

(b) The amount of fees awarded will be based upon the prevailing market rates for the kind and quality of services furnished, except that:

(1) Compensation for an expert witness will not exceed $24.09 per hour; and

(2) Attorney or agent fees will not be in excess of $75 per hour.

(c) In determining the reasonableness of the fee sought, the Presiding Officer shall consider the following:

(1) The prevailing rate for similar services in the community in which

the attorney, agent, or witness ordinarily performs services;

(2) The time actually spent in the representation of the applicant;

(3) The difficulty or complexity of the issues raised by the application;

(4) Any necessary and reasonable expenses incurred;

(5) Such other factors as may bear on the value of the services performed.

§ 17.8 Delegation of authority.

The Administrator delegates to his Judicial Officer authority to take final action relating to the Equal Access to Justice Act. Nothing in this delegation shall preclude the Judicial Officer from referring any matter related to the Equal Access to Justice Act to the Administrator when the Judicial Officer determines the referral to be appropriate.

Subpart B—Information Required From Applicants

§ 17.11 Contents of application.

(a) An application for award of fees and expenses under the Act shall identify the applicant and the proceeding for which an award is sought. The application shall show that the applicant has prevailed and identify the position of EPA in the proceeding that the applicant alleges was not substantially justified.

(b) The application shall include a statement that the applicant's net worth as of the time the proceeding was initiated did not exceed $1 million if the applicant is an individual (other than a sole owner of an unincorporated business seeking an award in that capacity) or $5 million in the case of all other applicants. An applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) and is exempt from taxation under section 501(a) of the Code or, in the case of such an organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under section 501(c)(3) of the Code; or

(2) It states that it is a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 114j(a)).

(c) If the applicant is a partnership, corporation, association, or organization, or a sole owner of an unincorporated business, the application shall state that the applicant did not have more than 500 employees at the time the proceeding was initiated, giving the number of its employees and describing briefly the type and purpose of its organization or business.

(d) The application shall itemize the amount of fees and expenses sought.

(e) The application may include any other matters that the applicant believes should be considered in determining whether and in what amount an award should be made.

(f) The application shall be signed by the applicant with respect to the eligibility of the applicant and by the attorney of the applicant with respect to fees and expenses sought. The application shall contain or be accompanied by a written verification under oath or affirmation or under penalty of perjury that the information provided in the application and all accompanying material is true and complete to the best of the signer's information and belief.

(Approved by the Office of Management and Budget under control number 2000-0403)

§ 17.12 Net worth exhibit.

(a) Each applicant except a qualified tax exempt organization or a qualified cooperative must submit with its application a detailed exhibit showing its net worth at the time the proceeding was initiated. If any individual, corporation, or other entity directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or if the applicant directly or indirectly owns or controls a majority of the voting shares or other interest of any corporation or other entity, the exhibit must include a showing of the net worth of all such affiliates or of the applicant including the affiliates. The exhibit may be in

any form that provides full disclosure of assets and liabilities of the applicant and any affiliates and is sufficient to determine whether the applicant qualifies under the standards of 5 U.S.C. 504(b)(1)(B)(i). The Presiding Officer may require an applicant to file additional information to determine the applicant's eligibility for an award.

(b) The net worth exhibit shall describe any transfers of assets from, or obligations incurred by, the applicant or any affiliate occurring in the one-year period prior to the date on which the proceeding was initiated that reduced the net worth of the applicant and its affiliates below the applicable net worth ceiling. If there were no such transactions, the applicant shall so state.

(c) The net worth exhibit shall be included in the public record of the proceeding.

(Approved by the Office of Management and Budget under control number 2000-0430)

§ 17.13 Documentation of fees and expenses.

(a) The application shall be accompanied by full documentation of fees and expenses, including the cost of any study, engineering report, test, or project, for which an award is sought.

(b) The documentation shall include an affidavit from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed and describing the specific services performed.

(1) The affidavit shall itemize in detail the services performed by the date, number of hours per date, and the services performed during those hours. In order to establish the hourly rate, the affidavit shall state the hourly rate which is billed and paid by the majority of clients during the relevant time periods.

(2) If no hourly rate is paid by the majority of clients because, for instance, the attorney or agent represents most clients on a contingency basis, the attorney or agent shall provide affidavits from two attorneys or agents with similar experience, who perform similar work, stating the hourly rate which they bill and are paid by the majority of their clients during a comparable time period.

(c) The documentation shall also include a description of any expenses for which reimbursement is sought and a statement of the amounts paid and payable by the applicant or by any other person or entity for the services provided.

(d) The Presiding Officer may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

(Approved by the Office of Management and Budget under control number 2000-0430)

§ 17.14 Time for submission of application.

(a) An application must be filed no later than 30 days after final disposition of the proceeding. If agency review or reconsideration is sought or taken of a decision in which an applicant believes it has prevailed, action on the award of fees shall be stayed pending final agency disposition of the underlying controversy.

(b) Final disposition means the later of: (1) The date on which the agency decision becomes final, either through disposition by the Administrator or Judicial Officer of a pending appeal or through an initial decision becoming final due to lack of an appeal or (2) the date of final resolution of the proceeding, such as settlement or voluntary dismissal, which is not subject to a petition for rehearing or reconsideration.

(c) If judicial review is sought or taken of the final agency disposition of the underlying controversy, then agency proceedings for the award of fees will be stayed pending completion of judicial review. If, upon completion of review, the court decides what fees to award, if any, then EPA shall have no authority to award fees.

Subpart C—Procedures for Considering Applications

§ 17.21 Filing and service of documents

An application for an award and any other pleading or document related to

the application shall be filed and served on all parties to the proceeding in the same manner as other pleadings in the proceeding.

§ 17.22 Answer to application.

(a) Within 30 calendar days after service of the application, EPA counsel shall file an answer.

(b) If EPA counsel and the applicant believe that they can reach a settlement concerning the award, EPA counsel may file a statement of intent to negotiate. The filing of such a statement shall extend the time for filing an answer an additional 30 days.

(c) The answer shall explain in detail any objections to the award requested and identify the facts relied on to support the objection. If the answer is based on any alleged facts not already reflected in the record of the proceeding, EPA counsel shall include with the answer either a supporting affidavit or affidavits or request for further proceedings under § 17.25.

§ 17.23 Comments by other parties.

Any party to a proceeding other than the applicant and EPA counsel may file comments on an application within 30 calendar days after it is served or on an answer within 15 calendar days after it is served.

§ 17.24 Settlement.

A prevailing party and EPA counsel may agree on a proposed settlement of an award before final action on the application, either in connection with a settlement of the underlying proceeding or after the underlying proceeding has been concluded. If the party and EPA counsel agree on a proposed settlement of an award before an application has been filed, the application shall be filed with the proposed settlement.

§ 17.25 Extensions of time and further proceedings.

(a) The Presiding Officer may, on motion and for good cause shown, grant extensions of time, other than for filing an application for fees and expenses, after final disposition in the adversary adjudication.

(b) Ordinarily, the determination of an award will be made on the basis of the written record of the underlying proceeding and the filings required or permitted by the foregoing sections of these rules. However, the adjudicative officer may *sua sponte* or on motion of any party to the proceedings require or permit further filings or other action, such as an informal conference, oral argument, additional written submissions, or an evidentiary hearing. Such further action shall be allowed only when necessary for full and fair resolution of the issues arising from the application and shall take place as promptly as possible. A motion for further filings or other action shall specifically identify the information sought on the disputed issues and shall explain why the further filings or other action is necessary to resolve the issues.

(c) In the event that an evidentiary hearing is required or permitted by the adjudicative officer, such hearing and any related filings or other action required or permitted shall be conducted pursuant to the procedural rules governing the underlying adversary adjudication.

§ 17.26 Decision on application.

The Presiding Officer shall issue a recommended decision on the application which shall include proposed written findings and conclusions on such of the following as are relevant to the decision: (a) The applicant's status as a prevailing party; (b) the applicant's qualification as a "party" under 5 U.S.C. 504(b)(1)(B); (c) whether EPA's position as a party to the proceeding was substantially justified; (d) whether the special cirumstances make an award unjust; (e) whether the applicant during the course of the proceedings engaged in conduct that unduly and unreasonably protracted the final resolution of the matter in controversy; and (f) the amounts, if any, awarded for fees and other expenses, explaining any difference between the amount requested and the amount awarded.

§ 17.27 Agency review.

The recommended decision of the Presiding Officer will be reviewed by EPA in accordance with EPA's procedures for the type of substantive proceeding involved.

§ 17.28 Judicial review.

Judicial review of final EPA decisions on awards may be sought as provided in 5 U.S.C. 504(c)(2).

§ 17.29 Payment of award.

An applicant seeking payment of an award shall submit a copy of the final decision granting the award to the Office of Financial Management for Processing. A statement that review of the underlying decision is not being sought in the United States courts or that the process for seeking review of the award has been completed must also be included.

PART 20—CERTIFICATION OF FACILITIES

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APPENDIX A—GUIDELINES FOR CERTIFICATION

AUTHORITY: Secs. 301, 704, 80 Stat. 379, 83 Stat. 667; 5 U.S.C. 301, 26 U.S.C. 169.

SOURCE: 36 FR 22382, Nov. 25, 1971, unless otherwise noted.

§ 20.1 Applicability.

The regulations of this part apply to certifications by the Administrator of water or air pollution control facilities for purposes of section 169 of the Internal Revenue Code of 1954, as amended, 26 U.S.C. 169, as to which the amortization period began after December 31, 1975. Certification of air or water pollution control facilities as to which the amortization period began before January 1, 1976, will continue to be governed by Environmental Protection Agency regulations published November 25, 1971, at 36 FR 22382. Applicable regulations of the Department of Treasury are at 26 CFR 1.169 et seq.

[43 FR 1340, Jan. 9, 1978]

§ 20.2 Definitions.

As used in this part, the following terms shall have the meaning indicated below:

(a) *Act* means, when used in connection with water pollution control facilities, the Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 et seq.) or, when used in connection with air pollution control facilities, the Clean Air Act, as amended (42 U.S.C. 1857 et seq.).

(b) *State certifying authority* means:

(1) For water pollution control facilities, the State pollution control agency as defined in section 502 of the Act.

(2) For air pollution control facilities, the air pollution control agency designated pursuant to section 302(b)(1) of the Act; or

(3) For both air and water pollution control facilities, any interstate agency authorized to act in place of the certifying agency of a State.

(c) *Applicant* means any person who files an application with the Administrator for certification that a facility is in compliance with the applicable regulations of Federal agencies and in furtherance of the general policies of the United States for cooperation with the States in the prevention and abatement of water or air pollution under the Act.

(d) *Administrator* means the Administrator, Environmental Protection Agency.

(e) *Regional Administrator* means the Regional designee appointed by the Administrator to certify facilities under this part.

(f) *Facility* means property comprising any new identifiable treatment facility which removes, alters, disposes of, stores, or prevents the creation of pollutants, contaminants, wastes, or heat.

(g) *State* means the States, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone,

Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§ 20.3 General provisions.

(a) An applicant shall file an application in accordance with this part for each separate facility for which certification is sought; *Provided*, That one application shall suffice in the case of substantially identical facilities which the applicant has installed or plans to install in connection with substantially identical properties; *Provided further*, That an application may incorporate by reference material contained in an application previously submitted by the applicant under this part and pertaining to substantially identical facilities.

(b) The applicant shall, at the time of application to the State certifying authority, submit an application in the form prescribed by the Administrator to the Regional Administrator for the region in which the facility is located.

(c) Applications will be considered complete and will be processed when the Regional Administrator receives the completed State certification.

(d) Applications may be filed prior or subsequent to the commencement of construction, acquisition, installation, or operation of the facility.

(e) An amendment to an application shall be submitted in the same manner as the original application and shall be considered a part of the original application.

(f) If the facility is certified by the Regional Administrator, notice of certification will be issued to the Secretary of the Treasury or his delegate, and a copy of the notice shall be forwarded to the applicant and to the State certifying authority. If the facility is denied certification, the Regional Administrator will advise the applicant and State certifying authority in writing of the reasons therefor.

(g) No certification will be made by the Regional Administrator for any facility prior to the time it is placed in operation and the application, or amended application, in connection with such facility so states.

(h) An applicant may appeal any decision of the Regional Administrator which:

(1) Denies certification;

(2) Disapproves the applicant's suggested method of allocating costs pursuant to § 20.8(e); or

(3) Revokes a certification pursuant to § 20.10.

Any such appeal may be taken by filing with the Administrator within 30 days from the date of the decision of the Regional Administrator a written statement of objections to the decision appealed from. Within 60 days after receipt of such appeal the Administrator shall affirm, modify, or revoke the decision of the Regional Administrator, stating in writing his reasons therefor.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§ 20.4 Notice of intent to certify.

(a) On the basis of applications submitted prior to the construction, reconstruction, erection, acquisition, or operation of a facility, the Regional Administrator may notify applicants that such facility will be certified if:

(1) The Regional Administrator determines that such facility, if constructed, reconstructed, erected, acquired, installed, and operated in accordance with such application will be in compliance with requirements identified in § 20.8; and if

(2) The application is accompanied by a statement from the State certifying authority that such facility, if constructed, reconstructed, acquired, erected, installed, and operated in accordance with such application, will be in conformity with the State program or requirements for abatement or control of water or air pollution.

(b) Notice of actions taken under this section will be given to the appropriate State certifying authority.

§ 20.5 Applications.

Applications for certification under this part shall be submitted in such manner as the Administrator may prescribe, shall be signed by the applicant or agent thereof, and shall include the following information:

(a) Name, address, and Internal Revenue Service identifying number of the applicant;

(b) Type and narrative description of the new identifiable facility for which certification is (or will be) sought, including a copy of schematic or engineering drawings, and a description of the function and operation of such facility;

(c) Address (or proposed address) of facility location;

(d) A general description of the operation in connection with which the facility is (or will be) used and a description of the specific process or processes resulting in discharges or emissions which are (or will be) controlled or prevented by the facility.

(e) If the facility is (or will be) used in connection with more than one plant or other property, one or more of which were not in operation before January 1, 1976, a description of the operations of the facility in respect to each plant or other property, including a reasonable allocation of the costs of the facility among the plants being serviced, and a description of the reasoning and accounting method or methods used to arrive at these allocations.

(f) A description of the effect of the facility in terms of type and quantity of pollutants, contaminants, wastes, or heat, removed, altered, stored, disposed of, or prevented by the facility.

(g) If the facility performs a function other than removal, alteration, storage, prevention, or disposal of pollutants, contaminants, wastes, or heat, a description of all functions performed by the facility, including a reasonable identification of the costs of the facility allocable to removal, alteration, storage, prevention, or disposal of pollutants, contaminants, wastes, or heat and a description of the reasoning and accounting method or methods used to arrive at the allocation.

(h) Date when such construction, reconstruction, or erection will be completed or when such facility was (or will be) acquired;

(i) Date when such facility is placed (or is intended to be placed) in operation;

(j) Identification of the applicable State and local water or air pollution control requirements and standards, if any;

(k) Expected useful life of facility;

(l) Cost of construction, acquisition, installation, operation, and maintenance of the facility;

(m) Estimated profits reasonably expected to be derived through the recovery of wastes or otherwise in the operation of the facility over the period referred to in paragraph (a)(6) of 26 CFR 1.169-2;

(n) The percentage (if any, and if the taxpayer claims that the percentage is 5 percent or less) by which the facility (1) increases the output or capacity, (2) extends the useful life, or (3) reduces the total operating costs of the operating unit of the plant or other property most directly associated with the pollution control facility and a description of the reasoning and accounting method or methods used to arrive at this percentage.

(o) Such other information as the Administrator deems necessary for certification.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1340, Jan. 9, 1978]

§ 20.6 State certification.

The State certification shall be by the State certifying authority having jurisdiction with respect to the facility in accordance with 26 U.S.C. 169(d)(1)(A) and (d)(2). The certification shall state that the facility described in the application has been constructed, reconstructed, erected, or acquired in conformity with the State program or requirements for abatement or control of water or air pollution. It shall be executed by an agent or officer authorized to act on behalf of the State certifying authority.

§ 20.7 General policies.

(a) The general policies of the United States for cooperation with the States in the prevention and abatement of water pollution are: To enhance the quality and value of our water resources; to eliminate or reduce the pollution of the nation's waters and tributaries thereof; to improve the sanitary condition of surface and underground waters; and to conserve such waters for public water supplies,

propagation of fish and aquatic life and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.

(b) The general policy of the United States for cooperation with the States in the prevention and abatement of air pollution is to cooperate with and to assist the States and local governments in protecting and enhancing the quality of the Nation's air resources by the prevention and abatement of conditions which cause or contribute to air pollution which endangers the public health or welfare.

§ 20.8 Requirements for certification.

(a) Subject to § 20.9, the Regional Administrator will certify a facility if he makes the following determinations:

(1) It has been certified by the State certifying authority.

(2) That the facility: (i) Removes, alters, disposes of, stores, or prevents the creation of pollutants, contaminants, wastes, or heat, which, but for the facility, would be released into the environment;

(ii) Does not by a factor or more than 5 percent: (A) Increase the output or capacity, (B) extend the useful life, or (C) reduce the total operating costs of the operating unit (of the plant or other property) most directly associated with the pollution control facility; and

(iii) Does not significantly alter the nature of the manufacturing or production process or facility.

(3) The applicant is in compliance with all regulations of Federal agencies applicable to use of the facility, including conditions specified in any NPDES permit issued to the applicant under section 402 of the Act.

(4) The facility furthers the general policies of the United States and the States in the prevention and abatement of pollution.

(5) The applicant has complied with all the other requirements of this part and has submitted all requested information.

(b) In determining whether use of a facility furthers the general policies of the United States and the States in the prevention and abatement of water pollution, the Regional Administrator shall consider whether such facility is consistent with the following, insofar as they are applicable to the waters which will be affected by the facility:

(1) All applicable water quality standards, including water quality criteria and plans of implementation and enforcement established pursuant to section 303 of the Act or State laws or regulations;

(2) Decisions issued pursuant to section 310 of the Act;

(3) Water pollution control programs required pursuant to any one or more of the following sections of the Act: Section 306, section 307, section 311, section 318, or section 405; or in order to be consistent with a plan under section 208.

(c) In determining whether use of a facility furthers the general policies of the United States and the States in the prevention and abatement of air pollution, the Regional Administrator shall consider whether such facility is consistent with and meets the following requirements, insofar as they are applicable to the air which will be affected by the facility;

(1) Plans for the implementation, maintenance, and enforcement of ambient air quality standards adopted or promulgated pursuant to section 110 of the Act;

(2) Recommendations issued pursuant to sections 103(e) and 115 of the Act which are applicable to facilities of the same type and located in the area to which the recommendations are directed;

(3) Local government requirements for control of air pollution, including emission standards;

(4) Standards promulgated by the Administrator pursuant to the Act.

(d) A facility that removes elements or compounds from fuels that would be released as pollutants when such fuels are burned is eligible for certification if the facility is—

(1) Used in connection with a plant or other property in operation before January 1, 1976 (whether located and used at a particular plant or as a centralized facility for one or more plants), and

(2) Is otherwise eligible for certification.

(e) Where a facility is used in connection with more than one plant or other property, one or more of which were not in operation before January 1, 1976, or where a facility will perform a function other than the removal, alteration, storage, disposal, or prevention of pollutants, contaminants, wastes, or heat, the Regional Administrator will so indicate on the notice of certification and will approve or disapprove the applicant's suggested method of allocating costs. If the Regional Administrator disapproves the applicant's suggested method, he shall identify the proportion of costs allocable to each such plant, or to the removal, alteration, storage, disposal, or prevention of pollutants, contaminants, wastes, or heat.

[36 FR 22382, Nov. 25, 1971, as amended at 43 FR 1341, Jan. 9, 1978]

§ 20.9 Cost recovery.

Where it appears that, by reason of estimated profits to be derived through the recovery of wastes, through separate charges for use of the facility in question, or otherwise in the operation of such facility, all or a portion of its costs may be recovered over the period referred to in paragraph (a)(6) of 26 CFR 1.169-2, the Regional Administrator shall so signify in the notice of certification. Determinations as to the meaning of the term *estimated profits* and as to the percentage of the cost of a certified facility which will be recovered over such period shall be made by the Secretary of the Treasury, or his delegate: *Provided*, That in no event shall estimated profits be deemed to arise from the use or reuse by the applicant of recovered waste.

§ 20.10 Revocation.

Certification hereunder may be revoked by the Regional Administrator on 30 days written notice to the applicant, served by certified mail, whenever the Regional Administrator shall determine that the facility in question is no longer being operated consistent with the § 20.8(b) and (c) criteria in effect at the time the facility was placed in service. Within such 30-day period, the applicant may submit to the Regional Administrator such evidence, data or other written materials as the applicant may deem appropriate to show why the certification hereunder should not be revoked. Notification of a revocation under this section shall be given to the Secretary of the Treasury or his delegate. See 26 CFR 1.169-4(b)(1).

Appendix A—Guidelines for Certification

1. General.
2. Air Pollution Control Facilities.
a. Pollution control or treatment facilities normally eligible for certification.
b. Air pollution control facility boundaries.
c. Examples of eligibility limits.
d. Replacement of manufacturing process by another nonpolluting process.
3. Water Pollution Control Facilities.
a. Pollution control or treatment facilities normally eligible for certification.
b. Examples of eligibility limits.
4. Multiple-purpose facilities.
5. Facilities serving both old and new plants.
6. State certification.
7. Dispersal of pollutants.
8. Profit-making facilities.
9. Multiple applications.

1. *General.* Section 2112 of the Tax Reform Act of 1976 (Pub. L. 94-455, October 4, 1976) amended section 169 of the Internal Revenue Code of 1954, "Amortization of Pollution Control Facilities." The amendment made permanent the rapid amortization provisions of section 704 of the Tax Reform Act of 1969 (Pub. L. 91-172, December 30, 1969) and redefined eligibility limits to allow certification of facilities which prevent the creation or emission of pollutants.

The law defines a *certified pollution control facility* as *a new identifiable treatment facility* which is:

(a) Used in connection with a plant or other property in operation before January 1, 1976, to abate or control air or water pollution by removing, altering, disposing of, storing, or preventing the creation or emission of pollutants, contaminants, wastes, or heat;

(b) Constructed, reconstructed, erected or (if purchased) first placed in service by the taxpayer after December 31, 1975;

(c) Not to *significantly* increase the output or capacity, extend the useful life, alter the nature of the manufacturing or production process or facility or reduce the total operating costs of the operating unit of the plant or other property most directly associated with the pollution control facility

(as suggested by the legislative history, EPA regulations define the term *significant* as any increase, reduction or extension greater than 5%); and

(d) Certified by both State and Federal authorities, as provided in section 169(d)(1)(A) and (B) of the Internal Revenue Code.

If the facility is a building, the statute requires that it be exclusively devoted to pollution control. Most questions as to whether a facility is a *building* and, if so, whether it is *exclusively* devoted to pollution control are resolved by § 1.169-2(b)(2) of the Treasury Department regulations.

Since a treatment facility is eligible only if it furthers the general policies of the United States under the Clean Air Act and the Clean Water Act, a facility will be certified only if its purpose is to improve the quality of the air or water outside the plant. Facilities to protect the health or safety of employees inside the plant are not eligible.

Facilities installed before January 1, 1976, in plants placed in operation after December 31, 1968, are ineligible for certification under the statute. 26 U.S.C. 169.

2. *Air pollution control facilities.*

a. *Pollution control or treatment facilities normally eligible for certification.* The following devices are illustrative of facilities for removal, alteration, disposal, storage or preventing the creation or emission of air pollution:

(1) Inertial separators (cyclones, etc.).
(2) Wet collection devices (scrubbers).
(3) Electrostatic precipitators.
(4) Cloth filter collectors (baghouses).
(5) Director fired afterburners.
(6) Catalytic afterburners.
(7) Gas absorption equipment.
(8) Vapor condensers.
(9) Vapor recovery systems.
(10) Floating roofs for storage tanks.
(11) Fuel cleaning equipment.
(12) Combinations of the above.

(b) *Air Pollution control facility boundaries.* Most facilities are systems consisting of several parts. A facility need not start at the point where the gaseous effluent leaves the last unit of the processing equipment, nor will it always extend to the point where the effluent is emitted to the atmosphere or existing stack, breeching, ductwork or vent. It includes all the auxiliary equipment used to operate the control system, such as fans, blowers, ductwork, valves, dampers and electrical equipment. It also includes all equipment used to handle, store, transport or dispose of the collected pollutants.

(c) *Examples of eligibility limits.* The amortization deduction is limited to new identifiable treatment facilities which remove, alter, destroy, dispose of, store, or prevent the creation or emission of pollutants, contaminants or wastes. It is not available for all expenditures for air pollution control and is limited to devices which are installed for the purpose of pollution control and which actually remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants by removing potential pollutants at any stage of the production process.

(1) *Boiler modifications or replacements.* Modifications of boilers to accommodate *cleaner* fuels are not eligible for rapid amortization: e.g., removal of stokers from a coal-fired boiler and the addition of gas or oil burners. The purpose of the burners is to produce heat, and they are not identifiable as treatment facilities nor do they prevent the creation or emission of pollutants by removing potential pollutants. A new gas or oil-fired boiler that replaces a coal-fired boiler would also be ineligible for certification.

(2) *Fuel processing.* Eligible air pollution control facilities include preprocessing equipment which removes potential air pollutants from fuels before they are burned. A desulfurization facility would thus be eligible provided it is used in connection with the plant where the desulfurized coal will be burned or is used as a centralized facility for one or more plants. However, fluidized bed facilities would generally not be eligible for rapid amortization. Such facilities would almost certainly increase output or capacity, reduce total operating costs, or extend the useful life of the plant or other property by more than 5%, since the boiler itself would be the operating unit of the plant most closely associated with the pollution control facility. Where the Regional Office and the taxpayer disagree as to the applicability of the 5% rule, the Regional office should nonetheless certify the facility if it is otherwise eligible and leave the ultimate determination to the Treasury Department. The certification should alert Treasury to the possibility that the facility is ineligible for rapid amortization.

(3) *Incinerators.* The addition of an afterburner, secondary combustion chamber or particulate collector would be eligible as would any device added to effect more efficient combustion.

(4) *Collection devices used to collect products or process material.* In some manufacturing operations, devices are used to collect product or process material, as in the case of the manufacture of carbon black. The baghouse would be eligible for certification, but the certification should notify the Treasury Department of the profitable waste recovery involved. (See paragraph 8 below.)

(5) *Intermittent control systems.* Measuring devices which inform the taxpayer that ambient air quality standards are being exceeded are not eligible for certification since they do not physically remove, alter, destroy, dispose of, store or prevent the cre-

ation or emission of pollutants, but merely act as a signal to curtail operations. Of course, measuring devices used in connection with an eligible pollution control facility would be eligible.

d. *Replacement of manufacturing process by another, nonpolluting process.* An installation does not qualify for certification where it uses a process known to be *cleaner* than an alternative, but which does not actually remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants by removing potential pollutants at any stage in the production process. For example, a minimally polluting electric induction furnace to melt cast iron which replaces, or is installed instead of, a heavily polluting iron cupola furnace would be ineligible for this reason and because it is not an identifiable treatment facility. However, if the replacement equipment has an air pollution control device added to it, the control device would be eligible even though the process equipment would not. For example, where a primary copper smelting reverberatory furnace is replaced by a flash smelting furnace, followed by the installation of a contact sulfuric acid plant, the acid plant would qualify since it is a control device not necessary to the production process. The flash smelting furnace would not qualify because its purpose is to produce copper matte.

3. *Water Pollution Control Facilities.*

a. *Pollution control or treatment facilities normally eligible for certification.* The following types of equipment are illustrative of facilities to remove, alter, destroy, store or prevent the creation of water pollution:

(1) Pretreatment facilities which neutralize or stabilize industrial or sanitary wastes, or both, from a point immediately preceding the point of such treatment to the point of disposal to, and acceptance by, a publicly-owned treatment works. The necessary pumping and transmitting facilities are also eligible.

(2) Treatment facilities which neutralize or stabilize industrial or sanitary wastes, or both, to comply with Federal, State or local effluent or water quality standards, from a point immediately preceding the point of such treatment to the point of disposal, including necessary pumping and transmitting facilities, including those for recycle or segregation of wastewater.

(3) Ancillary devices and facilities such as lagoons, ponds and structures for storage, recycle, segregation or treatment, or any combination of these, of wastewaters or wastes from a plant or other property.

(4) Devices, equipment or facilities constructed or installed for the primary purpose of recovering a by-product of the operation (saleable or otherwise) previously lost either to the atmosphere or to the waste effluent. Examples are:

(A) A facility to concentrate and recover vaporous by-products from a process stream for reuse as raw feedstock or for resale, unless the estimated profits from resale exceed the cost of the facility (see paragraph 8 below).

(B) A facility to concentrate or remove *gunk* or similar *tars* or polymerized tar-like materials from the process waste effluent previously discharged in the plant effluents. Removal may occur at any stage of the production process.

(C) A device used to extract or remove insoluble constitutents from a solid or liquid by use of a selective solvent; an open or closed tank or vessel in which such extraction or removal occurs; a diffusion battery of tanks or vessels for countercurrent decantation, extraction, or leaching, etc.

(D) A skimmer or similar device for removing grease, oils and fat-like materials from the process or effluent stream.

(b) *Examples of eligibility limits.*

(1) In-plant process changes which may result in the reduction or elimination of pollution but which do not themselves remove, alter, destroy, dispose of, store or prevent the creation of pollutants by removing potential pollutants at some point in the process stream are not eligible for certification.

(2) A device, piece of equipment or facility is not eligible if it is associated with or included in a stream for subsurface injection of untreated or inadequately treated industrial or sanitary waste.

4. *Multiple-purpose facilities.* A facility can qualify for rapid amortization if it serves a function other than the abatement of pollution (unless it is a building). Otherwise, the effect might be to discourage installation of sensible pollution abatement facilities in favor of less efficient single-function facilities.

The regulations require applicants to state what percentage of the cost of a facility is properly allocable to its abatement function and to justify the allocation. The Regional Office will review these allocations, and the certification will inform the Treasury Department if the allocation appears to be incorrect. Although not generally necessary or desireable, site inspections may be appropriate in cases involving large sums of money or unusual types of equipment.

5. *Facilities serving both old and new plants.* The statute provides that pollution control facilities must be used in connection with a plant or other property in operation before January 1, 1976. When a facility is used in connection with both pre-1976 and newer property, it may qualify for rapid amortization to the extent it is used in connection with pre-1976 property.

Again, the applicant will submit a theory of allocation for review by the Regional

Office. The usual method of allocation is to compare the effluent capacity of the pre-1976 plant to the treatment capacity of the control facility. For example, if the old plant has a capacity of 80 units of effluent (but an average output of 60 units), the new plant has a capacity of 40 units (but an average output of 20 units), and the control facility has a capacity of 150 units, then $^{80}/_{150}$ of the cost of the control facility would be eligible for rapid amortization.

If a taxpayer presents a seemingly reasonable method of allocation different from the foregoing, Regional Office personnel should consult with the Office of Air Quality Planning and Standards or the Office of Water Planning and Standards, and with the Office of General Counsel.

6. *State certification.* To qualify for rapid amortization under section 169, a facility must first be certified by the State as having been installed "in conformity with the State program or requirements for abatement or control of water or atmospheric pollution or contamination." Significantly, the statute does not say that the State must require that a facility be installed. If use of a facility will not actually contravene a State requirement, the State may certify. However, since State certification is a prerequisite to EPA certification, EPA may not certify if the State has denied certification for whatever reason.

It should be noted that certification of a facility does not constitute the personal warranty of the certifying official that the conditions of the statute have been met. EPA certification is binding on the Government only to the extent the submitted facts are accurate and complete.

7. *Dispersal of pollutants.* Section 169 applies to facilities which remove, alter, destroy, dispose of, store or prevent the creation or emission of pollutants—including heat. Facilities which merely disperse pollutants (such as tall stacks) do not qualify. However, there is no way to *dispose of* heat other than by transferring B.t.u.'s to the environment. A cooling tower is therefore eligible for certification provided it is used in connection with a pre-1976 plant. A cooling pond or an addition to an outfall structure which results in a decrease in the amount by which the temperature of the receiving water is raised and which meets applicable State standards is likewise eligible.

8. *Profit-making facilities.* The statute denies rapid amortization where the cost of pollution control facilities will be recovered from profits derived through the recovery or wastes *or otherwise.*

If a facility recovers marketable wastes, estimated profits on which are not sufficient to recover the entire cost of the facility, the amortization basis of the facility will be reduced in accordance with Treasury Department regulations. The responsibility of the Regional Offices is merely to identify for the Treasury Department those cases in which estimated profits will arise. The Treasury Department will determine the amount of such profits and the extent to which they can be expected to result in cost recovery, but the EPA certification should inform the Treasury whether cost recovery is possible.

The phrase *or otherwise* also includes situations where the taxpayer is in the business of renting the facility for a fee or charging for the treatment of waste. In such cases, the facility may theoretically qualify for EPA certification. The decision as to the extent of its profitability is for the Treasury Department. Situations may also arise where use of a facility is furnished at no additional charge to a number of users, or to the public, as part of a package of other services. In such cases, no profits will be deemed to arise from operation of the facility unless the other services included in the package are merely ancillary to use of the facility. Of course, the cost recovery provision does not apply where a taxpayer merely recovers the cost of a facility through general revenues; otherwise no profitable firm would ever be eligible for rapid amortization.

It should be noted that § 20.9 of the EPA regulation is not meant to affect general principles of Federal income tax law. An individual other than the title holder of a piece of property may be entitled to take depreciation deductions on it if the arrangements by which such individual has use of the property may, for all practical purposes, be viewed as a purchase. In any such case, the facility could qualify for full rapid amortization, notwithstanding the fact that the title holder charges a separate fee for the use of the facility, so long as the taxpayer—in such a case, the user—does not charge a separate fee for use of the facility.

9. *Multiple applications.* Under EPA regulations, a multiple application may be submitted by a taxpayer who applies for certification of substantially identical pollution abatement facilities used in connection with substantially identical properties. It is not contemplated that the multiple application option will be used with respect to facilities in different States, since each such facility would require a separate application for certification to the State involved. EPA regulations also permit an applicant to incorporate by reference in an application material contained in an application previously filed. The purpose of this provision is to avoid the burden of furnishing detailed information (which may in some cases include portions of catalogs or process flow diagrams) which the certifying official has previously received. Accordingly, material filed with a Regional Office of EPA may be incorporat-

ed by reference only in an application subsequently filed with the same Regional Office.

[47 FR 38319, Aug. 31, 1982]

PART 21—SMALL BUSINESS

Sec.
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21.13 Effect of certification upon authority to enforce applicable standards.

AUTHORITY: 15 U.S.C. 636, as amended by Pub. L. 92-500.

SOURCE: 42 FR 8083, Feb. 8, 1977, unless otherwise noted.

§ 21.1 Scope.

This part establishes procedures for the issuance by EPA of the statements, referred to in section 7(g) of the Small Business Act and section 8 of the Federal Water Pollution Control Act Amendments of 1972, to the effect that additions to or alterations in the equipment, facilities (including the construction of pretreatment facilities and interceptor sewers), or methods of operations of small business concerns are necessary and adequate to comply with requirements established under the Federal Water Pollution Control Act, 33 U.S.C. 1151, *et seq.*

§ 21.2 Definitions.

(a) *Small business concern* means a concern defined by section 2[3] of the Small Business Act, 15 U.S.C. 632, 13 CFR part 121, and regulations of the Small Business Administration promulgated thereunder.

(b) For purposes of paragraph 7(g)(2) of the Small Business Act, *necessary and adequate* refers to additions, alterations, or methods of operation in the absence of which a small business concern could not comply with one or more applicable standards. This can be determined with reference to design specifications provided by manufacturers, suppliers, or consulting engineers; including, without limitations, additions, alterations, or methods of operation the design specifications of which will provide a measure of treatment or abatement of pollution in excess of that required by the applicable standard.

(c) *Applicable Standard* means any requirement, not subject to an exception under § 21.6, relating to the quality of water containing or potentially containing pollutants, if such requirement is imposed by:

(1) The Act;

(2) EPA regulations promulgated thereunder or permits issued by EPA or a State thereunder;

(3) Regulations by any other Federal Agency promulgated thereunder;

(4) Any State standard or requirement as applicable under section 510 of the Act;

(5) Any requirements necessary to comply with an areawide management plan approved pursuant to section 208(b) of the Act;

(6) Any requirements necessary to comply with a facilities plan developed under section 201 of the Act (see 35 CFR, subpart E);

(7) Any State regulations or laws controlling the disposal of aqueous pollutants that may affect groundwater.

(d) *Regional Administrator* means the Regional Administrator of EPA for the region including the State in which the facility or method of operation is located, or his designee.

(e) *Act* means the Federal Water Pollution Control Act, 33 U.S.C. 1151, *et seq.*

(f) *Pollutant* means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. For the purposes of this section, the term also means sewage from vessels within the meaning of section 312 of the Act.

(g) *Permit* means any permit issued by either EPA or a State under the au-

thority of section 402 of the Act; or by the Corps of Engineers under section 404 of the Act.

(h) *State* means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

Comment: As the SBA does not extend its programs to the Canal Zone, the listing of the Canal Zone as a State for the purposes of meeting a requirement imposed by section 311 or 312 of the Act is not effective in this regulation.

(i) *Statement* means a written approval by EPA, or if appropriate, a State, of the application.

(j) *Facility* means any building, structure, installation or vessel, or portion thereof.

(k) *Construction* means the erection, building, acquisition, alteration, remodeling, modification, improvement, or extension of any facility; *Provided,* that it does not mean preparation or undertaking of: Plans to determine feasibility; engineering, architectural, legal, fiscal, or economic investigations or studies; surveys, designs, plans, writings, drawings, specifications or procedures.

Comment: This provision would not later preclude SBA financial assistance being utilized for any planning or design effort conducted previous to construction.

(l) The term *additions and alterations* means the act of undertaking construction of any facility.

(m) The term *methods of operation* means the installation, emplacement, or introduction of materials, including those involved in construction, to achieve a process or procedure to control: Surface water pollution from non-point sources—that is, agricultural, forest practices, mining, construction; ground or surface water pollution from well, subsurface, or surface disposal operations; activities resulting in salt water intrusion; or changes in the movement, flow, or circulation of navigable or ground waters.

(n) The term *vessel* means every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on the navigable waters of the United States other than a vessel owned or operated by the United States or a State or a political subdivision thereof, or a foreign nation; and is used for commercial purposes by a small business concern.

(o) *EPA* means the Environmental Protection Agency.

(p) *SBA* means the Small Business Administration.

(q) *Areawide agency* means an areawide management agency designated under section 208(c)(1) of the Act.

(r) *Lateral sewer* means a sewer which connects the collector sewer to the interceptor sewer.

(s) *Interceptor sewer* means a sewer whose primary purpose is to transport wastewaters from collector sewers to a treatment facility.

§ 21.3 Submission of applications.

(a) Applications for the statement described in § 21.5 of this part shall be made to the EPA Regional Office for the region covering the State in which the additions, alterations, or methods of operation covered by the application are located. A listing of EPA Regional Offices, with their mailing addresses, and setting forth the States within each region is as follows:

Region	Address	State
I	Regional Administrator, region I, EPA, John F. Kennedy Federal Bldg., room 2303, Boston, MA 02203.	Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.
II	Regional Administrator, region II, EPA, 26 Federal Plaza, room 908, New York, NY 10007.	New Jersey, New York, Virgin Islands, and Puerto Rico.
III	Regional Administrator, region III, EPA, Curtis Bldg., 6th and Walnut Sts., Philadelphia, PA 19106.	Delaware, District of Columbia, Pennsylvania, Maryland, Virginia, and West Virginia.
IV	Regional Administrator, region IV, EPA, 345 Courtland St. NE., Atlanta, GA 30308.	Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee.
V	Regional Administrator, region V, EPA, 230 South Dearborn St., Chicago, IL 60604.	Illinois, Indiana, Michigan, Minnesota, Ohio, and Wisconsin.

Region	Address	State
VI	Regional Administrator, region VI, EPA, 1201 Elm St., 27th floor, First International Bldg., 70 Dallas, TX 75201.	Arkansas, Louisiana, New Mexico, Oklahoma, and Texas.
VII	Regional Administrator, region VII, EPA, 1735 Baltimore Ave., Kansas City, MO 64108.	Iowa, Kansas, Missouri, and Nebraska.
VIII	Regional Administrator, region VIII, EPA, 1860 Lincoln St., Suite 900, Denver, CO 80203.	Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming.
IX	Regional Administrator, region IX, EPA, 100 California St., San Francisco, CA 94111.	Arizona, California, Hawaii, Nevada, Guam, American Samoa, and Trust Territory of the Pacific Islands.
X	Regional Administrator, region X, EPA, 1200 6th Ave., Seattle, WA 98101.	Alaska, Idaho, Oregon, and Washington.

(b) An application described in paragraph (1) of § 21.3(c) may be submitted directly to the appropriate State, where a State has assumed responsibility for issuing the statement. Information on whether EPA has retained responsibility for certification or whether it has been assumed by the State may be obtained from either the appropriate Regional Administrator or the State Water Pollution Control Authority in which the facility is located.

(c) An application need be in no particular form, but it must be in writing and must include the following:

(1) Name of applicant (including business name, if different) and mailing address. Address of the affected facility or operation, if different, should also be included.

(2) Signature of the owner, partner, or principal executive officer requesting the statement.

(3) The Standard Industrial Classification number for the business for which an application is being submitted. Such SIC number shall be obtained from the Standard Industrial Classification Manual, 1972 edition. If the applicant does not know the SIC for the business, a brief description of the type of business activity being conducted should be provided.

(4) A description of the process or activity generating the pollution to be abated by the additions, alterations, or methods of operation covered by the application, accompanied by a schematic diagram of the major equipment and process, where practicable.

(5) A specific description of the additions, alterations, or methods of operation covered by the application. Where appropriate, such description will include a summary of the facility construction to be undertaken; a listing of the major equipment to be purchased or utilized in the operation of the facility; the purchase of any land or easements necessary to the operation of the facility; and any other items that the applicant deems pertinent. Any information that the applicant considers to be a trade secret shall be identified as such.

(6) A declaration of the requirement, or requirements, for compliance with which the alterations, additions, or methods of operation are claimed to be necessary and adequate.

(i) If the requirement results from a permit issued by EPA or a State under section 402 of the Act, the permit number shall be included.

(ii) If the requirement results from a permit issued by EPA or a State for a publicly-owned treatment works, the municipal permit number shall be included along with a written declaration from the authorized agent for the publicly owned treatment works that received the permit detailing the specific pretreatment requirements being placed upon the applicant.

(iii) If the requirement initiates from a plan to include the applicant's effluent in an existing municipal sewer system through the construction of lateral or interceptor sewers, a written declaration from the authorized agent for the publicly owned treatment works shall be included noting that the sewer construction is consistent with the integrity of the system; will not result in the capacity of the publicly owned treatment works being exceeded; and where applicable, is consistent with a facilities plan developed under section 201 of the Act (see 35 CFR part 917).

(iv) If the requirement results from a State order, regulation, or other enforceable authority controlling pollution from a vessel as provided by section 312(f)(3) of the Act, a written declaration from the authorized agent of the State specifying the control measures being required of the applicant shall be included.

(v) If the requirement is a result of a permit issued by the Corps of Engineers related to permits for dredged or fill material as provided by section 404 of the Act, a copy of the permit as issued shall be included.

(vi) If the requirement results from a standard of performance for control of sewage from vessels as promulgated by the Coast Guard under section 312(b) of the Act, the vessel registration number or documentation number shall be included.

(vii) If the requirement results from a plan to control or prevent the discharge or spill of pollutants as identified in section 311 of the Act, the title and date of that plan shall be included.

(viii) If the requirement is the result of an order by a State or an areawide management agency controlling the disposal of aqueous pollutants so as to protect groundwater, a copy of the order as issued shall be included.

(7) Additionally, if the applicant has received from a State Water Pollution Control Agency a permit issued by the State within the preceding two years, and if such permit was not issued under the authorities of section 402 of the Act, and where the permit directly relates to abatement of the discharge for which a statement is sought, a copy of that permit shall also be included.

Comment: Some States under State permit programs, separate and distinct from the NPDES permit program under the Act, conduct an engineering review of the facilities or equipment that would be used to control pollution. The results of such a review would be materially helpful in determining the necessity and adequacy of any alterations or additions.

(8) Any written information from a manufacturer, supplier, or consulting engineer, or similar independent source, concerning the design capabilities of the additions or alterations covered by the application, including any warranty limitations or certifications obtained from or provided by such sources which would bear upon these design or performance capabilities. The Regional Administrator may waive the requirement for this paragraph if it appears that there is no independent source for the information described herein; as, for example, when the applicant has designed and constructed the additions or alterations with in-house capability.

(9) An estimated schedule for the construction or implementation of the alterations, additions, or methods of operation.

(10) An estimated cost of the alterations, additions, or methods of operation, and where practicable, the individual costs of major elements of the construction to be undertaken.

(11) Information on previously received loan assistance under this section for the facility or method of operation, including a description and dates of the activity funded.

(d) A separate application must be submitted for every addition, alteration, or method of operation that is at a separate geographical location from the initial application.

Comment: As an example, a chain has four dry cleaning establishments scattered through a community. A separate application would have to be filed for each.

(e) No statement shall be approved for any application that has not included the information or declaration requirements imposed by paragraph (c)(6) of § 21.3.

(f) All applications are to be submitted in duplicate.

(g) All applications are subject to the provisions of 18 U.S.C. 1001 regarding prosecution for the making of false statements or the concealing of material facts.

(h) Instructional guidelines to assist in the submission of applications for EPA certification are available from EPA or a certifying State.

§ 21.4 Review of application.

(a) The Regional Administrator or his designee will conduct a review of the application. This review will consist of a general assessment of the ade-

quacy of the proposed alterations, additions, or methods of operation. The review will corroborate that the proposed alterations, additions, or methods of operation are required by an applicable standard. The review will identify any proposed alterations, additions, or methods of operation that are not required by an applicable standard, or that are extfaneous to the achievement of an applicable standard.

(b) The assessment of adequacy will be conducted to ensure that the proposed additions, alterations, or methods of operation are sufficient to meet one or more applicable standards whether alone or in conjunction with other plans. The assessment will not generally examine whether other alternatives exist or would be more meritorious from a cost-effective, efficiency, or technological standpoint.

(c) An application which proposes additions, alterations, or methods of operation whose design, in anticipation of a future requirement, will achieve a level of performance above the requirements imposed by a presently applicable standard shall be reviewed and approved by EPA or a State without prejudice. The amount of financial assistance for such an application will be determined by SBA.

(d) The Regional Administrator shall retain one copy of the application and a summary of the action taken on it. Upon completion of his review, the Regional Administrator shall return the original application along with any other supporting documents or information provided to the applicant along with a copy to the appropriate SBA district office for processing.

§ 21.5 Issuance of statements.

(a) Upon application by a small business concern pursuant to § 21.3 the Regional Administrator will, if he finds that the additions, alterations, or methods of operation covered by the application are adequate and necessary to comply with an applicable standard, issue a written statement to the applicant to that effect, within 45 working days following receipt of the application, or within 45 working days following receipt of all information required to be submitted pursuant to § 21.3(c), whichever is later. Such a written statement shall be classified as a full approval. If an application is deficient in any respect, with regard to the specifications for submission listed in § 21.3(c), the Regional Administrator shall promptly, but in no event later than 30 working days following receipt of the application, notify the applicant of such deficiency.

(b) (1) If an application contains proposed alterations, additions, or methods of operation that are adequate and necessary to comply with an applicable standard but also contains proposed alterations, additions, or methods of operation that are not necessary to comply with an applicable standard, the Regional Administrator shall conditionally approve the application within the time limit specified in paragraph (a) of this section, and shall also identify in the approval those alterations, additions, or methods of operation that he determines are not necessary.

(2) Conditional approvals as contained in a statement will satisfy the requirements for approval by EPA for those alterations, additions, or methods of operation determined to be necessary and adequate. Such conditional approvals may be submitted to SBA in satisfaction of the requirements of section 7(g)(2)(B) of the Small Business Act.

(3) Conditional approvals will not satisfy the requirements for approval by EPA for those alterations, additions, or methods of operation included in the application that are determined not to be necessary. Unnecessary alterations, additions, or methods of operation are those which are extraneous to the achievement of an applicable standard.

(4) Conditional approvals may be appealed to the Deputy Administrator by an applicant in accordance with the procedures identified in § 21.8.

(c) If the Regional Administrator determines that the additions, alterations, or methods of operation covered by an application are not necessary and adequate to comply with an applicable standard, he shall disapprove the application and shall so advise the applicant of such determi-

nation within the time limit specified in paragraph (a) of this section, and shall state in writing the reasons for his determination.

(d) Any application shall be disapproved if the Regional Administrator determines that the proposed addition, alteration, or method of operation would result in the violation of any other requirement of this Act, or of any other Federal or State law or regulation with respect to the protection of the environment.

(e) An applicant need not demonstrate that its facility or method of operation will meet all applicable requirements established under the Act. The applicant need only demonstrate that the additions, alterations, or methods of operation will assist in ensuring compliance with one or more of the applicable standards for which financial assistance is being requested.

Comment: As an example, a small business has two discharge pipes—one for process water, the other for cooling water. The application for loan assistance is to control pollution from the process water discharge. However, EPA or a State may review the applicant's situation and identify for SBA that the applicant is subject to other requirements for which the applicant has not sought assistance.

(f) An application should not include major alternative designs significantly differing in scope, concept, or capability. It is expected that the applicant at the time of submission will have selected the most appropriate or suitable design for the addition, alteration, or method of operation.

(g) EPA will not provide assistance in the form of engineering, design, planning or other technical services to any applicant in the preparation of his application.

(h) An applicant may be issued a certification for additions, alterations, or methods of operation constructed or undertaken before loan assistance was applied for by the applicant. Any such applications would be reviewed by SBA for eligibility under SBA criteria, including refinancing and loan exposure.

§ 21.6 Exclusions.

(a) Statements shall not be issued for applications in the following areas:

(1) *Local requirements.* Applications for statements for additions, alterations, or methods of operation that result from requirements imposed by municipalities, counties or other forms of local or regional authorities and governments, except for areawide management agencies designated and approved under section 208 of the Act, shall not be approved; except for those requirements resulting from the application of pretreatment requirements under section 307(b) of the Act; or those resulting from an approved project for facilities plans, and developed under section 201 of the Act. (See 35 CFR, subpart E); or under a delegation of authority under the Act.

(2) *Cost recovery and user charges.* Applications for statements involving a request for financial assistance in meeting revenue and service charges imposed upon a small business by a municipality conforming to regulations governing a user charge or capital cost system under section 204(b)(2) of the Act (see 35 CFR 925-11 and 925-12) shall not be approved.

(3) *New facility sewer construction.* Applications for statements involving projects that involve the construction of a lateral, collection, or interceptor sewer, at a facility that was not in existence on October 18, 1972, shall not be approved. Applications for additions, alterations, or methods of operation for new facilities that do not involve sewer construction are not affected by this preclusion. Further, if an applicant is compelled to move as a result of a relocation requirement but operated at the facility prior to October 18, 1972, the cost of construction for a lateral, collection, or interceptor sewer can be approved for the new, relocated site. For the purpose of this exclusion lateral, collection, or interceptor sewer is determined as any sewer transporting waste from a facility or site to any publicly owned sewer.

(4) Other non-water related pollution abatement additions, alterations, or methods of operation which are not integral to meeting the requirements of the Act, although they may be achieving the requirements of another Federal or State law or regulation.

Comment: An example would be where stack emission controls were required on equipment that operated the water pollution control facility. This emission control equipment as an integral part of the water pollution control systems would be approvable. However, emission control equipment for a general purpose incinerator that only incidentally burned sewage sludge would not be approvable. The general purpose incinerator might also receive loan assistance but under separate procedures than those set out for water pollution control.

(5) *Privately owned treatment facility service or user costs.* Applications for statements involving financial assistance in meeting user cost or fee schedules related to participating in a privately owned treatment facility not under the ownership or control of the applicant shall not be approved.

(6) *Operation and maintenance charges.* Applications for statements containing a request for financial assistance in meeting the operations and maintenance costs of operating the applicant's additions, alterations, or methods of operation shall not be approved for any elements relating to such areas of cost.

(7) *Evidence of financial responsibility.* Applications for statements containing a request for financial assistance in meeting any requirements relating to evidence of financial responsibility as provided in section 311(p) of the Act shall not be approved.

§ 21.7 [Reserved]

Comment: Applications for a statement resulting from a requirement to control pollution from non-point sources as identified in section 304(e)(2)(A-F) of the Act and described in § 21.2(m) will not presently be issued a statement under § 21.5 unless the requirement is established through a permit under section 402. There is no requirement under the current Act that the Federal government control pollution from such sources, and the nature and scope of State or areawide management agency proposals or programs to control such sources cannot be determined at this time. As State and areawide plans for control of nonpoint sources being prepared under section 208 of the Act, will not be completed for several years, this section is being reserved pending a future determination on the eligibility of applications relating to non-profit sources to receive a statement under this part.

§ 21.8 Resubmission of application.

(a) A small business concern whose application is disapproved may submit an amended or corrected application to the Regional Administrator at any time. The applicant shall provide the date of any previous application.

§ 21.9 Appeals.

(a) An applicant aggrieved by a determination of a Regional Administrator under § 21.5 may appeal in writing to the Deputy Administrator of the Environmental Protection Agency, within 30 days of the date of the determination from which an appeal is taken; *Provided,* That the Deputy Administrator may, on good cause shown, accept an appeal at a later time.

(b) The applicant in requesting such an appeal shall submit to the Deputy Administrator a copy of the complete application as reviewed by the Regional Administrator.

(c) The applicant should also provide information as to why it believes the determination made by the Regional Administrator to be in error.

(d) The Deputy Administrator shall act upon such appeal within 60 days of receipt of any complete application for a review of the determination.

(e) Where a State has been delegated certification authority, the procedure for appeals shall be established in the State submission required in § 21.12.

§ 21.10 Utilization of the statement.

(a) Statements issued by the Regional Administrator will be mailed to the small business applicant and to the district office of the Small Business Administration serving the geographic area where the business is located. It is the responsibility of the applicant to also forward the statement to SBA as part of the application for a loan.

(b) Any statement or determination issued under § 21.5 shall not be altered, modified, changed, or destroyed by any applicant in the course of providing such statement to SBA. To do so can result in the revocation of any approval contained in the statement and subject the applicant to the penalties provided in 18 U.S.C. 1001.

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(c) If an application for which a statement is issued under § 21.5 is substantively changed in scope, concept, design, or capability prior to the approval by SBA of the financial assistance requested, the statement as issued shall be revoked. The applicant must resubmit a revised application under § 21.3 and a new review must be conducted. Failure to meet the requirements of this paragraph could subject the applicant to the penalties specified in 18 U.S.C. 1001 and 18 U.S.C. 286. A substantive change is one which materially affects the performance or capability of the proposed addition, alteration, or method of operation.

(d) An agency, Regional Administrator, or State issuing a statement under § 21.5 shall retain a complete copy of the application for a period of five years after the date of issuance of the statement. The application shall be made available upon request for inspection or use at any time by any agency of the Federal Government.

(e) No application for a statement or for financial assistance under this section or statement issued under this section shall constitute or be construed as suspending, modifying, revising, abrogating or otherwise changing the requirements imposed on the applicant by the terms, conditions, limitations or schedules of compliance contained in an applicable standard, permit, or other provision established or authorized under the Act or any State or local statute, ordinance or code.

(f) No statement as issued and reviewed shall be construed as a waiver to the applicants fulfilling the requirements of any State or local law, statute, ordinance, or code (including building, health, or zoning codes).

(g) An amended application need not be submitted if the facility, property, or operation for which the statement is issued is sold, leased, rented, or transferred by the applicant to another party prior to approval by SBA of the financial assistance: *Provided,* That there is or will be no substantive change in the scope, concept, design, capability, or conduct of the facility or operation.

Comment: However, eligibility for fi cial assistance would be reexamined by SB with regard to any such sale, lease, rental transfer.

(h) The Regional Administrator ma include in any statement a date of ex piration, after which date the appro al by the Regional Administrator co tained in the statement shall n longer apply. The date of expirati shall not become effective if the appl cant has submitted the statement t the SBA, prior to the date of expir tion, as part of the application for f nancial assistance.

§ 21.11 Public participation.

(a) Applications shall not general be subject to public notice, public com ment, or public hearings. Applicatio during the period of review as state in § 21.5, or during the period o appeal as provided in § 21.8, shall b available for public inspection. Ap proved applications as provided i § 21.10(d) shall be available for publi inspection at all times during the fiv year period.

(b) The Regional Administrator, i he believes that the addition, alte ation, or method of operation may ad versely and significantly affect an in terest of the public, shall provide for public notice and/or public hearing o the application. The public notic and/or public hearing shall be con ducted in accordance with the proce dures specified for a permit under 4 CFR 125.32 and 125.34(b).

(c) Where the applicant is able t demonstrate to the satisfaction of th Regional Administrator that disclo sure of certain information or part thereof as provided in § 21.3(c)(3 would result in the divulging of meth ods or processes entitled to protectio as trade secrets, the Regional Admini trator shall treat the information o the particular part as confidential i accordance with the purposes of se tion 1905 of Title 18 of the Unite States Code and not release it to an unauthorized person. *Provided, howe er,* That if access to such informatio is subsequently requested by an person, there will be compliance wi the procedures specified in 40 CF part 2. Such information may be d

closed to other officers, employees, or authorized representatives of the United States concerned with carrying out the Act or when relevant in any proceeding under the Act.

§ 21.12 State issued statements.

(a) Any State after the effective date of these regulations may submit to the Regional Administrator for his approval an application to conduct a program for issuing statements under this section.

(1) A State submission shall specify the organizational, legal, financial, and administrative resources and procedures that it believes will enable it to conduct the program.

(2) The State program shall constitute an equivalent effort to that required of EPA under this section.

(3) The State organization responsible for conducting the program should be the State water pollution control agency, as defined in section 502 of the Act.

(4) The State submission shall propose a procedure for adjudicating applicant appeals as provided under § 21.9.

(5) The State submission shall identify any existing or potential conflicts of interest on the part of any personnel who will or may review or approve applications.

(i) A conflict of interest shall exist where the reviewing official is the spouse of or dependent (as defined in the Tax Code, 26 U.S.C. 152) of an owner, partner, or principal officer of the small business, or where he has or is receiving from the small business concern applicant 10 percent of gross personal income for a calendar year, except that it shall mean 50 percent gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangements.

(ii) If the State is unable to provide alternative parties to review or approve any application subject to conflict of interest, the Regional Administrator shall review and approve the application.

(b) The Regional Administrator, within 60 days after such application, shall approve any State program that conforms to the requirements of this Section. Any such approval shall be after sufficient notice has been provided to the Regional Director of SBA.

(c) If the Regional Administrator disapproves the application, he shall notify the State, in writing, of any deficiency in its application. A State may resubmit an amended application at any later time.

(d) Upon approval of a State submission, EPA will suspend all review of applications and issuance of statements for small businesses in that State, pending transferral. *Provided, however,* That in the event of a State conflict of interest as identified in § 21.12(a)(4) of this section, EPA shall review the application and issue the statement.

(e) Any applications shall, if received by an EPA Regional Office, be forwarded promptly to the appropriate State for action pursuant to section 7(g)(2) of the Small Business Act and these regulations.

(f) (1) EPA will generally not review or approve individual statements issued by a State. However, SBA, upon receipt and review of a State approved statement may request the Regional Administrator of EPA to review the statement. The Regional Administrator, upon such request can further approve or disapprove the State issued statement, in accordance with the requirements of § 21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator,

after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§ 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION OR SUSPENSION OF PERMITS

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22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.
22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.
22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.
22.39 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.
22.40 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).
22.41 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Toxic Substances Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

APPENDIX TO PART 22—ADDRESSES OF EPA REGIONAL OFFICES

AUTHORITY: 15 U.S.C. sec. 2615; 42 U.S.C. secs. 7545 and 7601; 7 U.S.C. secs. 136(l) and 136(m); 33 U.S.C. secs. 1361, 1319(g), 1415, and 1418; 42 U.S.C. secs. 6912, 6928, and 6991(e) and 6992(d).

SOURCE: 45 FR 24363, Apr. 9, 1980, unless otherwise noted.

Subpart A—General

§ 22.01 Scope of these rules.

(a) These rules of practice govern all adjudicatory proceedings for:

(1) The assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act as amended (7 U.S.C. 1361(a));

(2) The assessment of any civil penalty conducted under section 211 of the Clean Air Act as amended (42 U.S.C. 7545);

(3) The assessment of any civil penalty or for the revocation or suspension of any permit conducted under section 105 (a) and (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a));

(4) The issuance of a compliance order or the issuance of a corrective action order, the suspension or revocation of authority to operate pursuant to section 3005(e) of the Solid Waste Disposal Act, or the assessment of any civil penalty under sections 3008, 9006 and 11005 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6928, 6991(e) and 6992(d)), except as provided in 40 CFR parts 24 and 124.

(5) The assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a));

(6) The assessment of any Class II penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g));

(7) The assessment of any administrative penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609);

(8) The assessment of any administrative penalty under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA) (42 U.S.C. 11045).

(b) The Supplemental rules of practice set forth in subpart H establish rules governing those aspects of the proceeding in question which are not covered in subparts A through G, and also specify procedures which supersede any conflicting procedures set forth in those subparts.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules or in the relevant supplementary procedures shall be resolved at the discretion of the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

[45 FR 24363, Apr. 9, 1980, as amended at 52 FR 30673, Aug. 17, 1987; 53 FR 12263, Apr. 13, 1988; 54 FR 12371, Mar. 24, 1989; 54 FR 21176, May 16, 1989]

§ 22.02 Use of number and gender.

As used in these rules of practice, words in the singular also include the plural and words in the masculine gender also include the feminine and vice versa, as the case may require.

§ 22.03 Definitions.

(a) The following definitions apply to part 22:

Act means the particular statute authorizing the institution of the proceeding at issue.

Administrative Law Judge means an Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95-251, 92 Stat. 183).

Administrator means the Administrator of the U.S. Environmental Protection Agency or his delegate.

Agency means the United States Environmental Protection Agency.

Complainant means any person authorized to issue a complaint on behalf of the Agency to persons alleged to be in violation of the Act. The complainant shall not be the Judicial Officer, Regional Judicial Officer, or any other person who will participate or advise in the decision.

Complaint means a written communication, alleging one or more violations of specific provisions of the Act, or regulations or a permit promulgated thereunder, issued by the complainant to a person under §§ 22.13 and 22.14.

Consent Agreement means any written document, signed by the parties, containing stipulations or conclusions of fact or law and a proposed penalty or proposed revocation or suspension acceptable to both complainant and respondent.

Final Order means (a) an order issued by the Administrator after an appeal of an initial decision, accelerated decision, decision to dismiss, or default order, disposing of a matter in controversy between the parties, or (b) an initial decision which becomes a final order under § 22.27(c).

Hearing means a hearing on the record open to the public and conducted under these rules of practice.

Hearing Clerk means the Hearing Clerk, A-110, U.S. Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Initial Decision means the decision issued by the Presiding Officer based upon the record of the proceedings out of which it arises.

Judicial Officer means the person designated by the Administrator under § 22.04(b) to serve as the Judicial Officer.

Party means any person that participates in a hearing as complainant, respondent, or intervenor.

Permit means a permit issued under section 102 of the Marine Protection, Research, and Sanctuaries Act.

Person includes any individual, partnership, association, corporation, and any trustee, assignee, receiver or legal successor thereof; any organized group of persons whether incorporated or not; and any officer, employee, agent, department, agency or instrumentality of the Federal Government, of any State or local unit of government, or of any foreign government.

Presiding Officer means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding Officer, unless otherwise specified by any supplemental rules.

Regional Administrator means the Administrator of any Regional Office of the Agency or any officer or employee thereof to whom his authority is duly delegated. Where the Regional Administrator has authorized the Regional Judicial Officer to act, the term *Regional Administrator* shall include the Regional Judicial Officer. In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Administrator* as used in these rules shall mean the Administrator.

Regional Hearing Clerk means an individual duly authorized by the Regional Administrator to serve as hearing clerk for a given region. Correspondence may be addressed to the Regional Hearing Clerk, U.S. Environmental Protection Agency (address of Regional Office—see Appendix). In a case where the complainant is the Assistant Administrator for Enforcement or his delegate, the term *Regional Hearing Clerk* as used in these rules shall mean the Hearing Clerk.

Regional Judicial Officer means a person designated by the Regional Administrator under § 22.04(b) to serve as a Regional Judicial Officer.

Respondent means any person proceeded against in the complaint.

(b) Terms defined in the Act and not defined in these rules of practice are

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used consistent with the meanings given in the Act.

§ 22.04 Powers and duties of the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, and Presiding Officer; disqualification.

(a) *Administrator and Regional Administrator.* The Administrator and the Regional Administrator shall exercise all powers and duties as prescribed or delegated under the Act and these rules of practice.

(b) *Judicial Officer and Regional Judicial Officer*—(1) *Office.* One or more Judicial Officers may be designated by the Administrator to perform the functions described below. One or more Regional Judicial Officers may be designated by the Regional Administrator to perform, within the region of their designation, the functions described below.

(2) *Qualifications.* A Judicial Officer or a Regional Judicial Officer shall be an attorney who is a permanent or temporary employee of the Agency or some other Federal agency and who may perform other duties within the Agency. A Regional Judicial Officer shall not be employed by the Region's Enforcement Division or by the Regional Division directly associated with the type of violation at issue in the proceeding. A Judicial Officer shall not be employed by the Office of Enforcement or by any program office directly associated with the type of violation at issue in the proceeding. Neither the Judicial Officer nor the Regional Judicial Officer shall have performed prosecutorial or investigative functions in connection with any hearing in which he serves as Judicial Officer or any factually related hearing.

(3) *Functions.* The Administrator may delegate to the Judicial Officer, or the Regional Administrator may delegate to the Regional Judicial Officer, all or part of his authority to act in a given proceeding. This delegation does not prevent the Judicial Officer or Regional Judicial Officer from referring any motion or case to the Administrator or Regional Administrator when appropriate. The Judicial Officer and Regional Judicial Officer shall exercise all powers and duties prescribed or delegated under the Act or these rules of practice.

(c) *Presiding Officer.* The Presiding Officer shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay. The Presiding Officer shall have authority to:

(1) Conduct administrative hearings under these rules of practice;

(2) Rule upon motions, requests, and offers of proof, dispose of procedural requests, and issue all necessary orders;

(3) Administer oaths and affirmations and take affidavits;

(4) Examine witnesses and receive documentary or other evidence;

(5) For good cause, upon motion or sua sponte, order a party, or an officer or agent thereof, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party;

(6) Admit or exclude evidence;

(7) Hear and decide questions of facts, law, or discretion;

(8) Require parties to attend conferences for the settlement or simplification of the issues, or the expedition of the proceedings;

(9) Issue subpoenas authorized by the Act; and

(10) Do all other acts and take all measures necessary for the maintenance of order and for the efficient, fair and impartial adjudication of issues arising in proceedings governed by these rules.

(d) *Disqualification; withdrawal.* (1) The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may not perform functions provided for in these rules of practice regarding any matter in which they (i) have a financial interest or (ii) have any relationship with a party or with the subject matter which would make it inappropriate for them to act. Any party may at any time by motion made to the Regional Administrator request that the Regional Judicial Officer be disqualified from the proceeding. Any party may at any time by motion to the Administrator request that the Regional Administrator, Judicial Officer, or

Presiding Officer be disqualified or request that the Administrator disqualify himself from the proceeding. The Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer or Presiding Officer may at any time withdraw from any proceeding in which they deem themselves disqualified or unable to act for any reason.

(2) If the Administrator, Regional Administrator, Regional Judicial Officer, Judicial Officer, or Presiding Officer is disqualified or withdraws from the proceeding, a qualified individual who has none of the infirmities listed in paragraph (d)(1) of this section shall be assigned to replace him. Assignment of a replacement for the Regional Administrator or Judicial Officer, or for the Regional Judicial Officer shall be made by the Administrator or the Regional Administrator, respectively. The Administrator, should he withdraw or disqualify himself, shall assign the Regional Administrator from the region where the case originated to replace him. If that Regional Administrator would himself be disqualified, the Administrator shall assign a Regional Administrator from another region to replace the Administrator. The Regional Administrator shall assign a new Presiding Officer if the original Presiding Officer was not an Administrative Law Judge. The Chief Administrative Law Judge shall assign a new Presiding Officer from among available Administrative Law Judges if the original Presiding Officer was an Administrative Law Judge.

(3) The Chief Administrative Law Judge, at any stage in the proceeding, may reassign the case to an Administrative Law Judge other than the one originally assigned in the event of the unavailability of the Administrative Law Judge or where reassignment will result in efficiency in the scheduling of hearings and would not prejudice the parties.

§ 22.05 Filing, service, and form of pleadings and documents.

(a) *Filing of pleadings and documents.* (1) Except as otherwise provided, the original and one copy of the complaint, and the original of the answer and of all other documents served in the proceeding shall be filed with the Regional Hearing Clerk.

(2) A certificate of service shall accompany each document filed or served. Except as otherwise provided, a party filing documents with the Regional Hearing Clerk, after the filing of the answer, shall serve copies thereof upon all other parties and the Presiding Officer. The Presiding Officer shall maintain a duplicate file during the course of the proceeding.

(3) When the Presiding Officer corresponds directly with the parties, the original of the correspondence shall be sent to the Regional Hearing Clerk, a copy shall be maintained by the Presiding Officer in the duplicate file, and a copy shall be sent to all parties. Parties who correspond directly with the Presiding Officer shall in addition to serving all other parties send a copy of all such correspondence to the Regional Hearing Clerk. A certificate of service shall accompany each document served under this subsection.

(b) *Service of pleadings and documents*—(1) *Service of complaint.* (i) Service of a copy of the signed original of the complaint, together with a copy of these rules of practice, may be made personally or by certified mail, return receipt requested, on the respondent (or his representative).

(ii) Service upon a domestic or foreign corporation or upon a partnership or other unincorporated association which is subject to suit under a common name shall be made by personal service or certified mail, as prescribed by paragraph (b)(1)(i) of this section, directed to an officer, partner, a managing or general agent, or to any other person authorized by appointment or by Federal or State law to receive service of process.

(iii) Service upon an officer or agency of the United States shall be made by delivering a copy of the complaint to the officer or agency, or in any manner prescribed for service by applicable regulations. If the agency is a corporation, the complaint shall be served as prescribed in paragraph (b)(1)(ii) of this section.

(iv) Service upon a State or local unit of government, or a State or local officer, agency, department, corporation or other instrumentality shall be

made by serving a copy of the complaint in the manner prescribed by the law of the State for the service of process on any such persons, or:

(A) If upon a State or local unit of government, or a State or local department, agency, corporation or other instrumentality, by delivering a copy of the complaint to the chief executive officer thereof;

(B) If upon a State or local officer by delivering a copy to such officer.

(v) Proof of service of the complaint shall be made by affidavit of the person making personal service, or by properly executed return receipt. Such proof of service shall be filed with the complaint immediately upon completion of service.

(2) *Service of documents other than complaint, rulings, orders, and decisions.* All documents other than the complaint, rulings, orders, and decisions, may be served personally or by certified or first class mail.

(c) *Form of pleadings and documents.* (1) Except as provided herein, or by order of the Presiding Officer or Administrator, there are no specific requirements as to the form of documents.

(2) The first page of every pleading, letter, or other document shall contain a caption identifying the respondent and the docket number which is exhibited on the complaint.

(3) The original of any pleading, letter or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter or other document, that to the best of his knowledge, information and belief, the statements made therein are true, and that it is not interposed for delay.

(4) The initial document filed by any person shall contain his name, address and telephone number. Any changes in this information shall be communicated promptly to the Regional Hearing Clerk, Presiding Officer, and all parties to the proceeding. A party who fails to furnish such information and any changes thereto shall be deemed to have waived his right to notice and service under these rules.

(5) The Administrator, Regional Administrator, Presiding Officer, or Regional Hearing Clerk may refuse to file any document which does not comply with this paragraph. Written notice of such refusal, stating the reasons therefor, shall be promptly given to the person submitting the document. Such person may amend and resubmit any document refused for filing upon motion granted by the Administrator, Regional Administrator, or Presiding Officer, as appropriate.

§ 22.06 Filing and service of rulings, orders, and decisions.

All rulings, orders, decisions, and other documents issued by the Regional Administrator, Regional Judicial Officer, or Presiding Officer, as appropriate, shall be filed with the Regional Hearing Clerk. All such documents issued by the Administrator or Judicial Officer shall be filed with the Hearing Clerk. Copies of such rulings, orders, decisions, or other documents shall be served personally, or by certified mail, return receipt requested, upon all parties by the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or Presiding Officer, as appropriate.

§ 22.07 Computation and extension of time.

(a) *Computation.* In computing any period of time prescribed or allowed in these rules of practice, except as otherwise provided, the day of the event from which the designated period begins to run shall not be included. Saturdays, Sundays, and Federal legal holidays shall be included. When a stated time expires on a Saturday, Sunday or legal holiday, the stated time period shall be extended to include the next business day.

(b) *Extensions of time.* The Administrator, Regional Administrator, or Presiding Officer, as appropriate, may grant an extension of time for the filing of any pleading, document, or motion (1) upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties, or (2) upon his own motion. Such a motion by a party may only be made after

notice to all other parties, unless the movant can show good cause why serving notice is impracticable. The motion shall be filed in advance of the date on which the pleading, document or motion is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

(c) *Service by mail.* Service of the complaint is complete when the return receipt is signed. Service of all other pleadings and documents is complete upon mailing. Where a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document.

§ 22.08 Ex parte discussion of proceeding.

At no time after the issuance of the complaint shall the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, Presiding Officer, or any other person who is likely to advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. Any ex parte memorandum or other communication addressed to the Administrator, Regional Administrator, Judicial Officer, Regional Judicial Officer, or the Presiding Officer during the pendency of the proceeding and relating to the merits thereof, by or on behalf of any party shall be regarded as argument made in the proceeding and shall be served upon all other parties. The other parties shall be given an opportunity to reply to such memorandum or communication.

§ 22.09 Examination of documents filed.

(a) Subject to the provisions of law restricting the public disclosure of confidential information, any person may, during Agency business hours, inspect and copy any document filed in any proceeding. Such documents shall be made available by the Regional Hearing Clerk or Hearing Clerk, as appropriate.

(b) The cost of duplicating doc ments filed in any proceeding shall b borne by the person seeking copies such documents. The Agency ma waive this cost in appropriate cases.

Subpart B—Parties and Appearanc

§ 22.10 Appearances.

Any party may appear in person by counsel or other representative. partner may appear on behalf of partnership and an officer may appe on behalf of a corporation. Person who appear as counsel or other repr sentative must conform to the stand ards of conduct and ethics required practitioners before the courts of th United States.

§ 22.11 Intervention.

(a) *Motion.* A motion for leave to in tervene in any proceeding conducte under these rules of practice must se forth the grounds for the propose intervention, the position and interes of the movant and the likely impac that intervention will have on the ex peditious progress of the proceeding Any person already a party to the pro ceeding may file an answer to motion to intervene, making specific reference to the factors set forth i the foregoing sentence and paragraph (c) of this section, within ten (10) day after service of the motion for leave t intervene.

(b) *When filed.* A motion for leave t intervene in a proceeding must ordi narily be filed before the first prehear ing conference or, in the absence of prehearing conference, before the in tiation of correspondence under § 22.19(e), or if there is no such corre spondence, prior to the setting of time and place for a hearing. An motion filed after that time must in clude, in addition to the information set forth in paragraph (a) of this sec tion, a statement of good cause for th failure to file in a timely manner. The intervenor shall be bound by any agreements, arrangements and other matters previously made in the pro ceeding.

(c) *Disposition.* Leave to intervene may be granted only if the movant demonstrates that (1) his presence i

the proceeding would not unduly prolong or otherwise prejudice the adjudication of the rights of the original parties; (2) the movant will be adversely affected by a final order; and (3) the interests of the movant are not being adequately represented by the original parties. The intervenor shall become a full party to the proceeding upon the granting of leave to intervene.

(d) *Amicus curiae.* Persons not parties to the proceeding who wish to file briefs may so move. The motion shall identify the interest of the applicant and shall state the reasons why the proposed amicus brief is desirable. If the motion is granted, the Presiding Officer or Administrator shall issue an order setting the time for filing such brief. An amicus curiae is eligible to participate in any briefing after his motion is granted, and shall be served with all briefs, reply briefs, motions, and orders relating to issues to be briefed.

§ 22.12 Consolidation and severance.

(a) *Consolidation.* The Presiding Officer may, by motion or sua sponte, consolidate any or all matters at issue in two or more proceedings docketed under these rules of practice where (1) there exists common parties or common questions of fact or law, (2) consolidation would expedite and simplify consideration of the issues, and (3) consolidation would not adversely affect the rights of parties engaged in otherwise separate proceedings.

(b) *Severance.* The Presiding Officer may, by motion or sua sponte, for good cause shown order any proceedings severed with respect to any or all parties or issues.

Subpart C—Prehearing Procedures

§ 22.13 Issuance of complaint.

If the complainant has reason to believe that a person has violated any provision of the Act, or regulations promulgated or a permit issued under the Act, he may institute a proceeding for the assessment of a civil penalty by issuing a complaint under the Act and these rules of practice. If the complainant has reason to believe that

(a) A permittee violated any term or condition of the permit, or

(b) A permittee misrepresented or inaccurately described any material fact in the permit application or failed to disclose all relevant facts in the permit application, or

(c) Other good cause exists for such action, he may institute a proceeding for the revocation or suspension of a permit by issuing a complaint under the Act and these rules of practice. A complaint may be for the suspension or revocation of a permit in addition to the assessment of a civil penalty.

§ 22.14 Content and amendment of the complaint.

(a) *Complaint for the assessment of a civil penalty.* Each complaint for the assessment of a civil penalty shall include:

(1) A statement reciting the section(s) of the Act authorizing the issuance of the complaint;

(2) Specific reference to each provision of the Act and implementing regulations which respondent is alleged to have violated;

(3) A concise statement of the factual basis for alleging the violation;

(4) The amount of the civil penalty which is proposed to be assessed;

(5) A statement explaining the reasoning behind the proposed penalty;

(6) Notice of respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the amount of the proposed penalty.

A copy of these rules of practice shall accompany each complaint served.

(b) *Complaint for the revocation or suspension of a permit.* Each complaint for the revocation or suspension of a permit shall include:

(1) A statement reciting the section(s) of the Act, regulations, and/or permit authorizing the issuance of the complaint;

(2) Specific reference to each term or condition of the permit which the respondent is alleged to have violated, to each alleged inaccuracy or misrepresentation in respondent's permit application, to each fact which the respondent allegedly failed to disclose in his permit application, or to other reasons which form the basis for the complaint;

(3) A concise statement of the factual basis for such allegations;

(4) A request for an order to either revoke or suspend the permit and a statement of the terms and conditions of any proposed partial suspension or revocation;

(5) A statement indicating the basis for recommending the revocation, rather than the suspension, of the permit, or vice versa, as the case may be;

(6) Notice of the respondent's right to request a hearing on any material fact contained in the complaint, or on the appropriateness of the proposed revocation or suspension.

A copy of these rules of practice shall accompany each complaint served.

(c) *Derivation of proposed civil penalty.* The dollar amount of the proposed civil penalty shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act.

(d) *Amendment of the complaint.* The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate. Respondent shall have twenty (20) additional days from the date of service of the amended complaint to file his answer.

(e) *Withdrawal of the complaint.* The complainant may withdraw the complaint, or any part thereof, without prejudice one time before the answer has been filed. After one withdrawal before the filing of an answer, or after the filing of an answer, the complainant may withdraw the complaint, or any part thereof, without prejudice, only upon motion granted by the Presiding Officer or Regional Administrator, as appropriate.

§ 22.15 Answer to the complaint.

(a) *General.* Where respondent (1) contests any material fact upon which the complaint is based; (2) contends that the amount of the penalty proposed in the complaint or the proposed revocation or suspension, as the case may be, is inappropriate; or (3) contends that he is entitled to judgment as a matter of law, he shall file a written answer to the complaint with the Regional Hearing Clerk. Any such answer to the complaint must be filed with the Regional Hearing Clerk within twenty (20) days after service of the complaint.

(b) *Contents of the answer.* The answer shall clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge. Where respondent has no knowledge of a particular factual allegation and so states, the allegation is deemed denied. The answer shall also state (1) the circumstances or arguments which are alleged to constitute the grounds of defense, (2) the facts which respondent intends to place at issue, and (3) whether a hearing is requested.

(c) *Request for hearing.* A hearing upon the issues raised by the complaint and answer shall be held upon request of respondent in the answer. In addition, a hearing may be held at the discretion of the Presiding Officer, sua sponte, if issues appropriate for adjudication are raised in the answer.

(d) *Failure to admit, deny, or explain.* Failure of respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation.

(e) *Amendment of the answer.* The respondent may amend the answer to the complaint upon motion granted by the Presiding Officer.

§ 22.16 Motions.

(a) *General.* All motions, except those made orally on the record during a hearing, shall (1) be in writing; (2) state the grounds therefor with particularity; (3) set forth the relief or order sought; and (4) be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. Such motions shall be served as provided by § 22.05(b)(2).

(b) *Response to motions.* A party's response to any written motion must be filed within ten (10) days after ser-

ice of such motion, unless additional time is allowed for such response. The response shall be accompanied by any affidavit, certificate, other evidence, or legal memorandum relied upon. If no response is filed within the designated period, the parties may be deemed to have waived any objection to the granting of the motion. The Presiding Officer, Regional Administrator, or Administrator, as appropriate, may set a shorter time for response, or make such other orders concerning the disposition of motions as they deem appropriate.

(c) *Decision.* Except as provided in § 22.04(d)(1) and § 22.28(a), the Regional Administrator shall rule on all motions filed or made before an answer to the complaint is filed. The Administrator shall rule on all motions filed or made after service of the initial decision upon the parties. The Presiding Officer shall rule on all other motions. Oral argument on motions will be permitted where the Presiding Officer, Regional Administrator, or the Administrator considers it necessary or desirable.

§ 22.17 Default order.

(a) *Default.* A party may be found to be in default (1) after motion, upon failure to file a timely answer to the complaint; (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown. No finding of default on the basis of a failure to appear at a hearing shall be made against the respondent unless the complainant presents sufficient evidence to the Presiding Officer to establish a prima facie case against the respondent. Any motion for a default order shall include a proposed default order and shall be served upon all parties. The alleged defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default. If the complaint is for the revocation or suspension of a permit, the conditions of revocation or suspension proposed in the complaint shall become effective without further proceedings on the date designated by the Administrator in his final order issued upon default. Default by the complainant shall result in the dismissal of the complaint with prejudice.

(b) *Procedures upon default.* When Regional Administrator or Presiding Officer finds a default has occurred, he shall issue a default order against the defaulting party. This order shall constitute the initial decision, and shall be filed with the Regional Hearing Clerk.

(c) *Contents of a default order.* A default order shall include findings of fact showing the grounds for the order, conclusions regarding all material issues of law or discretion, and the penalty which is recommended to be assessed or the terms and conditions of permit revocation or suspension, as appropriate.

(d) For good cause shown the Regional Administrator or the Presiding Officer, as appropriate, may set aside a default order.

§ 22.18 Informal settlement; consent agreement and order.

(a) *Settlement policy.* The Agency encourages settlement of a proceeding at any time if the settlement is consistent with the provisions and objectives of the Act and applicable regulations. The respondent may confer with complainant concerning settlement whether or not the respondent requests a hearing. Settlement conferences shall not affect the respondent's obligation to file a timely answer under § 22.16.

(b) *Consent agreement.* The parties shall forward a written consent agreement and a proposed consent order to the Regional Administrator whenever settlement or compromise is proposed. The consent agreement shall state that, for the purpose of this proceed-

ing, respondent (1) admits the jurisdictional allegations of the complaint; (2) admits the facts stipulated in the consent agreement or neither admits nor denies specific factual allegations contained in the complaint; and (3) consents to the assessment of a stated civil penalty or to the stated permit revocation or suspension, as the case may be. The consent agreement shall include any and all terms of the agreement, and shall be signed by all parties or their counsel or representatives.

(c) *Consent order.* No settlement or consent agreement shall dispose of any proceeding under these rules of practice without a consent order from the Regional Administrator. In preparing such an order, the Regional Administrator may require that the parties to the settlement appear before him to answer inquiries relating to the consent agreement or order.

§ 22.19 Prehearing conference.

(a) *Purpose of prehearing conference.* Unless a conference appears unnecessary, the Presiding Officer, at any time before the hearing begins, shall direct the parties and their counsel or other representatives to appear at a conference before him to consider:

(1) The settlement of the case;

(2) The simplification of issues and stipulation of facts not in dispute;

(3) The necessity or desirability of amendments to pleadings;

(4) The exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof;

(5) The limitation of the number of expert or other witnesses;

(6) Setting a time and place for the hearing; and

(7) Any other matters which may expedite the disposition of the proceeding.

(b) *Exchange of witness lists and documents.* Unless otherwise ordered by the Presiding Officer, each party at the prehearing conference shall make available to all other parties (1) the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and (2) copies of all documents and exhibits which each party intends to introduce into evidence. Documents and exhibits shall be marked for identification as ordered by the Presiding Officer. Documents that have not been exchanged and witnesses whose names have not been exchanged shall not be introduced into evidence or allowed to testify without permission of the Presiding Officer. The Presiding Officer shall allow the parties reasonable opportunity to review new evidence.

(c) *Record of the prehearing conference.* No transcript of a prehearing conference relating to settlement shall be made. With respect to other prehearing conferences, no transcript of any prehearing conferences shall be made unless ordered by the Presiding Officer upon motion of a party or sua sponte. The Presiding Officer shall prepare and file for the record a written summary of the action taken at the conference. The summary shall incorporate any written stipulations or agreements of the parties and all rulings and appropriate orders containing directions to the parties.

(d) *Location of prehearing conference.* The prehearing conference shall be held in the county where the respondent resides or conducts the business which the hearing concerns, in the city in which the relevant Environmental Protection Agency Regional Office is located, or in Washington, D.C., unless (1) the Presiding Officer determines that there is good cause to hold it at another location in a region or by telephone, or (2) the Supplemental rules of practice provide otherwise.

(e) *Unavailability of a prehearing conference.* If a prehearing conference is unnecessary or impracticable, the Presiding Officer, on motion or sua sponte, may direct the parties to correspond with him to accomplish any of the objectives set forth in this section.

(f) *Other discovery.* (1) Except as provided by paragraph (b) of this section, further discovery, under this section, shall be permitted only upon determination by the Presiding Officer:

(i) That such discovery will not in any way unreasonably delay the proceeding;

(ii) That the information to be obtained is not otherwise obtainable; and

(iii) That such information has significant probative value.

(2) The Presiding Officer shall order depositions upon oral questions only upon a showing of good cause and upon a finding that:

(i) The information sought cannot be obtained by alternative methods; or

(ii) There is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

(3) Any party to the proceeding desiring an order of discovery shall make a motion therefor. Such a motion shall set forth;

(i) The circumstances warranting the taking of the discovery;

(ii) The nature of the information expected to be discovered; and

(iii) The proposed time and place where it will be taken. If the Presiding Officer determines that the motion should be granted, he shall issue an order for the taking of such discovery together with the conditions and terms thereof.

(4) When the information sought to be obtained is within the control of one of the parties, failure to comply with an order issued pursuant to this paragraph may lead to (i) the inference that the information to be discovered would be adverse to the party from whom the information was sought, or (ii) the issuance of a default order under § 22.17(a).

§ 22.20 Accelerated decision; decision to dismiss.

(a) *General.* The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding. In addition, the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

(b) *Effect.* (1) If an accelerated decision or a decision to dismiss is issued as to all the issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer, and shall be filed with the Regional Hearing Clerk.

(2) If an accelerated decision or a decision to dismiss is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without substantial controversy and what material facts remain controverted in good faith. He shall thereupon issue an interlocutory order specifying the facts which appear substantially uncontroverted, and the issues and claims upon which the hearing will proceed.

Subpart D—Hearing Procedure

§ 22.21 Scheduling the hearing.

(a) When an answer is filed, the Regional Hearing Clerk shall forward the complaint, the answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign himself or another Administrative Law Judge as Presiding Officer, unless otherwise provided in the Supplemental rules of practice. The Presiding Officer shall then obtain the case file from the Chief Administrative Law Judge and notify the parties of his assignment.

(b) *Notice of hearing.* If the respondent requests a hearing in his answer, or one is ordered by the Presiding Officer under § 22.15(c), the Presiding Officer shall serve upon the parties a notice of hearing setting forth a time and place for the hearing. The Presiding Officer may issue the notice of hearing at any appropriate time, but not later than twenty (20) days prior to the date set for the hearing.

(c) *Postponement of hearing.* No request for postponement of a hearing shall be granted except upon motion and for good cause shown.

(d) *Location of the hearing.* The location of the hearing shall be determined in accordance with the method

for determining the location of a prehearing conference under § 22.19(d).

§ 22.22 Evidence.

(a) *General.* The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence is not admissible. In the presentation, admission, disposition, and use of evidence, the Presiding Officer shall preserve the confidentiality of trade secrets and other commercial and financial information. The confidential or trade secret status of any information shall not, however, preclude its being introduced into evidence. The Presiding Officer may make such orders as may be necessary to consider such evidence *in camera*, including the preparation of a supplemental initial decision to address questions of law, fact, or discretion which arise out of that portion of the evidence which is confidential or which includes trade secrets.

(b) *Examination of witnesses.* Witnesses shall be examined orally, under oath or affirmation, except as otherwise provided in these rules of practice or by the Presiding Officer. Parties shall have the right to cross-examine a witness who appears at the hearing provided that such cross-examination is not unduly repetitious.

(c) *Verified statements.* The Presiding Officer may admit an insert into the record as evidence, in lieu of oral testimony, statements of fact or opinion prepared by a witness. The admissibility of the evidence contained in the statement shall be subject to the same rules as if the testimony were produced under oral examination. Before any such statement is read or admitted into evidence, the witness shall deliver a copy of the statement to the Presiding Officer, the reporter, and opposing counsel. The witness presenting the statement shall swear to or affirm the statement and shall be subject to appropriate oral cross-examination upon the contents thereof.

(d) *Admission of affidavits where the witness is unavailable.* The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

(e) *Exhibits.* Where practicable, an original and one copy of each exhibit shall be filed with the Presiding Officer for the record and a copy shall be furnished to each party. A true copy of any exhibit may be substituted for the original.

(f) *Official notice.* Official notice may be taken of any matter judicially noticed in the Federal courts and of other facts within the specialized knowledge and experience of the Agency. Opposing parties shall be given adequate opportunity to show that such facts are erroneously noticed.

§ 22.23 Objections and offers of proof.

(a) *Objection.* Any objection concerning the conduct of the hearing may be stated orally or in writing during the hearing. The party raising the objection must supply a short statement of its grounds. The ruling by the Presiding Officer on any objection and the reasons given for it shall be part of the record. An exception to each objection overruled shall be automatic and is not waived by further participation in the hearing.

(b) *Offer of proof.* Whenever evidence is excluded from the record, the party offering the evidence may make an offer of proof, which shall be included in the record. The offer of proof for excluded oral testimony shall consist of a brief statement describing the nature of the evidence excluded. The offer of proof for excluded documents or exhibits shall consist of the insertion in the record of the documents or exhibits excluded. Where the Administrator decides that the ruling of the Presiding Officer in excluding the evidence was both erroneous and prejudicial, the hearing may be reopened to permit the taking of such evidence.

§ 22.24 Burden of presentation; burden of persuasion.

The complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty, revocation, or suspension, as the case may be, is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and of going forward with any defense to the allegations set forth in the complaint. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

§ 22.25 Filing the transcript.

The hearing shall be transcribed verbatim. Promptly following the taking of the last evidence, the reporter shall transmit to the Regional Hearing Clerk the original and as many copies of the transcript of testimony as are called for in the reporter's contract with the Agency, and also shall transmit to the Presiding Officer a copy of the transcript. A certificate of service shall accompany each copy of the transcript. The Regional Hearing Clerk shall notify all parties of the availability of the transcript and shall furnish the parties with a copy of the transcript upon payment of the cost of reproduction, unless a party can show that the cost is unduly burdensome. Any person not a party to the proceeding may receive a copy of the transcript upon payment of the reproduction fee, except for those parts of the transcript order to be kept confidential by the Presiding Officer.

§ 22.26 Proposed findings, conclusions, and order.

Within twenty (20) days after the parties are notified of the availability of the transcript, or within such longer time as may be fixed by the Presiding Officer, any party may submit for the consideration of the Presiding Officer, proposed findings of fact, conclusions of law, and a proposed order, together with briefs in support thereof. The Presiding Officer shall set a time by which reply briefs must be submitted. All submissions shall be in writing, shall be served upon all parties, and shall contain adequate references to the record and authorities relied on.

Subpart E—Initial Decision and Motion To Reopen a Hearing

§ 22.27 Initial decision.

(a) *Filing and contents.* The Presiding Officer shall issue and file with the Regional Hearing Clerk his initial decision as soon as practicable after the period for filing reply briefs under § 22.26 has expired. The Presiding Officer shall retain a copy of the complaint in the duplicate file. The initial decision shall contain his findings of fact, conclusions regarding all material issues of law or discretion, as well as reasons therefor, a recommended civil penalty assessment, if appropriate, and a proposed final order. Upon receipt of an initial decision, the Regional Hearing Clerk shall forward a copy to all parties, and shall send the original, along with the record of the proceeding, to the Hearing Clerk. The Hearing Clerk shall forward a copy of the initial decision to the Administrator.

(b) *Amount of civil penalty.* If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted.

(c) *Effect of initial decision.* The initial decision of the Presiding Officer shall become the final order of the Administrator within forty-five (45) days after its service upon the parties and without further proceedings unless (1) an appeal to the Administrator is taken from it by a party to the pro-

ceedings, or (2) the Administrator elects, sua sponte, to review the initial decision.

§ 22.28 Motion to reopen a hearing.

(a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing. The motion shall be made to the Presiding Officer and filed with the Regional Hearing Clerk.

(b) *Disposition of motion to reopen a hearing.* Within ten (10) days following the service of a motion to reopen a hearing, any other party to the proceeding may file with the Regional Hearing Clerk and serve on all other parties an answer thereto. The Presiding Officer shall announce his intent to grant or deny such motion as soon as practicable thereafter. The conduct of any proceeding which may be required as a result of the granting of any motion allowed in this section shall be governed by the provisions of the applicable sections of these rules. The filing of a motion to reopen a hearing shall automatically stay the running of all time periods specified under these Rules until such time as the motion is denied or the reopened hearing is concluded.

Subpart F—Appeals and Administrative Review

§ 22.29 Appeal from or review of interlocutory orders or rulings.

(a) *Request for interlocutory appeal.* Except as provided in this section, appeals to the Administrator shall obtain as a matter of right only from a default order, an accelerated decision or decision to dismiss issued under § 22.20(b)(1), or an initial decision rendered after an evidentiary hearing. Appeals from other orders or rulings shall lie only if the Presiding Officer or Regional Administrator, as appropriate, upon motion of a party, certifies such orders or rulings to the Administrator on appeal. Requests for such certification shall be filed in writing within six (6) days of notice of the ruling or service of the order, and shall state briefly the grounds to be relied upon on appeal.

(b) *Availability of interlocutory appeal.* The Presiding Officer may certify any ruling for appeal to the Administrator when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

(c) *Decision.* If the Administrator determines that certification was improvidently granted, or if he takes no action within thirty (30) days of the certification, the appeal is dismissed. When the Presiding Officer declines to certify an order or ruling to the Administrator on interlocutory appeal, it may be reviewed by the Administrator only upon appeal from the initial decision, except when the Administrator determines, upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest. Such motion shall be made within six (6) days of service of an order of the Presiding Officer refusing to certify a ruling for interlocutory appeal to the Administrator. Ordinarily, the interlocutory appeal will be decided on the basis of the submissions made by the Presiding Officer. The Administrator may, however, allow further briefs and oral argument.

(d) *Stay of proceedings.* The Presiding Officer may stay the proceedings pending a decision by the Administrator upon an order or ruling certified by the Presiding Officer for an interlocutory appeal. Proceedings will not be stayed except in extraordinary circumstances. Where the Presiding Officer grants a stay of more than thirty (30) days, such stay must be separately approved by the Administrator.

§ 22.30 Appeal from or review of initial decision.

(a) *Notice of appeal.* (1) Any party may appeal any adverse ruling or order of the Presiding Officer by filing a notice of appeal and an accompanying appellate brief with the Hearing Clerk and upon all other parties and amicus curiae within twenty (20) days after the initial decision is served upon the parties. The notice of appeal shall set forth alternative findings of fact, alternative conclusions regarding issues of law or discretion, and a proposed order together with relevant references to the record and the initial decision. The appellant's brief shall contain a statement of the issues presented for review, a statement of the nature of the case and the facts relevant to the issues presented for review, argument on the issues presented, and a short conclusion stating the precise relief sought, together with appropriate references to the record.

(2) Within fifteen (15) days of the service of notices of appeal and briefs under paragraph (a)(1) of this section, any other party or amicus curiae may file and serve with the Hearing Clerk a reply brief responding to argument raised by the appellant, together with references to the relevant portions of the record, initial decision, or opposing brief. Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Administrator.

(b) *Sua sponte review by the Administrator.* Whenever the Administrator determines sua sponte to review an initial decision, the Hearing Clerk shall serve notice of such intention on the parties within forty-five (45) days after the initial decision is served upon the parties. The notice shall include a statement of issues to be briefed by the parties and a time schedule for the service and filing of briefs.

(c) *Scope of appeal or review.* The appeal of the initial decision shall be limited to those issues raised by the parties during the course of the proceeding. If the Administrator determines that issues raised, but not appealed by the parties, should be argued, he shall give counsel for the parties reasonable written notice of such determination to permit preparation of adequate argument. Nothing herein shall prohibit the Administrator from remanding the case to the Presiding Officer for further proceedings.

(d) *Argument before the Administrator.* The Administrator may, upon request of a party or sua sponte, assign a time and place for oral argument after giving consideration to the convenience of the parties.

Subpart G—Final Order on Appeal

§ 22.31 Final order on appeal.

(a) *Contents of the final order.* When an appeal has been taken or the Administrator issues a notice of intent to conduct review sua sponte, the Administrator shall issue a final order as soon as practicable after the filing of all appellate briefs or oral argument, whichever is later. The Administrator shall adopt, modify or set aside the findings and conclusions contained in the decision or order being reviewed, and shall set forth in the final order the reasons for his actions. The Administrator may, in his discretion, increase or decrease the assessed penalty from the amount recommended to be assessed in the decision or order being reviewed, except that if the order being reviewed is a default order, the Administrator may not increase the amount of the penalty.

(b) *Payment of a civil penalty.* The respondent shall pay the full amount of the civil penalty assessed in the final order within sixty (60) days after receipt of the final order unless otherwise agreed by the parties. Payment shall be made by forwarding to the Regional Hearing Clerk a cashier's check or certified check in the amount of the penalty assessed in the final order, payable to the Treasurer, United States of America.

§ 22.32 Motion to reconsider a final order.

Motions to reconsider a final order shall be filed within ten (10) days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall not stay the

effective date of the final order unless specifically so ordered by the Administrator.

Subpart H—Supplemental Rules

§ 22.33 Supplemental rules of practice governing the administrative assessment of civil penalties under the Toxic Substances Control Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding consolidated rules of practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 16(a) of the Toxic Substances Control Act (15 U.S.C. 2615(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the agency.

§ 22.34 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Clean Air Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 211 of the Clean Air Act as amended (42 U.S.C. 7445). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Headquarters enforcement.* Where the complainant is the Assistant Administrator for Enforcement or his delegate, the prehearing conference and hearing shall be held in Washington, DC, unless the Presiding Officer determines that there is good cause for it to be held at another location.

(c) *Presiding Officer.* For purposes of hearings conducted pursuant to section 211 of the Clean Air Act, "Presiding Officer" means the Administrative Law Judge appointed under 5 U.S.C. 3105 (see also Pub. L. 95–251, 92 Stat. 183) or an attorney who is an employee or authorized representative of the Agency.

(d) *Assignment of a Presiding Officer.* Upon the filing of an answer, the Regional Hearing Clerk or Hearing Clerk, as appropriate, shall forward the complaint, answer, and any other documents filed thus far in the proceeding to the Regional Administrator or Administrator, respectively, who shall assign the Presiding Officer. The Regional Administrator or Administrator may, however, forward the case file to the Chief Administrative Law Judge and request that he assign an Administrative Law Judge as Presiding Officer. If the Chief Administrative Law Judge finds that such an assignment can be made without impairing the ability of his office to timely discharge its other responsibilities, he shall make the assignment. Otherwise, he shall notify the Regional Administrator or Administrator that he is unable to make such an assignment. The Presiding Officer assigned to the proceeding shall obtain the case file from the Chief Administrative Law Judge, Regional Administrator, or Administrator, as appropriate, and notify the parties of his assignment.

(e) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider (1) the gravity of the violation, (2) the size of

respondent's business, (3) the respondent's history of compliance with the Act, (4) the action taken by respondent to remedy the specific violation, and (5) the effect of such proposed penalty on respondent's ability to continue in business. The Presiding Officer must also consider any guidelines for the Assessment of Civil Penalties issued under the Act.

§ 22.35 Supplemental rules of practice governing the administrative assessment of civil penalties under the Federal Insecticide, Fungicide, and Rodenticide Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications for the assessment of any civil penalty conducted under section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act as amended (7 U.S.C. 1261(a)). Where inconsistencies exist between these Supplemental rules and the Consolidated rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Venue.* The prehearing conference and the hearing shall be held in the county, parish, or incorporated city of the residence of the person charged, unless otherwise agreed in writing by all parties.

(c) *Evaluation of proposed civil penalty.* In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) of the Act, (1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto.

§ 22.36 Supplemental rules of practice governing the administrative assessment of civil penalties and the revocation or suspension of permits under the Marine Protection, Research, and Sanctuaries Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all formal adjudications conducted under section 105(a) or (f) of the Marine Protection, Research, and Sanctuaries Act as amended (33 U.S.C. 1415(a) and (f)). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Additional criterion for the issuance of a complaint for the revocation or suspension of a permit.* In addition to the three criteria listed in 40 CFR 22.13 for issuing a complaint for the revocation or suspension of a permit, complaints may be issued on the basis of a person's failure to keep records and notify appropriate officials of dumping activities, as required by 40 CFR 224.1 and 223.2.

§ 22.37 Supplemental rules of practice governing the administrative assessment of civil penalties under the Solid Waste Disposal Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 3008 of the Solid Waste Disposal Act (42 U.S.C. 6928) (the "Act"). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Issuance of notice.* Whenever, on the basis of any information, the Administrator determines that any person is in violation of (1) any requirement of Subtitle C of the Act, (2) any regulation promulgated pursuant to Subtitle C of the Act, or (3) a term or condition of a permit issued pursuant to Subtitle C of the Act, the Administrator shall issue notice to the al-

leged violator of his failure to comply with such requirement, regulation or permit.

(c) *Content of notice.* Each notice of violation shall include:

(1) A specific reference to each provision of the Act, regulation, or permit term or condition which the alleged violator is alleged to have violated; and

(2) A concise statement of the factual basis for alleging such violation.

(d) *Service of notice.* Service of notice shall be made in accordance with § 22.05(b)(2) of the Consolidated Rules of Practice.

(e) *Issuance of the complaint.* (1) Except as provided in paragraph (e)(3) of this section, the complainant may issue a complaint whenever he has reason to believe that any violation extends beyond the thirtieth day after service of the notice of violation.

(2) The complaint shall include, in addition to the elements stated in § 22.14 of the Consolidated Rules, an order requiring compliance within a specified time period. The complaint shall be equivalent to the compliance order referred to in section 3008 of the Act.

(3) Whenever a violation is of a noncontinuous or intermittent nature, the Administrator may issue a complaint, without any prior notice to the violator, pursuant to § 22.14 of the Consolidated Rules of Practice which may also require the violator to take any and all measures necessary to offset all adverse effects to health and the environment created, directly or indirectly, as a result of the violation.

(4) Notwithstanding § 22.15(a), any answer to the complaint must be filed with the Regional Hearing Clerk within thirty (30) days after the filing of the complaint.

(f) *Subpoenas.* (1) The attendance of witnesses or the production of documentary evidence may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe with specificity the documents sought.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(42 U.S.C. 6901, *et seq.*)

NOTE: At 45 FR 79808, Dec. 2, 1980, paragraphs (b), (c), (d), (e)(1) and (3) of § 22.37 were suspended until further notice, effective Dec. 2, 1980.

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these supplemental rules.* These supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)).

(b) *Consultation with states.* The Administrator will consult with the state in which the alleged violation occurs before issuing a final order assessing a Class II civil penalty.

(c) *Public notice.* Before issuing a final order assessing a Class II civil penalty, the Administrator will provide public notice of the complaint.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a complaint must file written comments with the Regional Hearing Clerk within 30 days after public notice of the complaint and serve a copy of the comments upon each party. For good cause shown the Administrator, the Regional Administrator, or the Presiding Officer, as appropriate, may accept late comments. The Administrator will give any person who comments on a complaint notice of any hearing and notice of the final order assessing a penalty. Although commenters may be heard and present evidence at any hearing held

under section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator for which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing.* If no hearing on the complaint is held before issuance of an order assessing a Class II civil penalty, any person who commented on the complaint may petition the Administrator, within 30 days after issuance of the order, to set aside the order and to provide a hearing on the complaint. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator will immediately set aside the order and provide a hearing in accordance with the Consolidated Rules of Practice and these supplemental rules of practice. If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the FEDERAL REGISTER, notice of and the reasons for the denial.

[55 FR 23840, June 12, 1990]

EFFECTIVE DATE NOTE: At 55 FR 23840, June 12, 1990, § 22.38 was revised, effective July 12, 1990. For the convenience of the user, the superseded text follows.

§ 22.38 Supplemental rules of practice governing the administrative assessment of Class II penalties under the Clean Water Act.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any Class II civil penalty under section 309(g) of the Clean Water Act (33 U.S.C. 1319(g)).

(b) *Consultation with States.* The Administrator will consult with the State in which the alleged violation occurs before assessing a Class II civil penalty.

(c) *Public notice.* Before issuing an order assessing a Class II civil penalty, the Administrator will provide public notice of the proposed issuance of such order.

(d) *Comment by a person who is not a party.* A person not a party to the Class II proceeding who wishes to comment upon a proposed assessment must file written comment with the Regional Hearing Clerk within thirty days after public notice of the proposed order and serve a copy of the comment upon each party. For good cause shown the Administrator, the Regional Administrator or the Presiding Officer, as appropriate, may accept late comments. The Administrator will give any person who comments on a proposed assessment notice of any hearing and notice of the order assessing a penalty. Although commenters may be heard and present evidence at any hearing held pursuant to section 309(g) of the Act, commenters shall not be accorded party status with right of cross examination unless they formally move to intervene and are granted party status under § 22.11.

(e) *Administrative procedure and judicial review.* Action of the Administrator with respect to which review could have been obtained under section 509(b)(1) of the Act shall not be subject to review in an administrative proceeding for the assessment of a Class II civil penalty under section 309(g).

(f) *Petitions to set aside an order and to provide a hearing.* If no hearing is held before issuance of an order assessing a Class II civil penalty, any person who commented on the proposed assessment may petition, within 30 days after issuance of the order, the Administrator to set aside the order and to provide a hearing on the penalty. If the evidence presented by the petitioner in support of the petition is material and was not considered in the issuance of the order, the Administrator will immediately set aside such order and provide a hearing in accordance with the Consolidated Rules of Practice and these Supplemental rules of practice. If the Administrator denies a hearing under section 309(g)(4)(C) of the Act, the Administrator will provide to the petitioner, and publish in the FEDERAL REGISTER, notice of and the reasons for such denial.

[52 FR 30673, Aug. 17, 1987]

§ 22.39 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

(a) *Scope of these Supplemental rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment

of any civil penalty under section 109 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9609). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefor, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to a request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person who requested a hearing with respect to a Class II civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing a civil penalty may file a petition for judicial review of such order with the United States Court of Appeals for the District of Columbia or for any other circuit in which such person resides or transacts business. Any person who requested a hearing with respect to a Class I civil penalty under section 109 of CERCLA and who is the recipient of a final order assessing the civil penalty may file a petition for judicial review of such order with the appropriate district court of the United States. All petitions must be filed within 30 days of the date the order making the assessment was issued.

(d) *Payment of civil penalty assessed.* Payment of civil penalties finally assessed by the Regional Administrator shall be made by forwarding a cashier's check, payable to the "EPA, Hazardous Substances Superfund," in the amount assessed, and noting the case title and docket number, to the appropriate regional Superfund Lockbox Depository. Notice of payment must be sent by Respondent to the Hearing Clerk for inclusion as part of the administrative record for the proceeding in which the civil penalty was assessed. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

§ 22.40 Supplemental rules of practice governing the administrative assessment of administrative penalties under section 325 of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA).

(a) *Scope of these Supplemental Rules.* These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), administrative proceedings for the assessment of any civil penalty under section 325 for violations of the Emergency Planning and Community Right-To-Know Act of 1986 (EPCRA). Where inconsistencies exist between these Supplemental rules and the Consolidated Rules, (§§ 22.01 through 22.32) these Supplemental rules shall apply.

(b) *Subpoenas.* (1) The attendance and testimony of witnesses or the production of relevant papers, books, and documents may be required by subpoena. The Presiding Officer may grant a request for a subpoena upon a showing of (i) the grounds and necessity therefore, and (ii) the materiality and relevancy of the evidence to be adduced. Requests for the production of documents shall describe the evidence sought as specifically as practicable.

(2) Subpoenas shall be served in accordance with § 22.05(b)(1) of the Consolidated Rules of Practice.

(3) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness appears. Where a witness appears pursuant to

request initiated by the Presiding Officer, fees shall be paid by the Agency.

(c) *Judicial review.* Any person against whom a civil penalty is assessed may seek judicial review in the appropriate district court of the United States by filing a notice of appeal and by simultaneously sending a copy of such notice by certified mail to the Administrator. The notice must be filed within 30 days of the date the order making such assessment was issued. The Administrator shall promptly file in such court a certified copy of the record upon which such violation was found or such penalty imposed.

(d) *Procedures for collection of civil penalty.* If any person fails to pay an assessment of a civil penalty after it has become a final and unappealable order or after the appropriate court has entered final judgment in favor of the United States, the Administrator may request the Attorney General of the United States to institute a civil action in an appropriate district court of the United States to collect the penalty, and such court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty on the record. Interest on overdue payments shall be collected pursuant to the Debt Collection Act, 37 U.S.C. 3717.

[54 FR 21176, May 16, 1989]

§ 22.41 Supplemental rules of practice governing the administrative assessment of civil penalties under Title II of the Toxic Substances Control Act, enacted as section 2 of the Asbestos Hazard Emergency Response Act (AHERA).

(a) Scope of the Supplemental rules. These Supplemental rules of practice shall govern, in conjunction with the preceding Consolidated Rules of Practice (40 CFR part 22), all proceedings to assess a civil penalty conducted under section 207 of the Toxic Substances Control Act (the "Act") (15 U.S.C. 2647). Where inconsistencies exist between these Supplemental rules and the Consolidated rules (§§ 22.01 through 22.32), these Supplemental rules shall apply.

(b) Collection of civil penalty. Any civil penalty collected under section 207 of the Act shall be used by the local educational agency for purposes of complying with Title II of the Act. Any portion of a civil penalty remaining unspent after a local educational agency achieves compliance shall be deposited into the Asbestos Trust Fund established under section 5 of AHERA.

[54 FR 24112, June 5, 1989]

Appendix to Part 22—Addresses of EPA Regional Offices

Region I—John F. Kennedy Federal Building, Boston, MA 02203.
Region II—26 Federal Plaza, New York, NY 10007.
Region III—Curtis Building, 6th and Walnut Streets, Philadelphia, PA 19106.
Region IV—345 Courtland Street NE., Atlanta, GA 30308.
Region V—230 South Dearborn Street, Chicago, IL 60604.
Region VI—First International Building, 1201 Elm Street, Dallas, TX 75270.
Region VII—1735 Baltimore Street, Kansas City, MO 64108.
Region VIII—1860 Lincoln Street, Denver, CO 80203.
Region IX—215 Fremont Street, San Francisco, CA 94105.
Region X—1200 6th Avenue, Seattle, WA 98101.

PART 23—JUDICIAL REVIEW UNDER EPA—ADMINISTERED STATUTES

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23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.
23.11 Holidays.
23.12 Filing notice of judicial review.

AUTHORITY: Clean Water Act, 33 U.S.C. 1361(a), 1369(b); Clean Air Act, 42 U.S.C. 7601(a)(1), 7607(b); Resource, Conservation and Recovery Act, 42 U.S.C. 6912(a), 6976; Toxic Substances Control Act, 15 U.S.C. 2618; Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. 136n(b), 136w(a); Safe Drinking Water Act, 42 U.S.C. 300j-7(a)(2), 300j-9(a); Atomic Energy Act, 42 U.S.C. 2201, 2239; Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 371(a), 346a, 348; 28 U.S.C. 2112(a), 2343, 2344.

SOURCE: 50 FR 7270, Feb. 21, 1985, unless otherwise noted.

§ 23.1 Definitions.

As used in this part, the term:

(a) *Federal Register document* means a document intended for publication in the Federal Register and bearing in its heading an identification code including the letters *FRL*.

(b) *Admininstrator* means the Administrator or any official exercising authority delegated by the Administrator.

(c) *General Counsel* means the General Counsel of EPA or any official exercising authority delegated by the General Counsel.

[50 FR 7270, Feb. 21, 1985, as amended at 53 FR 29322, Aug. 3, 1988]

§ 23.2 Timing of Administrator's action under Clean Water Act.

Unless the Administrator otherwise explicity provides in a particular promulgation or approval action, the time and date of the Administrator's action in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date that is two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.3 Timing of Administrator's action under Clean Air Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation, approval, or action, the time and date of such promulgation, approval or action for purposes of the second sentence of section 307(b)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a FEDERAL REGISTER document, the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.4 Timing of Administrator's action under Resource Conservation and Recovery Act.

Unless the Administrator otherwise explicitly provides in taking a particular action, for purposes of section 7006(b), the time and date of the Administrator's action in issuing, denying, modifying, or revoking any permit under section 3005, or in granting, denying, or withdrawing authorization or interim authorization under section 3006, shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.5 Timing of Administrator's action under Toxic Substances Control Act.

Unless the Administrator otherwise explicitly provides in promulgating a particular rule or issuing a particular order, the time and date of the Administrator's promulgation or issuance for purposes of section 19(a)(1) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.6 Timing of Administrator's action under Federal Insecticide, Fungicide and Rodenticide Act.

Unless the Administrator otherwise explicitly provides in a particular

order, the time and date of entry of an order issued by the Administrator following a public hearing for purposes of section 16(b) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after it is signed.

§ 23.7 Timing of Administrator's action under Safe Drinking Water Act.

Unless the Administrator otherwise explicitly provides in a particular promulgation action or determination, the time and date of the Administrator's promulgation, issuance, or determination for purposes of section 1448(a)(2) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER or (b) for any other document, two weeks after it is signed.

§ 23.8 Timing of Administrator's action under Uranium Mill Tailings Radiation Control Act of 1978.

Unless the Administrator otherwise explicitly provides in a particular rule, the time and date of the Administrator's promulgation for purposes of 42 U.S.C. 2022(c)(2) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice of promulgation is published in the FEDERAL REGISTER.

§ 23.9 Timing of Administrator's action under the Atomic Energy Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order for purposes of 28 U.S.C. 2344 shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is two weeks after the date when notice thereof is published in the FEDERAL REGISTER.

§ 23.10 Timing of Administrator's action under the Federal Food, Drug, and Cosmetic Act.

Unless the Administrator otherwise explicitly provides in a particular order, the time and date of the entry of an order issued after a public hearing for purposes of 21 U.S.C. 346a(i) or 348(g) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on the date that is (a) for a FEDERAL REGISTER document, two weeks after the date when the document is published in the FEDERAL REGISTER, or (b) for any other document, two weeks after it is signed.

§ 23.11 Holidays.

If the date determined under §§ 23.2 to 23.10 falls on a Federal holiday, then the time and date of the Administrator's action shall be at 1:00 p.m. eastern time on the next day that is not a Federal holiday.

§ 23.12 Filing notice of judicial review.

(a) For the purposes of 28 U.S.C. 2112(a), a copy of any petition filed in any United States Court of Appeals challenging a final action of the Administrator shall be sent by certified mail, return receipt requested, or by personal delivery to the General Counsel. The petition copy shall be time-stamped by the Clerk of the Court when the original is filed with the Court. The petition should be addressed to: Correspondence Control Unit, Office of General Counsel (LE-130), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

(b) If the General Counsel receives two or more petitions filed in two or more United States Courts of Appeals for review of any Agency action within ten days of the effective date of that action for purposes of judicial review (as specified under §§ 23.2 through 23.10 of this part), the General Counsel will notify the United States Judicial Panel of Multidistrict Litigation of any petitions that were received within the ten day period, in accordance with the applicable rules of the Panel.

(c) For purposes of determining whether a petition for review has been received within the ten day period under paragraph (b) of this section, the petition shall be considered received on the date of service, if served personally. If service is accomplished by mail, the date of receipt shall be considered to be the date noted on the return receipt card.

[53 FR 29322, Aug. 3, 1988]

PART 24—RULES GOVERNING ISSUANCE OF AND ADMINISTRATIVE HEARINGS ON INTERIM STATUS CORRECTIVE ACTION ORDERS

Subpart A—General

Sec.

24.01 Scope of these rules.
24.02 Issuance of initial orders; definition of final orders and orders on consent.
24.03 Maintenance of docket and official record.
24.04 Filing and service of orders, decisions, and documents.
24.05 Response to the initial order; request for hearing.
24.06 Designation of Presiding Officer.
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24.13 Qualifications of Presiding Officer; ex parte discussion of the proceeding.
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Subpart D—Post-Hearing Procedures

24.18 Final decision.
24.19 Final order.
24.20 Final agency action.

AUTHORITY: 42 U.S.C. sections 6912, 6928.

SOURCE: 53 FR 12263, Apr. 13, 1988, unless otherwise noted.

Subpart A—General

§ 24.01 Scope of these rules.

(a) These rules establish procedures governing issuance of administrative orders for corrective action pursuant to section 3008(h) of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (the Act), and conduct of administrative hearings on such orders, except as specified in paragraph (b) of this section.

(b) The hearing procedures appearing at 40 CFR part 22 govern administrative hearings on any order issued pursuant to section 3008(h) of the Act which:

(1) Is contained within an administrative order that includes claims under section 3008(a) of the Act; or

(2) Includes a suspension or revocation of authorization to operate under section 3005(e) of the Act; or

(3) Seeks penalties under section 3008(h)(2) of the Act for non-compliance with a section 3008(h) order.

(c) Questions arising at any stage of the proceeding which are not addressed in these rules shall be resolved at the discretion of the Regional Administrator or Presiding Officer, as appropriate.

§ 24.02 Issuance of initial orders; definition of final orders and orders on consent.

(a) An administrative action under section 3008(h) of the Act shall be commenced by issuance of an administrative order. When the order is issued unilaterally, the order shall be referred to as an initial administrative order and may be referenced as a proceeding under section 3008(h). When the order has become effective, either after issuance of a final order following a final decision by the Regional Administrator, or after thirty days from issuance if no hearing is requested, the order shall be referred to as a final administrative order. Where the order is agreed to by the parties, the order shall be denominated as a final administrative order on consent.

(b) The initial administrative order shall be executed by an authorized official of EPA (petitioner), other than the Regional Administrator or the Assistant Administrator for the Office of Solid Waste and Emergency Response. For orders issued by EPA Headquarters, rather than by a Regional office, all references in these procedures to

the Regional Administrator shall be understood to be to the Assistant Administrator for Solid Waste and Emergency Response or his delegatee.

(c) The initial administrative order shall contain:

(1) A reference to the legal authority pursuant to which the order is issued,

(2) A concise statement of the factual basis upon which the order is issued, and

(3) Notification of respondent's right to request a hearing with respect to any issue of material fact or the appropriateness of the proposed corrective action.

§ 24.03 Maintenance of docket and official record.

(a) A Clerk shall be designated by the Regional Administrator to receive all initial orders, final orders, decisions, responses, memoranda, and documents regarding the order and to maintain the official record and docket.

(b) On or before the date the initial order is served on respondent the EPA office issuing the order shall deliver to the Clerk (a copy of) the administrative record supporting the findings of fact, determinations of law, and relief sought in the initial administrative order. This record shall include all relevant documents and oral information (which has been reduced to writing), which the Agency considered in the process of developing and issuing the order, exclusive of privileged internal communications. The administrative record delivered to the Clerk must have an index and be available for review in the appropriate Agency Regional or Headquarters office during normal business hours after the order is issued.

§ 24.04 Filing and service of orders, decisions, and documents.

(a) *Filing of orders, decisions, and documents.* The original and one copy of the initial administrative order, the recommended decision of the Presiding Officer, the final decision and the final administrative order, and one copy of the administrative record and an index thereto must be filed with the Clerk designated for section 3008(h) orders. In addition, all memoranda and documents submitted in the proceeding shall be filed with the Clerk.

(b) *Service of orders, decisions, and rulings.* The Clerk (or in the case of the initial administrative order, any other designated EPA employee) shall arrange for the effectuation of service of the initial administrative order, the recommended decision of the Presiding Officer, the final decision, and final administrative order. Service of a copy of the initial administrative order together with a copy of these procedures, the recommended decision of the Presiding Officer, the final decision, or a final administrative order, shall be made personally or by certified mail, return receipt requested or, if personal service cannot be effectuated or certified mail is returned refused or unsigned, by regular mail, on the respondent or his representative. The Clerk shall serve other documents from the Presiding Officer by regular mail.

(c) *Service of documents filed by the parties.* Service of all documents, filed by the parties, shall be made by the parties or their representatives on other parties or their representatives and may be regular mail, with the original filed with the Clerk. The original of any pleading, letter, or other document (other than exhibits) shall be signed by the party filing or by his counsel or other representative. The signature constitutes a representation by the signer that he has read the pleading, letter, or other document, that to the best of his knowledge, information, and belief, the statements made therein are true, and that it is not interposed for delay.

(d) *Service in general.* Service of orders, decisions, rulings, or documents by either the Clerk or the parties shall, in the case of a domestic or foreign corporation, a partnership, or other unincorporated association, which is subject to suit under a common name, be made, as prescribed in § 24.04 (b) and (c), upon an officer, partner, managing or general agent, or any person authorized by appointment or by Federal or State law to receive service of process.

(e) *Effective date of service.* Service of the initial administrative order and final administrative order is complete upon receipt by respondent (or the respondent's agent, attorney, representative or other person employed by respondent and receiving such service), personally or by certified mail, or upon mailing by regular mail, if personal service or service by certified mail cannot be accomplished, in accordance with § 24.04(b). Service of all other pleadings and documents is complete upon mailing, except as provided in §§ 24.10(b) and 24.14(e).

§ 24.05 Response to the initial order; request for hearing.

(a) The initial administrative order becomes a final administrative order thirty (30) days after service of the order, unless the respondent files with the Clerk within thirty (30) days after service of the order, a response to the initial order and requests a hearing.

(b) The response to the initial order and request for a hearing must be in writing and mailed to, or personally served on, the Clerk of the Regional office which issued the order.

(c) The response to the initial order shall specify each factual or legal determination, or relief provision in the initial order the respondent disputes and shall briefly indicate the basis upon which it disputes such determination or provision.

(d) Respondent may include with its response to the initial order and request for a hearing a statement indicating whether it believes the subpart B or subpart C hearing procedures should be employed for the requested hearing and the reason(s) therefore.

§ 24.06 Designation of Presiding Officer.

Upon receipt of a request for a hearing, the Regional Administrator shall designate a Presiding Officer to conduct the hearing and preside over the proceedings.

§ 24.07 Informal settlement conference.

The respondent may request an informal settlement conference at any time by contacting the appropriate EPA employee, as specified in the initial administrative order. A request for an informal conference will not affect the respondent's obligations to timely request a hearing. Whether or not the respondent requests a hearing, the parties may confer informally concerning any aspect of the order. The respondent and respondent's representatives shall generally be allowed the opportunity at an informal conference to discuss with the appropriate Agency technical and legal personnel all aspects of the order, and in particular the basis for the determination that a release has occurred and the appropriateness of the ordered corrective action.

§ 24.08 Selection of appropriate hearing procedures.

If the initial order directs the respondent—

(a) To undertake only a RCRA Facility Investigation and/or Corrective Measures Study, which may include monitoring, surveys, testing, information gathering, analyses, and/or studies (including studies designed to develop recommendations for appropriate corrective measures), or

(b) To undertake such investigations and/or studies and interim corrective measures, and if such interim corrective measures are neither costly nor technically complex and are necessary to protect human health and the environment prior to development of a permanent remedy,

the hearing procedures set forth in subpart B of this part shall be employed for any requested hearing. If the respondent seeks a hearing on an order directing that corrective measures or such corrective measures together with investigations/studies be undertaken, the hearing procedures set forth in subpart C of this part shall be employed. The procedures contained in subparts A and D of this part shall be followed regardless of whether the initial order directs respondent to undertake an investigation or implement corrective measures.

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Subpart B—Hearings on Orders Requiring Investigations or Studies

§ 24.09 Qualifications of Presiding Officer; ex parte discussion of the proceeding.

The Presiding Officer shall be either the Regional Judicial Officer (as described in 40 CFR 22.04(b)) or another attorney employed by the Agency, who has had no prior connection with the case, including the performance of any investigative or prosecuting functions. At no time after issuance of the initial administrative order and prior to issuance of the final order shall the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an ex parte communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other parties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

§ 24.10 Scheduling the hearing; pre-hearing submissions by respondent.

(a) *Date and time for hearing.* The Presiding Officer shall establish the date, time, location, and agenda for the requested public hearing and transmit this information to the parties. Subject to § 24.10(c), the hearing shall be scheduled and held within thirty (30) days of the Agency's receipt of the request for a public hearing.

(b) *Pre-hearing submissions by respondent.* At any time up to five (5) business days before the hearing respondent may, but is not required to, submit for inclusion in the administrative record information and argument supporting respondent's positions on the facts, law and relief, as each relates to the order in question. A copy of any information or argument submitted by respondent shall be served such that the Clerk and petitioner receive same at least five (5) business days before hearing.

(c) *Postponment of hearing.* The Presiding Officer may grant an extension of time for the conduct of the hearing upon written request of either party, for good cause shown, and after consideration of any prejudice to other parties. The Presiding Officer may not extend the date by which the request for hearing is due under § 24.05(a).

(d) *Location of hearing.* The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

§ 24.11 Hearing; oral presentations and written submissions by the parties.

The Presiding Officer shall conduct the hearing in a fair and impartial way, taking action as needed to avoid unnecessary delay, exclude redundant material and maintain order during the proceedings. Representatives of EPA shall introduce the administrative record and be prepared to summarize the basis for the order. The respondent shall have a reasonable opportunity to address relevant issues and present its views through legal counsel or technical advisors. The Presiding Officer may also allow technical and legal discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or respondent an opportunity to engage in direct examination or cross-examination of witnesses. The Presiding Officer may address questions to the respondent's or EPA's representative(s) during the hearing. Each party shall insure that a representative(s) is (are) present at the hearing, who is (are) capable of responding to questions and articulating that party's position on

the law and facts at issue. Where respondent can demonstrate that through no fault of its own certain documents supportive of its position could not have been submitted before hearing in accordance with the requirements of § 24.10(b), it may submit such documents at the hearing. Otherwise no new documentary support may be submitted at hearing. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this section or § 24.10(b). The Presiding Officer shall have the discretion to order either party to submit additional information (including but not limited to posthearing briefs on undeveloped factual, technical, or legal matters) in whatever form he deems appropriate either at or after the hearing.

§ 24.12 Summary of hearing; Presiding Officer's recommendation.

(a) As soon as practicable after the conclusion of the hearing a written summary of the proceeding shall be prepared. This summary shall, at a minimum, identify:

(1) The dates of and known attendees at the hearing; and

(2) The bases upon which the respondent contested the terms of the order.

The summary must be signed by the Presiding Officer.

(b) The Presiding Officer will evaluate the entire administrative record and, on the basis of that review and the representations of EPA and respondent at the hearing, shall prepare and file a recommended decision with the Regional Administrator. The recommended decision must address all material issues of fact or law properly raised by respondent, and must recommend that the order be modified, withdrawn or issued without modification. The recommended decision must provide an explanation with citation to material contained in the record for any decision to modify a term of the order, to issue the order without change, or to withdraw the order. The recommended decision shall be based on the administrative record. If the Presiding Officer finds that any contested relief provision in the order is not supported by a preponderance of the evidence in the record, the Presiding Officer shall recommend that the order be modified and issued on terms that are supported by the record or withdrawn.

(c) At any time within twenty-one (21) days of service of the recommended decision on the parties, the parties may file comments on the recommended decision with the Clerk. The Clerk shall promptly transmit any such comments received to the Regional Administrator for his consideration in reaching a final decision.

Subpart C—Hearings on Orders Requiring Corrective Measures

§ 24.13 Qualifications of Presiding Officer; ex parte discussion of the proceeding.

(a) *Qualifications of Presiding Officer.* The Presiding Officer shall be either the Regional Judicial Officer (as described in 40 CFR 22.04(b)) of another attorney employed by the Agency, who has had no prior connection with the case, including the performance of any investigative or prosecuting functions.

(b) *Ex parte discussion of the proceeding.* At no time after issuance of the initial administrative order and prior to issuance of the final order shall the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case, discuss ex parte the merits of the proceeding with any interested person outside the Agency, with any Agency staff member who performs a prosecutorial or investigative function in such proceeding or a factually related proceeding, or with any representative of such person. If, after issuance of the initial order and prior to issuance of the final order, the Regional Administrator, Presiding Officer, or any person who will advise these officials in the decision on the case receives from or on behalf of any party in an ex parte communication information which is relevant to the decision on the case and to which other parties have not had an opportunity to respond, a summary of such information shall be served on all other par-

ties, who shall have an opportunity to reply to same within ten (10) days of service of the summary.

§ 24.14 Scheduling the hearing; pre-hearing submissions by the parties.

(a) The Presiding Officer shall establish an expeditious schedule for:

(1) The submission by respondent of a memorandum, with appropriate affidavits and exhibits, stating and supporting respondent's position on the facts, law and relief, specifying the bases upon and manner in which such determinations or relief provisions, if erroneous, require modification or withdrawal of the order;

(2) Submission of a response by EPA; and

(3) A public hearing.

Subject to § 24.14(b), a hearing shall be scheduled within 45 days of the order setting the schedule. The Presiding Officer shall establish the date, time, location and agenda for the hearing and shall transmit this information to the parties along with the schedule for the hearing.

(b) *Postponement of the hearing.* The Presiding Officer, as appropriate, may grant an extension of time for the filing of any document, other than a request for a hearing under § 24.05(a), or may grant an extension of time for the conduct of the hearing, upon written request of either party, for good cause shown and after consideration of any prejudice to other parties.

(c) *Respondent's pre-hearing submission.* In accordance with the schedule set by the Presiding Officer, the respondent shall file a memorandum stating and supporting respondent's position on the facts, law and relief. The memorandum must identify each factual allegation and all issues regarding the appropriateness of the terms of the relief in the initial order that respondent contests and for which respondent requests a hearing. The memorandum must clearly state respondent's position with respect to each such issue. Respondent must also include any proposals for modification of the order. The memorandum shall also present any arguments on the legal conclusions contained in the order.

(d) *Written questions to EPA.* The respondent may file a request with the Presiding Officer for permission to submit written questions to the EPA Regional Office issuing the order concerning issues of material fact in the order.

(1) Requests shall be accompanied by the proposed questions. In most instances, no more than twenty-five (25) questions, including subquestions and subparts, may be posed. The request and questions must be submitted to the Presiding Officer at least twenty-one (21) days before the hearing.

(2) The Presiding Officer may direct EPA to respond to such questions as he designates. In deciding whether or not to direct the Agency to respond to written questions the Presiding Officer should consider whether such responses are required for full disclosure and adequate resolution of the facts. No questions shall be allowed regarding privileged internal communications. The Presiding Officer shall grant, deny, or modify such requests expeditiously. If a request is granted the Presiding Officer may revise questions and may limit the number and scope of questions. Questions may be deleted or revised in the discretion of the Presiding Officer for reasons, which may include the fact that he finds the questions to be irrelevant, redundant, unnecessary, or an undue burden on the Agency. The Presiding Officer shall transmit the questions as submitted or as modified to EPA. EPA shall respond to the questions within fourteen (14) calendar days of service of the questions by the Presiding Officer, unless an extension is granted.

(e) *Submission of additional information.* The Presiding Officer shall have the discretion to order either party to submit additional information (including but not limited to post-hearing briefs on undeveloped factual, technical, or legal matters) in whatever form he deems appropriate either before, at, or after the hearing. The Presiding Officer may issue subpoenas for the attendance and testimony of persons and the production of relevant papers, books and documents. Since these hearing procedures provide elsewhere that the parties are not to engage in direct or cross-examination

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of witnesses, the subpoena power is to serve only as an adjunct to the Presiding Officer's authority to ask questions and otherwise take steps to clarify factual matters which are in dispute. Upon request of the respondent the Presiding Officer may, in his discretion, allow submittal by the respondent of additional information in support of its claim, if it is received by the Clerk and petitioner at least five (5) business days before the hearing.

(f) *Location of hearing.* The hearing shall be held in the city in which the relevant EPA Regional Office is located, unless the Presiding Officer determines that there is good cause to hold it in another location.

§ 24.15 Hearing; oral presentations and written submissions by the parties.

(a) The Presiding Officer shall conduct the hearing in a fair and impartial manner, take action to avoid unnecessary delay in the disposition of the proceedings, and maintain order. The Presiding Officer shall permit oral statements on behalf of the respondent and EPA. The Presiding Officer may address questions to the respondent's or the EPA's representative(s) during the hearing. Each party shall ensure that a representative(s) is (are) present at the hearing, who is (are) capable of responding to questions and articulating that party's position on the law and facts at issue. Apart from questions by the Presiding Officer, no direct examination or cross-examination shall be allowed.

(b) Upon commencement of the hearing, a representative of EPA shall introduce the order and record supporting issuance of the order, and summarize the basis for the order. The respondent may respond to the administrative record and offer any facts, statements, explanations or documents which bear on any issue for which the hearing has been requested. Any such presentation by respondent may include new documents only to the extent that respondent can demonstrate that, through no fault of its own, such documents could not have been submitted before hearing in accordance with the requirements of § 24.14 (c) and (e). The Agency may then present matters solely in rebuttal to matters previously presented by the respondent. The Presiding Officer may allow the respondent to respond to any such rebuttal submitted. The Presiding Officer may exclude repetitive or irrelevant matter. The Presiding Officer may upon request grant petitioner leave to respond to submissions made by respondent pursuant to this paragraph or § 24.14(e).

§ 24.16 Transcript or recording of hearing.

(a) The hearing shall be either transcribed stenographically or tape recorded. Upon written request, such transcript or tape recording shall be made available for inspection or copying.

(b) The transcript or recording of the hearing and all written submittals filed with the Clerk by the parties subsequent to initial issuance of the order including post-hearing submissions will become part of the administrative record for the proceeding, for consideration by the Presiding Officer and Regional Administrator.

§ 24.17 Presiding Officer's recommendation.

(a) The Presiding Officer will, as soon as practicable after the conclusion of the hearing, evaluate the entire administrative record and, on the basis of the administrative record, prepare and file a recommended decision with the Regional Administrator. The recommended decision must address all material issues of fact or law properly raised by respondent, and must recommend that the order be modified, withdrawn or issued without modification. The recommended decision must provide an explanation, with citation to material contained in the record for any decision to modify a term of the order, to issue the order without change or to withdraw the order. The recommended decision shall be based on the administrative record. If the Presiding Officer finds that any contested relief provision in the order is not supported by a preponderance of the evidence in the record, the Presiding Officer shall recommend that the order be modified

and issued on terms that are supported by the record, or withdrawn.

(b) At any time within twenty-one (21) days of service of the recommended decision on the parties, the parties may file comments on the recommended decision with the Clerk. The Clerk shall promptly transmit any such comments received to the Regional Administrator for his consideration in reaching a final decision.

Subpart D—Post-Hearing Procedures

§ 24.18 Final decision.

As soon as practicable after receipt of the recommended decision, the Regional Administrator will either sign or modify such recommended decision, and issue it as a final decision. If the Regional Administrator modifies the recommended decision, he shall insure that the final decision indicates the legal and factual basis for the decision as modified. The Regional Administrator's decision shall be based on the administrative record.

§ 24.19 Final order.

If the Regional Administrator does not adopt portions of the initial order, or finds that modification of the order is necessary, the signatory official on the initial administrative order shall modify the order in accordance with the terms of the final decision and file and serve a copy of the final administrative order. If the Regional Administrator finds the initial order appropriate as originally issued, the final decision shall declare the initial administrative order to be a final order, effective upon service of the final decision. If the Regional Administrator declares that the initial order must be withdrawn, the signatory official on the initial administrative order will file and serve a withdrawal of the initial administrative order. This may be done without prejudice.

§ 24.20 Final agency action.

The final decision and the final administrative order are final agency actions that are effective on filing and service. These actions are not appealable to the Administrator.

PART 25—PUBLIC PARTICIPATION IN PROGRAMS UNDER THE RESOURCE CONSERVATION AND RECOVERY ACT, THE SAFE DRINKING WATER ACT, AND THE CLEAN WATER ACT

Sec.

25.1 Introduction.
25.2 Scope.
25.3 Policy and objectives.
25.4 Information, notification, and consultation responsibilities.
25.5 Public hearings.
25.6 Public meetings.
25.7 Advisory groups.
25.8 Responsiveness summaries.
25.9 Permit enforcement.
25.10 Rulemaking.
25.11 Work elements in financial assistance agreements.
25.12 Assuring compliance with public participation requirements.
25.13 Coordination and non-duplication.
25.14 Termination of reporting requirements.

AUTHORITY: Sec. 101(e), Clean Water Act, as amended (33 U.S.C. 1251(e)); sec. 7004(b), Resource Conservation and Recovery Act (42 U.S.C. 6974(b)); sec. 1450(a)(1), Safe Drinking Water Act, as amended (42 U.S.C. 300j-9).

SOURCE: 44 FR 10292, Feb. 16, 1979, unless otherwise noted.

§ 25.1 Introduction.

This part sets forth minimum requirements and suggested program elements for public participation in activities under the Clean Water Act (Pub. L. 95-217), the Resource Conservation and Recovery Act (Pub. L. 94-580), and the Safe Drinking Water Act (Pub. L. 93-523). The applicability of the requirements of this part is as follows:

(a) Basic requirements and suggested program elements for public information, public notification, and public consultation are set forth in § 25.4. These requirements are intended to foster public awareness and open processes of government decisionmaking. They are applicable to all covered activities and programs described in § 25.2(a).

(b) Requirements and suggested program elements which govern the structure of particular public participation mechanisms (for example, advisory groups and responsiveness summaries)

are set forth in §§ 25.5, 25.6, 25.7, and 25.8. This part does not mandate the use of these public participation mechanisms. It does, however, set requirements which those responsible for implementing the mechanisms must follow if the mechanisms are required elsewhere in this chapter.

(c) Requirements which apply to Federal financial assistance programs (grants and cooperative agreements) under the three acts are set forth in §§ 25.10 and 25.12(a).

(d) Requirements for public involvement which apply to specific activities are set forth in § 25.9 (Permit enforcement), § 25.10 (Rulemaking), and § 25.12 (Assuring compliance with requirements).

§ 25.2 Scope.

(a) The activities under the three Acts which are covered by this part are:

(1) EPA rulemaking, except nonpolicy rulemaking (for example publication of funding allotments under statutory formulas); and State rulemaking under the Clean Water Act and Resource Conservation and Recovery Act;

(2) EPA issuance and modification of permits, and enforcement of permits as delineated by § 25.9;

(3) Development by EPA of major informational materials, such as citizen guides or handbooks, which are expected to be used over several years and which are intended to be widely distributed to the public;

(4) Development by EPA of strategy and policy guidance memoranda when a Deputy Assistant Administrator determines it to be appropriate;

(5) Development and implementation of plans, programs, standards, construction, and other activities supported with EPA financial assistance (grants and cooperative agreements) to State, interstate, regional and local agencies (herein after referred to as "State, interstate, and substate agencies");

(6) The process by which EPA makes a determination regarding approval of State administration of the Construction Grants program in lieu of Federal administration; and the administration of the Construction Grants Program by the State after EPA approval;

(7) The process by which EPA makes a determination regarding approval of State administration of the following programs in lieu of Federal administration: The State Hazardous Waste Program; the NPDES Permit Program; the Dredge and Fill Permit Program; and the Underground Injection Control Program;

(8) Other activities which the Assistant Administrator for Water and Waste Management, the Assistant Administrator for Enforcement, or any EPA Regional Administrator deems appropriate in view of the Agency's responsibility to involve the public in significant decisions.

(b) Activities which are not covered by this part, except as otherwise provided under (a)(8) or (c) of this section, are activities under Parts 33 (Subagreements), 39 (Loan Guarantees for Construction of Treatment Works), 40 (Research and Development Grants), 45 (Training Grants and Manpower Forecasting) and 46 (Fellowships) of this chapter.

(c) Some programs covered by these regulations contain further provisions concerning public participation. These are found elsewhere in this chapter in provisions which apply to the program of interest. Regulations which govern the use and release of public information are set forth in part 2 of this chapter.

(d) Specific provisions of court orders which conflict with requirements of this part, such as court-established timetables, shall take precedence over the provisions in this part.

(e) Where the State undertakes functions in the construction grants program, the State shall be responsible for meeting these requirements for public participation, and any applicable public participation requirements found elsewhere in this chapter, to the same extent as EPA.

(f) Where the State undertakes functions in those programs specifically cited in § 25.2(a)(7), the State shall be responsible for meeting the requirements for public participation included in the applicable regulations governing those State programs. The requirements for public participation in

State Hazardous Waste Programs, Dredge and Fill Permit programs, Underground Injection Control programs and NPDES permit programs are found in part 123 of this chapter. These regulations embody the substantive requirements of this part.

(g) These regulations apply to the activities of all agencies receiving EPA financial assistance which is awarded after [the effective date of final regulations], and to all other covered activities of EPA, State, interstate, and substate agencies which occur after that date. These regulations will apply to ongoing grants or other covered activities upon any significant change in the activity (for example, upon a significant proposed increase in project scope of a construction grant). Parts 105 (Public Participation in Water Pollution Control) and 249 (Public Participation in Solid Waste Management) will no longer appear in the Code of Federal Regulations; however, they will remain applicable, in uncodified form, to grants awarded prior to the effective date of this part and to all other ongoing activities.

§ 25.3 Policy and objectives.

(a) EPA, State, interstate, and substate agencies carrying out activities described in § 25.2(a) shall provide for, encourage, and assist the participation of the public. The term, "the public" in the broadest sense means the people as a whole, the general populace. There are a number of identifiable "segments of the public" which may have a particular interest in a given program or decision. Interested and affected segments of the public may be affected directly by a decision, either beneficially or adversely; they may be affected indirectly; or they may have some other concern about the decision. In addition to private citizens, the public may include, among others, representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations.

(b) Public participation is that part of the decision-making process through which responsible officials become aware of public attitudes by providing ample opportunity for interested and affected parties to communicate their views. Public participation includes providing access to the decision-making process, seeking input from and conducting dialogue with the public, assimilating public viewpoints and preferences, and demonstrating that those viewpoints and preferences have been considered by the decision-making official. Disagreement on significant issues is to be expected among government agencies and the diverse groups interested in and affected by public policy decisions. Public agencies should encourage full presentation of issues at an early stage so that they can be resolved and timely decisions can be made. In the course of this process, responsible officials should make special efforts to encourage and assist participation by citizens representing themselves and by others whose resources and access to decision-making may be relatively limited.

(c) The following are the objectives of EPA, State, interstate, and substate agencies in carrying out activities covered by this part:

(1) To assure that the public has the opportunity to understand official programs and proposed actions, and that the government fully considers the public's concerns;

(2) To assure that the government does not make any significant decision on any activity covered by this part without consulting interested and affected segments of the public;

(3) To assure that government action is as responsive as possible to public concerns;

(4) To encourage public involvement in implementing environmental laws;

(5) To keep the public informed about significant issues and proposed project or program changes as they arise;

(6) To foster a spirit of openness and mutual trust among EPA, States, substate agencies and the public; and

(7) To use all feasible means to create opportunities for public participation, and to stimulate and support participation.

§ 25.4 Information, notification, and consultation responsibilities.

(a) *General.* EPA, State, interstate, and substate agencies shall conduct a continuing program for public information and participation in the development and implementation of activities covered by this part. This program shall meet the following requirements:

(b) *Information and assistance requirements.* (1) Providing information to the public is a necessary prerequisite to meaningful, active public involvement. Agencies shall design informational activities to encourage and facilitate the public's participation in all significant decisions covered by § 25.2(a), particularly where alternative courses of action are proposed.

(2) Each agency shall provide the public with continuing policy, program, and technical information and assistance beginning at the earliest practicable time. Informational materials shall highlight significant issues that will be the subject of decisionmaking. Whenever possible, consistent with applicable statutory requirements, the social, economic, and environmental consequences of proposed decisions shall be clearly stated in such material. Each agency shall identify segments of the public likely to be affected by agency decisions and should consider targeting informational materials toward them (in addition to the materials directed toward the general public). Lengthy documents and complex technical materials that relate to significant decisions should be summarized for public and media uses. Fact sheets, news releases, newsletters, and other similar publications may be used to provide notice that materials are available and to facilitate public understanding of more complex documents, but shall not be a substitute for public access to the full documents.

(3) Each agency shall provide one or more central collections of reports, studies, plans, and other documents relating to controversial issues or significant decisions in a convenient location or locations, for example, in public libraries. Examples of such documents are catalogs of documents available from the agency, grant applications, fact sheets on permits and permit applications, permits, effluent discharge information, and compliance schedule reports. Copying facilities at reasonable cost should be available at the depositories.

(4) Whenever possible, agencies shall provide copies of documents of interest to the public free of charge. Charges for copies should not exceed prevailing commercial copying costs. EPA requirements governing charges for information and documents provided to the public in response to requests made under the Freedom of Information Act are set forth in part 2 of this chapter. Consistent with the objectives of § 25.3(b), agencies may reserve their supply of free copies for private citizens and others whose resources are limited.

(5) Each agency shall develop and maintain a list of persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity. Generally, this list will be most useful where subdivided by area of interest or geographic area. Whenever possible, the list should include representatives of the several categories of interests listed under § 25.3(a). Those on the list, or relevant portions if the list is subdivided, shall receive timely and periodic notification of the availability of materials under § 25.4(b)(2).

(c) *Public notification.* Each agency shall notify interested and affected parties, including appropriate portions of the list required by paragraph (b)(5) of this section, and the media in advance of times at which major decisions not covered by notice requirements for public meetings or public hearings are being considered. Generally, notices should include the timetable in which a decision will be reached, the issues under consideration, any alternative courses of action or tentative determinations which the agency has made, a brief listing of the applicable laws or regulations, the location where relevant documents may be reviewed or obtained, identification of any associated public participation opportunities such as workshops or meetings, the name of an individual to contact for additional information, and any

other appropriate information. All advance notifications under this paragraph must be provided far enough in advance of agency action to permit time for public response; generally this should not be less than 30 days.

(d) *Public consultation.* For the purposes of this part, "public consultation" means an exchange of veiws between governmental agencies and interested or affected persons and organizations in order to meet the objectives set forth in § 25.3. Requirements for three common forms of public consultation (public hearings, public meetings, and advisory groups) are set forth in §§ 25.5, 25.6, and 25.7. Other less formal consultation mechanisms may include but are not limited to review groups, ad hoc committees, task forces, workshops, seminars and informal personal communications with individuals and groups. Public consultation must be preceded by timely distribution of information and must occur sufficiently in advance of decisionmaking to allow the agency to assimilate public views into agency action. EPA, State, interstate, and substate agencies shall provide for early and continuing public consultation in any siginificant action covered by this part. Merely conferring with the public after an agency decision does not meet this requirement. In addition to holding hearings and meetings as specifically required in this chapter, a hearing or meeting shall be held if EPA, the State, interstate, or substate agency determines that there is significant public interest or that a hearing or meeting would be useful.

(e) *Public information concerning legal proceedings.* EPA, State, interstate, and substate agencies shall provide full and open information on legal proceedings to the extent not inconsistent with court requirements, and where such disclosure would not prejudice the conduct of the litigation. EPA actions with regard to affording opportunities for public comment before the Department of Justice consents to a proposed judgment in an action to enjoin discharges of pollutants into the environment shall be consistent with the Statement of Policy issued by the Department of Justice (see Title 28, CFR, Chapter 1, § 50.7).

§ 25.5 Public hearings.

(a) *Applicability.* Any non-adjudicatory public hearing, whether mandatory or discretionary, under the three Acts shall meet the following minimum requirements. These requirements are subordinate to any more stringent requirements found elsewhere in this chapter or otherwise imposed by EPA, State, interstate, or substate agencies. Procedures developed for adjudicatory hearings required by this chapter shall be consistent with the public participation objectives of this part, to the extent practicable.

(b) *Notice.* A notice of each hearing shall be well publicized, and shall also be mailed to the appropriate portions of the list of interested and affected parties required by § 25.4(b)(5). Except as otherwise specifically provided elsewhere in this chapter, these actions must occur at least 45 days prior to the date of the hearing. However, where EPA determines that there are no substantial documents which must be reviewed for effective hearing participation and that there are no complex or controversial matters to be addressed by the hearing, the notice requirement may be reduced to no less than 30 days. EPA may further reduce or waive the hearing notice requirement in emergency situations where EPA determines that there is an imminent danger to public health. To the extent not duplicative, the agency holding the hearing shall also provide informal notice to all interested persons or organizations that request it. The notice shall identify the matters to be discussed at the hearing and shall include or be accompanied by a discussion of the agency's tentative determination on major issues (if any), information on the availability of a bibliography of relevant materials (if deemed appropriate), and procedures for obtaining further information. Reports, documents and data relevant to the discussion at the public hearing shall be available to the public at least 30 days before the hearing. Earlier availability of materials relevant to

the hearing will further assist public participation and is encouraged where possible.

(c) *Locations and time.* Hearings must be held at times and places which, to the maximum extent feasible, facilitate attendance by the public. Accessibility of public transportation, and use of evening and weekend hearings, should be considered. In the case of actions with Statewide interest, holding more than one hearing should be considered.

(d) *Scheduling presentations.* The agency holding the hearing shall schedule witnesses in advance, when necessary, to ensure maximum participation and allotment of adequate time for all speakers. However, the agency shall reserve some time for unscheduled testimony and may consider reserving blocks of time for major categories of witnesses.

(e) *Conduct of hearing.* The agency holding the hearing shall inform the audience of the issues involved in the decision to be made, the considerations the agency will take into account, the agency's tentative determinations (if any), and the information which is particularly solicited from the public. The agency should consider allowing a question and answer period. Procedures shall not unduly inhibit free expression of views (for example, by onerous written statement requirements or qualification of witnesses beyond minimum identification).

(f) *Record.* The agency holding the hearing shall prepare a transcript, recording or other complete record of public hearing proceedings and make it available at no more than cost to anyone who requests it. A copy of the record shall be available for public review.

§ 25.6 Public meetings.

Public meetings are any assemblies or gathering, (such as conferences, informational sessions, seminars, workshops, or other activities) which the responsible agency intends to be open to anyone wishing to attend. Public meetings are less formal than public hearings. They do not require formal presentations, scheduling of presentations and a record of proceedings. The requirements of § 25.5 (b) and (c) are applicable to public meetings, except that the agency holding the meeting may reduce the notice to not less than 30 days if there is good reason that longer notice cannot be provided.

§ 25.7 Advisory groups.

(a) *Applicability.* The requirements of this section on advisory groups shall be met whenever provisions of this chapter require use of an advisory group by State, interstate, or substate agencies involved in activities supported by EPA financial assistance under any of the three Acts.

(b) *Role.* Primary responsibility for decision-making in environmental programs is vested by law in the elected and appointed officials who serve on public bodies and agencies at various levels of government. However, all segments of the public must have the opportunity to participate in environmental quality planning. Accordingly, where EPA identifies a need for continued attention of an informed core group of citizens in relation to activities conducted with EPA financial assistance, program regulations elsewhere in this chapter will require an advisory group to be appointed by the financially assisted agency. Such advisory groups will not be the sole mechanism for public participation, but will complement other mechanisms. They are intended to assist elected or appointed officials with final decision-making responsibility by making recommendations to such officials on important issues. In addition, advisory groups should foster a constructive interchange among the various interests present on the group and enhance the prospect of community acceptance of agency action.

(c) *Membership.* (1) The agency receiving financial assistance shall assure that the advisory group reflects a balance of interests in the affected area. In order to meet this requirement, the assisted agency shall take positive action, in accordance with paragraph (c)(3) of this section, to establish an advisory group which consists of substantially equivalent proportions of the following four groups:

(i) *Private citizens.* No person may be included in this portion of the advisory group who is likely to incur a financial gain or loss greater than that of an average homeowner, taxpayer or consumer as a result of any action likely to be taken by the assisted agency.

(ii) *Representatives of public interest groups.* A "public interest group" is an organization which reflects a general civic, social, recreational, environmental or public health perspective in the area and which does not directly reflect the economic interests of its membership.

(iii) Public officials.

(iv) Citizens or representatives of organizations with substantial economic interests in the plan or project.

(2) Generally, where the activity has a particular geographic focus, the advisory group shall be made up of persons who are residents of that geographic area.

(3) In order to meet the advisory group membership requirements of paragraph (c)(I) of this section, the assisted agency shall:

(i) Identify public interest groups, economic interests, and public officials who are interested in or affected by the assisted activity.

(ii) Make active efforts to inform citizens in the affected area, and the persons or groups identified under paragraph (c)(3)(i) of this section, of this opportunity for participation on the advisory group. This may include such actions as placing notices or announcements in the newspapers or other media, mailing written notices to interested parties, contacting organizations or individuals directly, requesting organizations to notify their members through meetings, newsletters, or other means.

(iii) Where the membership composition set forth in paragraph (c)(1) of this section is not met after the above actions, the assisted agency shall identify the causative problems and make additional efforts to overcome such problems. For example, the agency should make personal contact with prospective participants to invite their participation.

(iv) Where problems in meeting the membership composition arise, the agency should request advice and assistance from EPA.

(d) The assisted agency shall record the names and mailing addresses of each member of the advisory group, with the attributes of each in relation to the membership requirements set forth in paragraph (c)(1) of this section, provide a copy to EPA, and make the list available to the public. In the event that the membership requirements set forth in paragraph (c)(1) of this section are not met, the assisted agency shall append to the list a description of its efforts to comply with those requirements and an explanation of the problems which prevented compliance. EPA shall review the agency's efforts to comply and approve the advisory group composition or, if the agency's efforts were inadequate, require additional actions to achieve the required membership composition.

(e) *Responsibilities of the assisted agency.* (1) The assisted agency shall designate a staff contact who will be responsible for day-to-day coordination among the advisory group, the agency, and any agency contractors or consultants. The financial assistance agreement shall include a budget item for this staff contact. Where substantial portions of the assisted agency's responsibilities will be met under contract, the agency shall require a similar designation, and budget specification, of its contractor. In the latter event, the assisted agency does not have to designate a separate staff contact on its own staff, if the Regional Administrator determines that the contractor's designation will result in adequate coordination. The staff contact shall be located in the project area.

(2) The assisted agency has such responsibilities as providing the advisory group with information, identifying issues for the advisory group's consideration, consulting with the advisory group throughout the project, requesting the advisory group's recommendations prior to major decisions, transmitting advisory group recommendations to decision-making officials, and making written responses to any formal recommendation by the advisory group. The agency shall make any

such written responses available to the public. To the maximum extent feasible, the assisted agency shall involve the advisory group in the development of the public participation program.

(3) The assisted agency shall identify professional and clerical staff time which the advisory group may depend upon for assistance, and provide the advisory group with an operating budget which may be used for technical assistance and other purposes agreed upon between the advisory group and the agency.

(4) The assisted agency shall establish a system to make costs of reasonable out-of-pocket expenses of advisory group participation available to group members. Time away from work need not be reimbursed; however, assisted agencies are encouraged to schedule meetings at times and places which will not require members to leave their jobs to attend.

(f) *Advisory group responsibilities and duties.* The advisory group may select its own chairperson, adopt its own rules of order, and schedule and conduct its own meetings. Advisory group meetings shall be announced well in advance and shall be open to the public. At all meetings, the advisory group shall provide opportunity for public comment. Any minutes of advisory group meetings and recommendations to the assisted agency shall be available to the public. The advisory group should monitor the progress of the project and become familiar with issues relevant to project development. In the event the assisted agency and the advisory group agree that the advisory group will assume public participation responsibilities, the group should undertake those responsibilities promptly. The advisory group should make written recommendations directly to the assisted agency and to responsible decision-making officials on major decisions (including approval of the public participation program) and respond to any requests from the agency or decision-making officials for recommendations. The advisory group should remain aware of community attitudes and responses to issues as they arise. As part of this effort, the advisory group may, within the limitations of available resources, conduct public participation activities in conjunction with the assisted agency; solicit outside advice; and establish, in conjunction with the assisted agency, subcommittees, ad hoc groups, or task forces to investigate and develop recommendations on particular issues as they arise. The advisory group should undertake its responsibilities fully and promptly in accordance with the policies and requirements of this part. Nothing shall preclude the right of the advisory group from requesting EPA to perform an evaluation of the assisted agency's compliance with the requirements of this part.

(g) *Training and assistance.* EPA will promptly provide appropriate written guidance and project information to the newly formed advisory group and may provide advice and assistance to the group throughout the life of the project. EPA will develop and, in conjunction with the State or assisted agency, carry out a program to provide a training session for the advisory group, and appropriate assisted agency representatives, promptly after the advisory group is formed. The assisted agency shall provide additional needed information or assistance to the advisory group.

§ 25.8 Responsiveness summaries.

Each agency which conducts any activities required under this part shall prepare a Responsiveness Summary at specific decision points as specified in program regulations or in the approved public participation work plan. Responsiveness Summaries are also required for rulemaking activities under § 25.10. Each Responsiveness Summary shall identify the public participation activity conducted; describe the matters on which the public was consulted; summarize the public's views, significant comments, criticisms and suggestions; and set forth the agency's specific responses in terms of modifications of the proposed action or an explanation for rejection of proposals made by the public. Responsiveness Summaries prepared by agencies receiving EPA financial assistance shall also include evaluations by the agency of the effectiveness of the public participation program. Assisted agencies

shall request such evaluations from any advisory group and provide an opportunity for other participating members of the public to contribute to the evaluation. (In the case of programs with multiple responsiveness summary requirements, these analyses need only be prepared and submitted with the final summary required.) Responsiveness summaries shall be forwarded to the appropriate decision-making official and shall be made available to the public. Responsiveness Summaries shall be used as part of evaluations required under this part or elsewhere in this chapter.

§ 25.9 Permit enforcement.

Each agency administering a permit program shall develop internal procedures for receiving evidence submitted by citizens about permit violations and ensuring that it is properly considered. Public effort in reporting violations shall be encouraged, and the agency shall make available information on reporting procedures. The agency shall investigate alleged violations promptly.

§ 25.10 Rulemaking.

(a) EPA shall invite and consider written comments on proposed and interim regulations from any interested or affected persons and organizations. All such comments shall be part of the public record, and a copy of each comment shall be available for public inspection. EPA will maintain a docket of comments received and any Agency responses. Notices of proposed and interim rulemaking, as well as final rules and regulations, shall be distributed in accordance with § 25.4(c) to interested or affected persons promptly after publication. Each notice shall include information as to the availability of the full texts of rules and regulations (where these are not set forth in the notice itself) and places where copying facilities are available at reasonable cost to the public. Under Executive Order 12044 (March 23, 1978), further EPA guidance will be issued concerning public participation in EPA rulemaking. A Responsiveness Summary shall be published as part of the preamble to interim and final regulations. In addition to providing opportunity for written comments on proposed and interim regulations, EPA may choose to hold a public hearing.

(b) State rulemaking specified in § 25.2(a)(1) shall be in accord with the requirements of paragraph (a) of this section or with the State's administrative procedures act, if one exists. However, in the event of conflict between a provision of paragraph (a) of this section and a provision of a State's administrative procedures act, the State's law shall apply.

§ 25.11 Work elements in financial assistance agreements.

(a) This section is applicable to activities under § 25.2(a)(5) except as otherwise provided in parts 30 or 35.

(b) Each applicant for EPA financial assistance shall set forth in the application a public participation work plan or work element which reflects how public participation will be provided for, encouraged, and assisted in accordance with this part. This work plan or element shall cover the project period. At a minimum, the work plan or element shall include:

(1) Staff contacts and budget resources to be devoted to public participation by category;

(2) A proposed schedule for public participation activities to impact major decisions, including consultation points where responsiveness summaries will be prepared;

(3) An identification of consultation and information mechanisms to be used;

(4) The segments of the public targeted for involvement.

(c) All reasonable costs of public participation incurred by assisted agencies which are identified in an approved public participation work plan or element, or which are otherwise approved by EPA, shall be eligible for financial assistance.

(d) The work plan or element may be revised as necessary throughout the project period with approval of the Regional Administrator.

§ 25.12 Assuring compliance with public participation requirements.

(a) *Financial assistance programs*—(1) *Applications.* EPA shall review the

public participation work plan (or, if no work plan is required by this chapter for the particular financial assistance agreement, the public participation element) included in the application to determine consistency with all policies and requirements of this part. No financial assistance shall be awarded unless EPA is satisfied that the public participation policies and requirements of this part and, any applicable public participation requirements found elsewhere in this chapter, will be met.

(2) *Compliance*—(i) *Evaluation.* EPA shall evaluate compliance with public participation requirements using the work plan, responsiveness summary, and other available information. EPA will judge the adequacy of the public participation effort in relation to the objectives and requirements of § 25.3 and § 25.4 and other applicable requirements. In conducting this evaluation, EPA may request additional information from the assisted agency, including records of hearings and meetings, and may invite public comment on the agency's performance. The evaluation will be undertaken as part of any mid-project review required in various programs under this chapter; where no such review is required the review shall be conducted at an approximate mid-point in continuing EPA oversight activity. EPA may, however, undertake such evaluation at any point in the project period, and will do so whenever it believes that an assisted agency may have failed to meet public participation requirements.

(ii) *Remedial actions.* Whenever EPA determines that an assisted agency has not fully met public participation requirements, EPA shall take actions which it deems appropriate to mitigate the adverse effects of the failure and assure that the failure is not repeated. For ongoing projects, that action shall include, at a minimum, imposing more stringent requirements on the assisted agency for the next budget period or other period of the project (including such actions as more specific output requirements and milestone schedules for output achievement; interim EPA review of public participation activities and materials prepared by the agency, and phased release of funds based on compliance with milestone schedules.) EPA may terminate or suspend part or all financial assistance for non-compliance with public participation requirements, and may take any further actions that it determines to be appropriate in accordance with parts 30 and 35 of this chapter (see, in particular, §§ 30.340, Noncompliance and 30.615-3, Withholding of Payments, and subpart H of part 30, Modification, Suspension, and Termination).

(b) *State programs approved in lieu of Federal programs.* State compliance with applicable public participation requirements in programs specified in § 25.2(a) (6) and (7) and administered by approved States shall be monitored by EPA during the annual review of the State's program, and during any financial or program audit or review of these programs. EPA may withdraw an approved program from a State for failure to comply with applicable public participation requirements.

(c) *Other covered programs.* Assuring compliance with these public participation requirements for programs not covered by paragraphs (a) and (b) of this section is the responsibility of the Administrator of EPA. Citizens with information concerning alleged failures to comply with the public participation requirements should notify the Administrator. The Administrator will assure that instances of alleged noncompliance are promptly investigated and that corrective action is taken where necessary.

§ 25.13 Coordination and non-duplication.

The public participation activities and materials that are required under this part should be coordinated or combined with those of closely related programs or activities wherever this will enhance the economy, the effectiveness, or the timeliness of the effort; enhance the clarity of the issue; and not be detrimental to participation by the widest possible public. Hearings and meetings on the same matter may be held jointly by more than one agency where this does not conflict with the policy of this paragraph. Special efforts shall be

made to coordinate public participation procedures under this part and applicable regulations elsewhere in this chapter with environmental assessment and analysis procedures under 40 CFR part 6. EPA encourages interstate agencies in particular to develop combined proceedings for the States concerned.

§ 25.14 Termination of reporting requirements.

All reporting requirements specifically established by this part will terminate on (5 years from date of publication) unless EPA acts to extend the requirements beyond that date.

PART 27—PROGRAM FRAUD CIVIL REMEDIES

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AUTHORITY: 31 U.S.C. 3809.

SOURCE: 53 FR 15182, Apr. 27, 1988, unless otherwise noted.

§ 27.1 Basis and purpose.

(a) *Basis.* This part implements the Program Fraud Civil Remedies Act of 1986, Pub. L. No. 99-509, sections 6101-6104, 100 Stat. 1874 (October 21, 1986), to be codified at 31 U.S.C. 3801-3812. 31 U.S.C. 3809 of the statute requires each authority head to promulgate regulations necessary to implement the provisions of the statute.

(b) *Purpose.* This part (1) establishes administrative procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to the Environmental Protection Agency, and (2) specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

§ 27.2 Definitions

Administrative Law Judge means an administrative law judge in the Authority appointed pursuant to 5 U.S.C. 3105 or detailed to the Authority pursuant to 5 U.S.C. 3344.

Administrator means the Administrator of the United States Environmental Protection Agency.

Authority means the United States Environmental Protection Agency.

Authority head means the Administrator of a judicial officer.

Benefit means, in the context of "statement," anything of value, including but not limited to any advan-

tage, preference, privilege, license, permit, favorable decision, ruling, status, or loan guarantee.

Claim means any request, demand, or submission—

(a) Made to the Authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

(b) Made to a recipient of property, services, or money from the Authority or to a party to a contract with the Authority—

(1) For property or services if the United States—

(i) Provided such property or services;

(ii) Provided any portion of the funds for the purchase of such property or services; or

(iii) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States—

(i) Provided any portion of the money requested or demanded; or

(ii) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(c) Made to the Authority which has the effect of decreasing an obligation to pay or account for property, services, or money.

Complaint means the administrative complaint served by the reviewing official on the defendant under § 27.7.

Defendant means any person alleged in a complaint under § 27.7 to be liable for a civil penalty or assessment under § 27.3.

Government means the United States Government.

Hearing Clerk means the Hearing Clerk, A-110, United States Environmental Protection Agency, 401 M St. SW., Washington, DC 20460.

Individual means a natural person.

Initial decision means the written decision of the presiding officer required by § 27.10 or § 27.37, and includes a revised initial decision issued following a remand or a motion for reconsideration.

Investigating official means the Inspector General of the United States Environmental Protection Agency or an officer or employee of the Office of Inspector General designated by the Inspector General and serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Judicial officer means an attorney who is a permanent or temporary employee of the Authority designated by the Administrator to serve as judicial officer and who may perform other duties within the Authority but shall not be employed by any program office directly associated with the type of violation at issue in the proceeding.

Knows or has reason to know means that a person, with respect to a claim or statement—

(a) Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

(b) Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

(c) Acts in reckless disregard of the truth or falsity of the claim or statement.

Makes, wherever it appears, shall include the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, *making* or *made* shall likewise include the corresponding forms of such terms.

Person means any individual, partnership, corporation, association, or private organization, and includes the plural of those terms.

Presiding officer means the administrative law judge designated by the Chief administrative law judge to serve as presiding officer.

Representative means an attorney who is a member in good standing of the bar of any State, Territory, or possession of the United States or of the District of Columbia or the Commonwealth of Puerto Rico, or other representative who must conform to the standards of conduct and ethics required of practitioners before the courts of the United States.

Reviewing official means the General Counsel of the Authority or his designee who is—

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the Authority in which the investigating official is employed; and

(c) Serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for grade GS-16 under the General Schedule.

Statement means any representation, certification, affirmation, document, record, or accounting or bookkeeping entry made—

(a) With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

(b) With respect to (including relating to eligibility for)—

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from,

the Authority, or any State, political subdivision of a State, or other party, if the United States Government provides any portion of the money or property under such contract or for such grant, loah, or benefit, or if the Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

§ 27.3 Basis for civil penalties and assessments.

(a) *Claims.* (1) Except as provided in paragraph (c) of this section, any person who makes a claim that the person knows or has reason to know—

(i) Is false, fictitious, or fraudulent;

(ii) Includes or is supported by any written statement which asserts a material fact which is false, fictitious, or fraudulent;

(iii) Includes or is supported by any written statement that—

(A) Omits a material fact;

(B) Is false, fictitious, or fraudulent as a result of such omission; and

(C) Is a statement in which the person making such statement has a duty to include such material fact; or

(iv) Is for payment for the provision of property or services which the person has not provided as claimed,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

(2) Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

(3) A claim shall be considered made to the Authority, recipient, or party when such claim is actually made to an an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of the Authority, recipient, or party.

(4) Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, services, or money is actually delivered or paid.

(5) If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under paragraph (a)(1) of this section, shall also be subject to an assessment of not more than twice the amount of such claim or that portion thereof that is determined to be in violation of paragraph (a)(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

(b) *Statements.* (1) Except as provided in paragraph (c) of this section, any person who makes a written statement that—

(i) The person knows or has reason to know—

(A) Asserts a material fact which is false, fictitious, or fraudulent; or

(B) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(ii) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement,

shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such statement.

(2) Each written representation, certification, or affirmation constitutes a separate statement.

(3) A statement shall be considered made to the Authority when such

statement is actually made to an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such Authority.

(c) No proof of specific intent to defraud is required to establish liability under this section.

(d) In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held liable for a civil penalty under this section.

(e) In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services), an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

§ 27.4 Investigation.

(a) If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted—

(1) The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

(2) The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

(3) The person receiving such subpoena shall be required to tender to the investigating official or the person designated to receive the documents a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

(b) If the investigating official concludes that an action under the Program Fraud Civil Remedies Act may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the reviewing official.

(c) Nothing in this section shall preclude or limit an investigating official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

(d) Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

§ 27.5 Review by the reviewing official.

(a) If, based on the report of the investigating official under § 27.4(b), the reviewing official determines that there is adequate evidence to believe that a person is liable under § 27.3 of this part, the reviewing official shall transmit to the Attorney General a written notice of the reviewing official's intention to issue a complaint under § 27.7.

(b) Such notice shall include—

(1) A statement of the reviewing official's reasons for issuing a complaint;

(2) A statement specifying the evidence that supports the allegations of liability;

(3) A description of the claims or statements upon which the allegations of liability are based;

(4) An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of § 27.3 of this part;

(5) A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

(6) A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

§ 27.6 Prerequisites for issuing a complaint.

(a) The reviewing official may issue a complaint under § 27.7 only if—

(1) The Department of Justice approves the issuance of a complaint in written statement described in 31 U.S.C. 3803(b)(1), and

(2) In the case of allegations of liability under § 27.3(a) with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submit-

ted (as defined in paragraph (b) of this section), the amount of money or the value of property or services demanded or requested in violation of § 27.3(a) does not exceed $150,000.

(b) For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (*e.g.*, grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

(c) Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person, claims that are unrelated or were not submitted simultaneously, regardless of the amount of money, or the value of property or services, demanded or requested.

§ 27.7 Complaint.

(a) On or after the date the Department of Justice approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in § 27.8.

(b) The complaint shall state—

(1) The allegations of liability against the defendant, including the statuory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

(2) The maximum amount of penalties and assessments for which the defendant may be held liable;

(3) Instructions for filing an answer to request a hearing, including a specific statement of the defendant's right to request a hearing by filing an answer and to be represented by a representative; and

(4) That failure to file an answer within 30 days of service of the complaint will result in the imposition of the maximum amount of penalties and assessments without right to appeal as provided in § 27.10.

(c) At the same time the reviewing official serves the complaint, he or she shall serve the defendant with a copy of these regulations.

§ 27.8 Service of complaint.

(a) Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

(b) Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service, may be made by—

(1) Affidavit of the individual serving the complaint by delivery;

(2) A United States Postal Service return receipt card acknowledging receipt; or

(3) Written acknowledgment of receipt by the defendant or his or her representative.

§ 27.9 Answer.

(a) The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

(b) In the answer, the defendant—

(1) Shall admit or deny each of the allegations of liability made in the complaint;

(2) Shall state any defense on which the defendant intends to rely;

(3) May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

(4) Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

(c) If the defendant is unable to file an answer meeting the requirements of paragraph (b) of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting requirements of paragraph (b) of this section. The reviewing official shall file promptly with the hearing clerk the complaint, the general answer denying liability, and the request for an extension of time as pro-

vided in § 27.11. Upon assignment to a presiding officer, the presiding officer may, for good cause shown, grant the defendant up to 30 additional days within which to file an answer meeting the requirements of paragraph (b) of this section.

§ 27.10 Default upon failure to file an answer.

(a) If the defendant does not file an answer within the time prescribed in § 27.9(a), the reviewing official may file the complaint with the hearing clerk as provided in § 27.11.

(b) Upon assignment of the complaint to a presiding officer, the presiding officer shall promptly serve on defendant in the manner prescribed in § 27.8, a notice that an initial decision will be issued under this section.

(c) The presiding officer shall assume the facts alleged in the complaint to be true, and, if such facts establish liability under § 27.3, the presiding officer shall issue an initial decision imposing the maximum amount of penalties and assessments allowed under the statute.

(d) Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under paragraph (c) of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

(e) If, before such an initial decision becomes final, the defendant files a motion seeking to reopen on the grounds that extraordinary circumstances prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.

(f) If, on such motion, the defendant can demonstrate extraordinary circumstances excusing the failue to file a timely answer, the presiding officer shall withdraw the initial decision in paragraph (c) of this section, if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

(g) A decision of the presiding officer denying a defendant's motion under paragraph (e) of this section, is not subject to reconsideration under § 27.38.

(h) The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal within 15 days after the presiding officer denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

(i) If the defendant files a timely notice of appeal, the presiding officer shall forward the record of the proceeding to the authority head.

(j) The authority head shall decide expeditiously whether extraordinary circumstances excuse the defendant's failure to file a timely answer based solely on the record before the presiding officer.

(k) If the authority head decides that extraordinary circumstances excused the defendant's failure to file a timely answer, the authority head shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

(l) If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall reinstate the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

§ 27.11 Referral of complaint and answer to the presiding officer.

(a) Upon receipt of an answer, the reviewing official shall file the complaint and answer with the hearing clerk.

(b) The hearing clerk shall forward the complaint and answer to the Chief administrative law judge who shall assign himself or herself or another administrative law judge as presiding officer. The presiding officer shall then obtain the complaint and answer from the Chief administrative law judge and notify the parties of his or her assignment.

§ 27.12 Notice of hearing.

(a) When the presiding officer obtains the complaint and answer, the presiding officer shall promptly serve

a notice of hearing upon the defendant in the manner prescribed by § 27.8. At the same time, the presiding officer shall send a copy of such notice to the representative for the Government.

(b) Such notice shall include—

(1) The date, time and place, and the nature of the hearing;

(2) The legal authority and jurisdiction under which the hearing is to be held;

(3) The matters of fact and law to be asserted;

(4) A description of the procedures for the conduct of the hearing;

(5) The name, address, and telephone number of the representative of the Government and of the defendant, if any; and

(6) Such other matters as the presiding officer deems appropriate.

(c) The presiding officer shall issue the notice of hearing at least twenty (20) days prior to the date set for the hearing.

§ 27.13 Parties to the hearing.

(a) The parties to the hearing shall be the defendant and the Authority.

(b) Pursuant to 31 U.S.C. 3730(c)(5), a private plaintiff under the False Claims Act may participate in these proceedings to the extent authorized by the provisions of that Act.

§ 27.14 Separation of functions.

(a) The investigating official, the reviewing official, and any employee or agent of the Authority who takes part in investigating, preparing, or presenting a particular case, may not, in such case or a factually related case—

(1) Participate in the hearing as the presiding officer;

(2) Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in public proceedings; or

(3) Make the collection of penalties and assessments under 31 U.S.C. 3806.

(b) Neither the presiding officer nor judicial officer shall be responsible to, or subject to the supervision or direction of the investigating official or the reviewing official.

(c) Except as provided in paragraph (a) of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

§ 27.15 Ex parte contacts.

No party or person (except employees of the presiding officer's office) shall communicate in any way with the presiding officer on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine question concerning administrative functions or procedures.

§ 27.16 Disqualification of the reviewing official or presiding officer.

(a) A reviewing official or presiding officer in a particular case may disqualify himself or herself at any time.

(b) A party may file a motion for disqualification of a reviewing official or presiding officer with the hearing clerk. Such motion shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

(c) Such motion and affidavit shall be filed within 15 days of the party's discovery of reasons requiring disqualification, or such objections shall be deemed waived.

(d) Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

(e) Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until he or she resolves the matter of disqualification in accordance with paragraph (f) of this section.

(f)(1) If the presiding officer determines that the reviewing official is disqualified because the reviewing official could not have made an impartial determination pursuant to § 27.5(a), the presiding officer shall dismiss the complaint without prejudice.

(2) If the presiding officer disqualifies himself or herself, the case shall

be reassigned promptly to another presiding officer.

(3) If the presiding officer denies a motion to disqualify, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

§ 27.17 Rights of parties.

Except as otherwise limited by this part, all parties may—

(a) Be accompanied, represented, and advised by a representative;

(b) Participate in any conference held by the presiding officer;

(c) Conduct discovery;

(d) Agree to stipulations of fact or law, which shall be made part of the record;

(e) Present evidence relevant to the issues at the hearing;

(f) Present and cross-examine witnesses;

(g) Present oral arguments at the hearing as permitted by the presiding officer; and

(h) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

§ 27.18 Authority of the presiding officer.

(a) The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The presiding officer has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of discovery;

(8) Regulate the course of the hearing and the conduct of representatives and parties;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact;

(13) Conduct any conference, argument, or hearing on motions in person or by telephone; and

(14) Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this part.

(c) The presiding officer does not have the authority to find Federal statutes or regulations invalid.

§ 27.19 Prehearing conferences.

(a) The presiding officer may schedule prehearing conferences as appropriate.

(b) Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

(c) The presiding officer may use prehearing conferences to discuss the following:

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery;

(9) The time and place for the hearing; and

(10) Such other matters as may tend to expedite the fair and just disposition of the proceedings.

(d) The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a prehearing conference.

§ 27.20 Disclosure of documents.

(a) Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under § 27.4(b) are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

(b) Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed.

(c) The notice sent to the Attorney General from the reviewing official as described in § 27.5 is not discoverable under any circumstances.

(d) The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section. Such a motion may only be filed following the filing of an answer pursuant to § 27.9.

§ 27.21 Discovery.

(a) The following types of discovery are authorized:

(1) Requests for production of documents for inspection and copying;

(2) Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

(3) Written interrogatories; and

(4) Depositions.

(b) For the purpose of this section and §§ 27.22 and 27.23, the term "documents" includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained herein shall be interpreted to require the creation of a document.

(c) Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

(d) *Motions for discovery.* (1) A party seeking discovery may file a motion which shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

(2) Within ten days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in § 27.24.

(3) The presiding officer may grant a motion for discovery only if he finds that the discovery sought—

(i) Is necessary for the expeditious, fair, and reasonable consideration of the issues;

(ii) Is not unduly costly or burdensome;

(iii) Will not unduly delay the proceeding; and

(iv) Does not seek privileged information.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

(5) The presiding officer may grant discovery subject to a protective order under § 27.24.

(e) *Depositions.* (1) If a motion for deposition is granted, the presiding officer shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held.

(2) The party seeking to depose shall serve the subpoena in the manner prescribed in § 27.8.

(3) The deponent may file a motion to quash the subpoena or a motion for a protective order within ten days of service.

(4) The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it

shall make available to all other parties for inspection and copying.

(f) Each party shall bear its own costs of discovery.

§ 27.22 Exchange of witness lists, statements and exhibits.

(a) At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 27.33(b). At the time the above documents are exchanged, any party that intends to rely on the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

(b) If a party objects, the presiding officer shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the presiding officer finds good cause for the failure or that there is not prejudice to the objecting party.

(c) Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with paragraph (a) of this section shall be deemed to be authentic for the purpose of admissibility at the hearing.

§ 27.23 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

(b) A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

(c) A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing unless otherwise allowed by the presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

(d) The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

(e) The party seeking the subpoena shall serve it in the manner prescribed in § 27.8. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

(f) A party or the individual to whom the subpoena is directed may file a motion to quash the subpoena within ten days after service or on or before the time specified in the subpoena for compliance if it is less than ten days after service.

§ 27.24 Protective order.

(a) A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by a party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

(b) In issuing a protective order, the presiding officer may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) That the discovery not be had;

(2) That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) That the discovery may be had only through a method of discovery other than that requested;

(4) That certain matters not be inquired into, or that the scope of discovery be limited to certain matters;

(5) That discovery be conducted with no one present except persons designated by the presiding officer;

(6) That the contents of discovery or evidence be sealed;

(7) That a deposition after being sealed be opened only by order of the presiding officer;

(8) That a trade secret or other confidential research, development, or commercial information, or facts per-

taining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

(9) That the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the presiding officer.

§ 27.25 Fees.

The party requesting a subpoena shall pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the Authority, a check for witness fees and mileage need not accompany the subpoena.

§ 27.26 Form, filing and service of papers.

(a) *Form.* (1) Documents filed with the hearing clerk shall include an original and two copies.

(2) The first page of every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the hearing clerk, and a designation of the paper (*e.g.*, motion to quash subpoena).

(3) Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

(b) *Service.* A party filing a document with the hearing clerk shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document, other than those required to be served as prescribed in § 27.8, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed, to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

§ 27.27 Computation of time.

(a) In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal government, in which event it includes the next business day.

(b) When the period of time allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal government shall be excluded from the computation.

(c) When a document has been served or issued by placing it in the mail, an additional five days will be added to the time permitted for any response.

§ 27.28 Motions.

(a) Any application to the presiding officer for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, and the facts alleged, and shall be filed with hearing clerk and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require that oral motions be reduced to writing.

(c) Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

(d) The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The presiding officer shall make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

§ 27.29 Sanctions.

(a) The presiding officer may sanction a person, including any party or representative for—

(1) Failing to comply with an order, rule, or procedure governing the proceeding;

(2) Failing to prosecute or defend an action; or

(3) Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

(b) Any such sanction, including but not limited to those listed in paragraphs (c), (d), and (e) of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

(c) When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the presiding officer may—

(1) Draw an inference in favor of the requesting party with regard to the information sought;

(2) In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

(3) Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

(4) Strike any part of the pleadings or other submissions of the party failing to comply with such request.

(d) If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments.

(e) The presiding officer may refuse to consider any motion, request, response, brief or other document which is not filed in a timely fashion.

§ 27.30 The hearing and burden of proof.

(a) The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under § 27.3 and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

(b) The Authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

(c) The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

(d) The hearing shall be open to the public unless otherwise ordered by the presiding officer for good cause shown.

§ 27.31 Determining the amount of penalties and assessments.

(a) In determining an appropriate amount of civil penalties and assessments, the presiding officer and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose. Because of the intangible costs of fraud, the expense of investigating such conduct, and the need to deter others who might be similarly tempted, ordinarily double damages and a significant civil penalty should be imposed.

(b) Although not exhaustive, the following factors are among those that may influence the presiding officer and the authority head in determining the amount of penalties and assessments to impose with respect to the misconduct (*i.e.*, the false, fictitious, or fraudulent claims or statements) charged in the complaint:

(1) The number of false, fictitious, or fraudulent claims or statements;

(2) The time period over which such claims or statements were made;

(3) The degree of the defendant's culpability with respect to the misconduct;

(4) The amount of money or the value of the property, services, or benefit falsely claimed;

(5) The value of the Government's actual loss as a result of the misconduct, including foreseeable consequential damages and the costs of investigation;

(6) The relationship of the amount imposed as civil penalties to the amount of the Government's loss;

(7) The potential or actual impact of the misconduct upon national defense, public health or safety, or public confidence in the management of Government programs and operations, including particularly the impact on the intended beneficiaries of such programs;

(8) Whether the defendant has engaged in a pattern of the same or similar misconduct;

(9) Whether the defendant attempted to conceal the misconduct;

(10) The degree to which the defendant has involved others in the misconduct or in concealing it;

(11) Where the misconduct of employees or agents is imputed to the defendant, the extent to which the defendant's practices fostered or attempted to preclude such misconduct;

(12) Whether the defendant cooperated in or obstructed an investigation of the misconduct;

(13) Whether the defendant assisted in identifying and prosecuting other wrongdoers;

(14) The complexity of the program or transaction, and the degree of the defendant's sophistication with respect to it, including the extent of the defendant's prior participation in the program or in similar transactions;

(15) Whether the defendant has been found, in any criminal, civil, or administrative proceeding to have engaged in similar misconduct or to have dealt dishonestly with the Government of the United States or of a State, directly or indirectly; and

(16) The need to deter the defendant and others from engaging in the same or similar misconduct.

(c) Nothing in this section shall be construed to limit the presiding officer or the authority head from considering any other factors that in any given case may mitigate or aggravate the offense for which penalties and assessments are imposed.

§ 27.32 Location of hearing.

(a) The hearing may be held—

(1) In any judicial district of the United States in which the defendant resides or transacts business;

(2) In any judicial district of the United States in which the claim or statement in issue was made; or

(3) In such other place as may be agreed upon by the defendant and the presiding officer.

(b) Each party shall have the opportunity to present argument with respect to the location of the hearing.

(c) The hearing shall be held at the place and at the time ordered by the presiding officer.

§ 27.33 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

(b) At the discretion of the presiding officer, testimony may be admitted in the form of a written statement or deposition. Any such written statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing and deposition transcripts shall be exchanged as provided in § 27.22(a).

(c) The presiding officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrrogation and presentation effective for the ascertainment of the truth,

(2) Avoid needless consumption of time, and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The presiding officer shall permit the parties to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(e) At the discretion of the presiding officer, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination. To the extent permitted by the presiding officer, cross-examination on matters outside the scope of direct examination shall be conducted in the manner of direct examination and may proceed

by leading questions only if the witness is a hostile witness, an adverse party, or a witness identified with an adverse party.

(f) Upon motion of any party, the presiding officer shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or empoyee of the party appearing for the entity *pro se* or designated by the party's representative; or

(3) an individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

§ 27.34 Evidence.

(a) The presiding officer shall determine the admissibility of evidence.

(b) Except as provided in this part, the presiding officer shall not be bound by the Federal Rules of Evidence. However, the presiding officer may apply the Federal Rules of Evidence when appropriate, *e.g.*, to exclude unreliable evidence.

(c) The presiding officer shall exclude irrelevant and immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence may be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) The presiding officer shall permit the parties to introduce rebuttal witnesses and evidence.

(h) All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to § 27.24.

§ 27.35 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the hearing clerk at a cost not to exceed the actual cost of duplication.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the presiding officer and the authority head.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the presiding officer pursuant to § 27.24.

27.36 Post-hearing briefs.

The presiding officer may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The presiding officer shall fix the time for filing such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file responsive briefs.

§ 27.37 Initial decision.

(a) The presiding officer shall issue an initial decision based only on the record. The decision shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

(b) The findings of fact shall include a finding on each of the following issues:

(1) Whether the claims or statements identified in the complaint, or any portions thereof, violate § 27.3;

(2) If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments considering any mitigating or aggravating factors that he or she finds in the case, such as those described in § 27.31.

(c) The presiding officer shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing

briefs and responsive briefs (if permitted) has expired. The presiding officer shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration or a notice of appeal. If the presiding officer fails to meet the deadline contained in this paragraph, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

(d) Unless the initial decision of the presiding officer is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued by the presiding officer.

§ 27.38 Reconsideration of initial decision.

(a) Except as provided in paragraph (d) of this section, any party may file a motion for reconsideration of the initial decision within 20 days of receipt of the initial decision. If service was made by mail, receipt will be presumed to be five days from the date of mailing in the absence of contrary proof.

(b) Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

(c) Responses to such motions shall be allowed only upon request of the presiding officer.

(d) No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

(e) The presiding officer may dispose of a motion for reconsideration by denying it or by issuing a revised intial decision.

(f) If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the authority head in accordance with § 27.39.

(g) If the presiding officer issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with § 27.39.

§ 27.39 Appeal to authority head.

(a) Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the hearing clerk in accordance with this section.

(b)(1) A notice of appeal may be filed at any time within 30 days after the presiding officer issues an initial decision. However, if another party files a motion for reconsideration under § 27.38, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration.

(2) If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the presiding officer denies the motion or issues a revised initial decision, whichever applies.

(3) The authority head may extend the initial 30 day period for an additional 30 days if the defendant files a request for an extension within the initial 30 day period and shows good cause.

(c) If the defendant files a timely notice of appeal, and the time for filing motions for reconsideration under § 27.38 has expired, the presiding officer shall forward the record of the proceeding to the authority head.

(d) A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

(e) The representative for the Government may file a brief in opposition to exceptions within 30 days of receiving the notice of appeal and accompanying brief.

(f) There is no right to appear personally before the authority head.

(g) There is no right to appeal any interlocutory ruling by the presiding officer.

(h) In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the presiding officer unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

(i) If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

(j) The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment, determined by the presiding officer in any initial decision.

(k) The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a civil penalty or assessment to seek judicial review.

(l) Unless a petition for review is filed as provided in 31 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under § 27.3 is final and is not subject to judicial review.

§ 27.40 Stays ordered by the Department of Justice.

If at any time the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this part with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

§ 27.41 Stay pending appeal.

(a) An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.

(b) No administrative stay is available following a final decision of the authority head.

§ 27.42 Judicial review.

Section 3805 of Title 31, United States Code, authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessments under this part and specifies the procedures for such review.

§ 27.43 Collection of civil penalties and assessments.

Sections 3806 and 3808(b) of Title 31, United States Code, authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

§ 27.44 Right to administrative offset.

The amount of any penalty or assessment which has become final, or for which a judgment has been entered under §§ 27.42 or 27.43, or any amount agreed upon in a compromise or settlement under § 27.46, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes, then or later owing by the United States to the defendant.

§ 27.45 Deposit in Treasury of United States.

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

§ 27.46 Compromise or settlement.

(a) Parties may make offers of compromise or settlement at any time.

(b) The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the presiding officer issues an initial decision.

(c) The authority head has exclusive authority to compromise or settle a case under this part at any time after the date on which the presiding officer issues an initial decision, except during the pendency of any review under § 27.42 or during the pendency of any action to collect penalties and assessments under § 27.43.

(d) The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under § 27.42 or of any action to recover penalties and assessments under 31 U.S.C. 3806.

(e) The investigating official may recommend settlement terms to the reviewing official, the authority head, or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the authority head, or the Attorney General, as appropriate.

(f) Any compromise or settlement must be in writing.

§ 27.47 Limitations.

(a) The notice of hearing with respect to a claim or statement must be served in the manner specified in § 27.8 within 6 years after the date on which such claim or statement is made.

(b) If the defendant fails to file a timely answer, service of a notice under § 27.10(b) shall be deemed a notice of hearing for purposes of this section.

(c) The statute of limitations may be extended by agreement of the parties.

§ 27.48 Delegated functions.

The Administrator may delegate to a judicial officer, all or part of his authority to act in a given proceeding. This delegation does not prevent the judicial officer from referring any matter to the Administrator when appropriate.

PART 29—INTERGOVERNMENTAL REVIEW OF ENVIRONMENTAL PROTECTION AGENCY PROGRAMS AND ACTIVITIES

Sec.

29.1 What is the purpose of these regulations?
29.2 What definitions apply to these regulations?
29.3 What programs and activities of the Environmental Protection Agency are subject to these regulations?
29.4 What are the Administrator's general responsibilities under the Order?
29.5 What is the Administrator's obligation with respect to Federal interagency coordination?
29.6 What procedures apply to the selection of programs and activities under these regulations?
29.7 How does the Administrator communicate with State and local officials concerning EPA programs and activities?
29.8 How does the Administrator provide States an opportunity to comment on proposed Federal financial assistance and direct Federal development?
29.9 How does the Administrator receive and respond to comments?
29.10 How does the Administrator make efforts to accommodate intergovernmental concerns?
29.11 What are the Administrator's obligations in interstate situations?
29.12 How may a State simplify, consolidate, or substitute federally required State plans?
29.13 May the Administrator waive any provision of these regulations?

AUTHORITY: E.O. 12372, July 14, 1982 (47 FR 30959), as amended Apr. 8, 1983 (48 FR 15887); sec. 401 of the Intergovernmental Cooperation Act of 1968 as amended (31 U.S.C. 6506); sec. 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3334).

SOURCE: 48 FR 29300, June 24, 1983, unless otherwise noted.

§ 29.1 What is the purpose of these regulations?

(a) The regulations in this part implement Executive Order 12372, "Intergovernmental Review of Federal Programs," issued July 14, 1982, and amended, on April 8, 1983. These regulations also implement applicable provisions of section 401 of the Intergovernmental Cooperation Act of 1968, as amended and section 204 of the Dem-

onstration Cities and Metropolitan Development Act of 1966, as amended.

(b) These regulations are intended to foster an intergovernmental partnership and a strengthened federalism by relying on state processes and on state, areawide, regional and local coordination for review of proposed Federal financial assistance and direct Federal development.

(c) These regulations are intended to aid the internal management of the Environmental Protection Agency (EPA) and are not intended to create any right or benefit enforceable at law by a party against EPA or its officers.

§ 29.2 What definitions apply to these regulations?

Administrator means the Administrator of the U.S. Environmental Protection Agency or an official or employee of the Agency acting for the Administrator under a delegation of authority.

Agency means the U.S. Environmental Protection Agency (EPA). *Order* means Executive Order 12372, issued July 14, 1982, and amended April 8, 1983, and titled "Intergovernmental Review of Federal Programs."

States means any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, the U.S. Virgin Islands, or the Trust Territory of the Pacific Islands.

§ 29.3 What programs and activities of the Environmental Protection Agency are subject to these regulations?

The Administrator publishes in the FEDERAL REGISTER a list of the EPA programs and activities that are subject to these regulations and identifies which of these are subject to the requirements of section 204 of the Demonstration Cities and Metropolitan Development Act.

§ 29.4 What are the Administrator's general responsibilities under the Order?

(a) The Administrator provides opportunities for consultation by elected officials of those State and local governments that would provide the non-Federal funds for, or that would be directly affected by, proposed Federal financial assistance from, or direct Federal development by, the EPA.

(b) If a State adopts a process under the Order to review and coordinate proposed Federal financial assistance and direct Federal development, the Administrator to the extent permitted by law:

(1) Uses the State process to determine official views of State and local elected officials;

(2) Communicates with State and local elected officials as early in a program planning cycle as is reasonably feasible to explain specific plans and actions;

(3) Makes efforts to accommodate State and local elected officials' concerns with proposed Federal financial assistance and direct Federal development that are communicated through the State process;

(4) Allows the States to simplify and consolidate existing federally required State plan submissions;

(5) Where State planning and budgeting systems are sufficient and where permitted by law, encourages the substitution of State plans for federally required State plans;

(6) Seeks the coordination of views of affected State and local elected officials in one State with those of another State when proposed Federal financial assistance or direct Federal development has an impact on interstate metropolitan urban centers or other interstate areas; and

(7) Supports State and local governments by discouraging the reauthorization or creation of any planning organization which is federally-funded, which has a limited purpose, and which is not adequately representative of, or accountable to, State or local elected officials.

§ 29.5 What is the Administrator's obligation with respect to Federal interagency coordination?

The Administrator, to the extent practicable, consults with and seeks advice from all other substantially affected Federal departments and agencies in an effort to assure full coordination between such agencies and EPA regarding programs and activities covered under these regulations.

§ 29.6 What procedures apply to the selection of programs and activities under these regulations?

(a) A State may select any program or activity published in the FEDERAL REGISTER in accordance with § 29.3 of this part for intergovernmental review under these regulations. Each State, before selecting programs and activities, shall consult with local elected officials.

(b) Each State that adopts a process shall notify the Administrator of EPA programs and activities selected for that process.

(c) A State may notify the Administrator of changes in its selections at any time. For each change, the State shall submit an assurance to the Administrator that the State has consulted with local elected officials regarding the change. EPA may establish deadlines by which States are required to inform the Administrator of changes in their program selections.

(d) The Administrator uses a State's process as soon as feasible, depending on individual programs and activities, after the Administrator is notified of its selections.

§ 29.7 How does the Administrator communicate with State and local officials concerning the EPA programs and activities?

(a) For those programs and activities covered by a State process under § 29.6, the Administrator, to the extent permitted by law:

(1) Uses the State process to determine views of State and local elected officials; and

(2) Communicates with State and local elected officials, through the State process, as early in a program planning cycle as is reasonably feasible to explain specific plans and actions.

(b) The Administrator provides notice of proposed Federal financial assistance or direct Federal development to directly affected State, areawide, regional, and local entities in a State if:

(1) The State has not adopted a process under the Order; or

(2) The assistance or development involves a program or activity not selected for the State process.

This notice may be published in the FEDERAL REGISTER or issued by other means which EPA, in its discretion deems appropriate.

§ 29.8 How does the Administrator provide States an opportunity to comment on proposed Federal financial assistance and direct Federal development?

(a) Except in unusual circumstances, the Administrator gives State processes or directly affected State, areawide, regional and local officials and entities:

(1) At least 30 days from the date established by the Administrator to comment on proposed Federal financial assistance in the form of noncompeting continuation awards; and

(2) At least 60 days from the date established by the Administrator to comment on proposed direct Federal development or Federal financial assistance, other than noncompeting continuation awards.

(b) This section also applies to comments in cases in which the review, coordination, and communication with the Environmental Protection Agency have been delegated.

(c) Applicants for programs and activities subject to section 204 of the Demonstration Cities and Metropolitan Development Act shall allow areawide agencies a 60-day opportunity for review and comment.

§ 29.9 How does the Administrator receive and respond to comments?

(a) The Administrator follows the procedures in § 29.10 if:

(1) A State office or official is designated to act as a single point of contact between a State process and all Federal agencies, and

(2) That office or official transmits a State process recommendation for a program selected under § 29.6.

(b) The single point of contact is not obligated to transmit comments from State, areawide, regional or local officials and entities where there is no State process recommendation. However, if a State process recommendation is transmitted by a single point of contact, all comments from State, area-wide, regional, and local officials

and entities that differ from it must also be transmitted.

(c) If a State has not established a process, or is unable to submit a State process recommendation, the State, areawide, regional and local officials and entities may submit comments directly either to the applicant or to EPA.

(d) If a program or activity is not selected for a State process, the State, areawide, regional and local officials and entities may submit comments either directly to the applicant or to EPA. In addition, if a State process recommendation for a nonselected program or activity is transmitted to EPA by the single point of contact, the Administrator follows the procedures of § 29.10 of this part.

(e) The Administrator *considers* comments which do not constitute a State process recommendation submitted under these regulations and for which the Administrator is not required to apply the procedures of § 29.10 of this part, when such comments are provided by a single point of contact, by the applicant, or directly to the Agency by a commenting party.

§ 29.10 How does the Administrator make efforts to accommodate intergovernmental concerns?

(a) If a State process provides a State process recommendation to the Agency through the State's single point of contact, the Administrator either:

(1) Accepts the recommendation;

(2) reaches a mutually agreeable solution with the State process; or

(3) Provides the single point of contact with such written explanation of the decision, as the Administrator, in his or her discretion, deems appropriate. The Administrator may also supplement the written explanation by providing the explanation to the single point of contact by telephone, other telecommunication, or other means.

(b) In any explanation under paragraph (a)(3) of this section, the Administrator informs the single point of contact that:

(1) EPA will not implement its decision for at least ten days after the single point of contact receives the explanation; or

(2) The Administrator has reviewed the decision and determined that, because of unusual circumstances, the waiting period of at least ten days is not feasible.

(c) For purposes of computing the waiting period under paragraph (b)(1) of this section, a single point of contact is presumed to have received written notification 5 days after the date of mailing of such notification.

§ 29.11 What are the Administrator's obligations in interstate situations?

(a) The Administrator is responsible for:

(1) Identifying proposed Federal financial assistance and direct Federal development that have an impact on interstate areas;

(2) Notifying appropriate officials and entities in States which have adopted a process and selected an EPA program or activity.

(3) Making efforts to identify and notify the affected State, areawide, regional, and local officials and entities in those States that do not adopt a process under the Order or do not select an EPA program or activity;

(4) Responding in accordance with § 29.10 of this part to a recommendation received from a designated areawide agency transmitted by a single point of contact, in cases in which the review, coordination, and communication with EPA were delegated.

(b) The Administrator uses the procedures in § 29.10 if a State process provides a State process recommendation to the Agency through a single point of contact.

§ 29.12 How may a State simplify, consolidate, or substitute federally required State plans?

(a) As used in this section:

(1) SIMPLIFY means that a State may develop its own format, choose its own submission date, and select the planning period for a State plan.

(2) CONSOLIDATE means that a State may meet statutory and regulatory requirements by combining two or more plans into one document and that the

State can select the format, submission date, and planning period for the consolidated plan.

(3) SUBSTITUTE means that a State may use a plan or other document that it has developed for its own purposes to meet Federal requirements.

(b) If not inconsistent with law, a State may decide to try to simplify, consolidate, or substitute federally required State plans without prior approval by the Administrator.

(c) The Administrator reviews each State plan that a State has simplified, consolidated, or substituted and accepts the plan only if its contents meet Federal requirements.

§ 29.13 May the Administrator waive any provision of these regulations?

In an emergency, the Administrator may waive any provision of these regulations.

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SUBCHAPTER B—GRANTS AND OTHER FEDERAL ASSISTANCE

PART 30—GENERAL REGULATION FOR ASSISTANCE PROGRAMS FOR OTHER THAN STATE AND LOCAL GOVERNMENTS

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APPENDIX B—PATENTS AND COPYRIGHTS CLAUSES
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APPENDIX D—PART 30 REPORTING REQUIREMENTS
APPENDIX E—PART 30 AUDIT REQUIPEMENTS FOR STATE AND LOCAL GOVERNMENT RECIPIENTS

AUTHORITY: 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 9601 *et seq.*

SOURCE: 48 FR 45062, Sept. 30, 1983, unless otherwise noted.

Subpart A—What is the Purpose and Scope of this Regulation?

§ 30.100 What is the purpose of this regulation?

(a) The U.S. Environmental Protection Agency (EPA) is responsible for protecting and enhancing the quality of the environment. To achieve these objectives, EPA may award assistance in the form of grants, cooperative agreements, or fellowships to support: (1) State and local pollution control

programs; (2) research, demonstration, or training projects; and (3) other projects that advance EPA's mission.

This regulation tells how to apply for and manage an EPA project, describes EPA involvement in the process, and identifies recipients' responsibilities. Other EPA assistance regulations supplement these. They are found in 40 CFR part 32 (Debarment), part 33 (Procurement Under Assistance Agreements), part 35 (State and Local Assistance), part 40 (Research and Demonstration), part 45 (Training) and part 46 (Fellowships).

(c) This regulation incorporates the requirements of Office of Management and Budget (OMB) Circulars and EPA Orders.

(d) Recipients must provide the reporting information required in this part to be eligible for EPA assistance awards.

NOTE: The OMB clearances required by the Paperwork Reduction Act are identified in Appendix D to this part.

§ 30.101 What is the scope of this regulation?

This regulation covers financial assistance awards made as grants or cooperative agreements under requirements of the Federal Grant and Cooperative Agreement Act (Pub. L. 95-224). It does not cover direct EPA contracts under which EPA acquires property or services for its use.

§ 30.102 What laws authorize EPA to issue this regulation?

Reorganization Plan Number 3 of 1970 and the following statutes authorize the Administrator of EPA to issue this regulation.

(a) The Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*);

(b) The Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*);

(c) The Solid Waste Disposal Act, as amended (42 U.S.C. 6901 *et seq.*);

(d) The Safe Drinking Water Act, as amended (42 U.S.C. 300f *et seq.*);

(e) The Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*);

(f) The Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*); and

(g) The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*).

[48 FR 45062, Sept. 30, 1983; 49 FR 38944, Oct. 2, 1984]

Subpart B—What Definitions Apply to this Regulation?

§ 30.200 What definitions apply to this regulation?

Allowable costs. Those project costs that are: eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles, and approved by EPA in the assistance agreement.

Applicant. Any entity that files an application or unsolicited proposal for EPA financial assistance under this subchapter.

Assistance agreement. The legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose. It is either a grant or a cooperative agreement and will specify: budget and project periods; the Federal share of eligible project costs; a description of the work to be accomplished; and any special conditions.

Award official. The EPA official with the authority to execute assistance agreements and to take other actions authorized by this subchapter and by EPA Orders.

Budget period. The length of time EPA specifies in an assistance agreement during which the recipient may expend or obligate Federal funds.

Consolidated assistance. An assistance agreement awarded under more than one EPA program authority or funded together with one or more other Federal agencies. Applicants for consolidated assistance submit only one application.

Continuation award. An assistance agreement after the initial award, for a project which has more than one budget period in its approved project period, or annual awards, after the first award, to State, Interstate, or local agencies for continuing environmental programs (see § 30.306).

Contractor. Any party to whom a recipient awards a subagreement.

Cooperative agreement. An assistance agreement in which substantial EPA involvement is anticipated during the performance of the project (does not include fellowships).

Cost sharing. The portion of allowable project costs that a recipient contributes toward completing its project (i.e., non-Federal share, matching share).

Environmentally related measurements. Any data collection activity or investigation involving the assessment of chemical, physical, or biological factors in the environment which affect human health or the quality of life. The following are examples of environmentally related measurements: (a) A determination of pollutant concentrations from sources or in the ambient environment, including studies of pollutant transport and fate; (b) a determination of the effects of pollutants on human health and on the environment; (c) a determination of the risk/benefit of pollutants in the enviroment; (d) a determination of the quality of environmental data used in economic studies; and (e) a determination of the environmental impact of cultural and natural processes.

Expendable personal property. All tangible personal property other than nonexpendable personal property.

Force account work. The use of the recipient's own employees or equipment for construction, construction-related activities (including A and E services), or for repair or improvement to a facility.

Foreign awards. An EPA award of assistance when all or part of the project is performed in a foreign country by (a) a U.S. recipient, (b) a foreign recipient, or (c) an international organization.

Formal amendment. A written modification of an assistance agreement signed by both the authorized representative of the recipient and the award official.

Grant agreement. An assistance agreement that does not substantially involve EPA in the project and where the recipient has the authority and capability to complete all elements of the program (does not include fellowships).

In-kind contribution. The value of a non-cash contribution to meet a recipient's cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the EPA funded project.

Nonexpendable personal property. Personal property with a useful life of at least two years and an acquisition cost of $500 or more.

Personal property. Property other than real property. It may be tangible (having physical existence), such as equipment and supplies, or intangible (having no physical existence), such as patents, inventions, and copyrights.

Program income. Gross income the recipient earns during its project period from charges for the project. This may include income from service fees, sale of commodities, trade-in allowances, or usage or rental fees. Fees from royalties are program income only if the assistance agreement so states. Revenue generated under the governing powers of a State or local government which could have been generated without an award is not considered program income. Such revenues include fines or penalties levied under judicial or penal power and used as a means to enforce laws. (Revenue from wastewater treatment construction grant projects under Title II of the Clean Water Act, as amended, is not program income. It must be used for operation and maintenance costs of the recipient's wastewater facilities.)

Project. The activities or tasks EPA identifies in the assistance agreement.

Project costs. All costs the recipient incurs in carrying out the project. EPA considers all allowable project costs to include the Federal share.

Project officer. The EPA official designated in the assistance agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

Project period. The length of time EPA specifies in the assistance agreement for completion of all project work. It may be composed of more than one budget period.

Quality assurance narrative statement. A description of how precision,

accuracy, representativeness, completeness, and compatibility will be assessed, and which is sufficiently detailed to allow an unambiguous determination of the quality assurance practices to be followed throughout a research project.

Quality assurance program plan. A formal document which describes an orderly assembly of management policies, objectives, principles, organizational responsibilities, and procedures by which an agency or laboratory specifies how it intends to:

(a) Produce data of documented quality, and

(b) Provide for the preparation of quality assurance project plans and standard operating procedures.

Quality assurance project plan. An organization's written procedures which delineate how it produces quality data for a specific project or measurement method.

Real property. Land, including land improvements, and structures and appurtenances, excluding movable machinery and equipment.

Recipient. Any entity which has been awarded and accepted an EPA assistance agreement.

Standard operating procedure. A document which describes in detail an operation, analysis, or action which is commonly accepted as the preferred method for performing certain routine or repetitive tasks.

Subagreement. A written agreement between an EPA recipient and another party (other than another public agency) and any lower tier agreement for services, supplies, or construction necessary to complete the project. Subagreements include contracts and subcontracts for personal and professional services, agreements with consultants, and purchase orders.

Violating facility. Any facility that is owned, leased, or supervised by an applicant, recipient, contractor, or subcontractor that EPA lists under 40 CFR part 15 as not in compliance with Federal, State, or local requirements under the Clean Air Act or Clean Water Act. A facility includes any building, plant, installation, structure, mine, vessel, or other floating craft.

Unsolicited proposal. An informal written offer to perform EPA funded work for which EPA did not publish a solicitation.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38944, Oct. 2, 1984]

Subpart C—How do I Apply for and Receive Assistance?

§ 30.300 What activities does EPA fund?

EPA awards assistance to support various activities that protect the environment and reduce or control pollution. EPA groups these activities into the following types of assistance programs:

(a) State and local pollution control;

(b) Construction of wastewater treatment works;

(c) Research;

(d) Demonstration:

(e) Training;

(f) Fellowships;

(g) Special investigations, surveys or studies; and

(h) Consolidated assistance.

§ 30.301 To whom does EPA award assistance?

(a) EPA awards assistance only to applicants which are eligible under applicable statutes and regulations and which have the ability to meet the following criteria:

(1) Financial resources, technical qualifications, experience, organization, and facilities adequate to carry out the project, or a demonstrated ability to obtain these;

(2) Resources to meet the project completion schedule contained in the assistance agreement;

(3) A satisfactory performance record for completion of projects and subagreements;

(4) Accounting and auditing procedures adequate to control property, funds, and assets, as required in subpart E of this part;

(5) Procurement standards that comply with part 33 of this subchapter;

(6) Property management systems for acquiring, maintaining, safeguarding, and disposing of property, as required in subpart E of this part; and

(7) Demonstrated compliance or willingness to comply with the civil rights, equal employment opportunity, labor

law, and other statutory requirements under subpart F of this part.

(b) EPA considers your submission of an assistance application as your assurance that you can and will meet these standards. EPA may conduct a preaward audit or other review to determine your capabilities.

(c) EPA must notify you in writing if it finds you unable to meet these standards. The written notice will state the reasons for the finding. You may appeal EPA's findings under the disputes procedures in subpart L.

(d) Individuals, agencies, or organizations voluntarily excluded, suspended, or debarred under 40 CFR part 32 are ineligible to receive assistance.

§ 30.302 How do I apply for assistance?

(a) You must submit a standard application to apply for EPA assistance.

(b) Before you file an application to perform unsolicited work, you may submit an unsolicited proposal. EPA will apprise you of your proposal's potential for funding.

(c) You can get program information and an application kit with instructions from the EPA grants office which is responsible for administering that program. Regional EPA grants offices provide and review applications and award assistance for State and local pollution control projects. State water pollution control agencies provide and review applications for grants for the construction of wastewater treatment facilities. EPA Headquarters provides and reviews applications for and awards research, demonstration, fellowships, training, special investigations, surveys, studies, and most training assistance.

(d)(1) For assistance agreements awarded for Fiscal Year 1984, you must develop and implement a quality assurance program acceptable to the award official if your proposal involves any environmental related measurements or data generation. Except as noted in paragraphs (d) (2) and (3) of this section, your application for financial assistance must include a quality assurance plan which meets the requirements in § 30.503. If you already have an EPA approved quality assurance plan, you need only reference that plan in your application, provided the plan covers the project in your application.

[48 FR 45062, Sept. 30, 1983; 49 FR 38944, Oct. 2, 1984, as amended at 53 FR 8076, Mar. 11, 1988]

§ 30.303 What steps must I take when filing a standard application?

(a) Before you file an application, you must complete the forms according to the instructions. At least one copy of the completed application must have an original signature of the person authorized to obligate you or your organization to the terms and conditions of EPA's regulations and assistance agreement.

(b) You must:

(1) Comply with your State's intergovernmental review process, if it established one under Executive Order 12372. See 40 CFR part 29 (48 FR 29288, June 24, 1983).

(2) Comply with the areawide review requirements of section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, as amended (42 U.S.C. 3334) if your project will be located in a metropolitan area. EPA programs that are subject to areawide review are listed in 48 FR 29304, June 24, 1983, and marked with an asterisk (*).

§ 30.304 Is the information I submit to EPA confidential?

(a) Generally, the information is not confidential. When EPA receives your assistance application or unsolicited proposal the information you submit becomes part of the Agency's records. As such, it is subject to EPA's disclosure of information policy (40 CFR part 2) which is based on the provisions of the Freedom of Information Act (5 U.S.C. 552) and on the provision for patents and rights in data and copyrights under subpart K of this part.

(b) If you submit data, documents, or parts of documents which you consider to be confidential, you should clearly identify them with the words "trade secret," "proprietary," or "business confidential." For further instructions on assertion of confidentiality claims, see 40 CFR part 2, subpart B.

§ 30.305 How do I find out if EPA approved or disapproved my application?

(a) If EPA approves your application, the award official will prepare and sign an assistance agreement and send it to you for signature. Your authorized representative must either sign and return the agreement to EPA within three calendar weeks after you receive it or request EPA to extend the time for acceptance. If you do not sign or request an extension within the three week period, the assistance agreement is null and void.

(b) If EPA disapproves your application, it will promptly notify you in writing. You may appeal EPA's disapproval under subpart L.

(c) Sometimes, EPA will defer your application. You will be notified in writing of this decision.

§ 30.306 How long will I have to complete my project?

(a) Your assistance agreement will state the length of your approved budget period(s) and project period. Subject to statutory provisions, your approved project period may include more than one budget period. In this case, you must submit a continuation application to EPA to request funding for each budget period after the initial one. EPA makes continuation awards subject to availability of funds and Agency priorities. (Assistance awards under 40 CFR part 35, subpart A, do not have project periods, but recipients of such awards may receive continuation awards.)

(b) The continuation application must include:

(1) A detailed progress report for the current budget period;

(2) A preliminary financial statement for the current budget period that includes estimates of the amount you expect to spend by the end of the current budget period and the amount of any uncommitted funds which you propose to carry over beyond the term of the current budget period;

(3) A budget for the new budget period;

(4) A detailed work plan revised to account for your actual accomplishments during the current budget period;

(5) An invention report, if applicable;

(6) Any other reports that the assistance agreement may require.

(c) If approved by the award official, you may carry over unexpended prior year funds: (1) In lieu of new funds; (2) to complete work started in prior years; or (3) to supplement the new award. You must meet all program and cost sharing requirements in each budget period to carry over funds.

(d) If EPA executes a continuation agreement, EPA will reimburse you for allowable costs you incur between the end of a budget period and date of award for the next budget period provided you submit a continuation application before the expiration of the prior budget period.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38944, Oct. 2, 1984]

§ 30.307 How much must I contribute to the funding of my project?

(a) The amount of cost sharing you must contribute depends upon the statutory and regulatory cost sharing provisions that apply to your specific assistance project (see 40 CFR parts 35 and 40). You must contribute at least a 5 percent share of the total allowable project costs for each budget period *unless;*

(1) A lesser amount is specified in the respective statute or regulation applicable to your project; or

(2) The assistance agreement is for a remedial planning action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

(b) You may satisfy the requirement for cost sharing with cash or, when not prohibited by statute or regulations, with in-kind contributions. Your contribution may not be paid with Federal funds or with property or services received under another assistance agreement, unless authorized by statute. Additionally, your contributions must be:

(1) Negotiated before and specified in your assistance agreement;

(2) Verifiable from your records;

(3) Used exclusively for a single project; and

(4) Properly allocable to and allowable under the project.

(c) All project expenditures by the recipient shall be deemed to include the Federal share.

[48 FR 45062, Sept. 30, 1983; 49 FR 38944, Oct. 2, 1984]

§ 30.308 When may I begin incurring costs?

(a) Except as permitted in § 30.306(d), paragraph (b) of this section, or other EPA regulations, the award official and you must sign the EPA assistance agreement before you incur costs.

(b) You may incur costs between the date the award official signs the assistance agreement and you sign the agreement, provided the costs are identified in the agreement and you do not change the agreement.

[49 FR 38944, Oct. 2, 1984]

EDITORIAL NOTE: For Class deviation documents affecting § 30.308, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 30.309 What is the effect of accepting an assistance agreement?

(a) When the award official signs the assistance agreement, EPA will obligate Federal funds for the amount stated in your assistance agreement for the purposes of the award. EPA is not obligated to provide Federal funds for any costs incurred by you in excess of the Federal share of your approved budget. (See subpart G of this part.)

(b) The award of an assistance agreement constitutes a public trust. By signing and accepting an assistance agreement, you become responsible for complying with all terms and conditions of your assistance agreement, including any special conditions necessary to assure compliance with EPA policies and objectives, this subchapter, and any other applicable statute or regulation. You must efficiently and effectively manage your project, successfully complete the project according to the schedule, and meet all monitoring and reporting requirements. You may not delegate or transfer this responsibility.

Subpart D—How does EPA Pay Me?

§ 30.400 How does EPA make payments?

(a) EPA will promptly pay you for allowable costs you incur in accordance with EPA regulations and your assistance agreement. If at any time, EPA determines you received payment for unallowable cost or received an over-payment, you are required to reimburse EPA. (See § 30.802.)

(b) Your assistance agreement will specify one of the following ways for EPA to pay you. You will receive the appropriate forms and instructions with your assistance agreement.

(1) *By letter of credit.* EPA will pay you by the letter of credit method, it you meet the Treasury Department's criteria contained in Treasury Circular No. 1075, as revised. You must establish a separate bank account when payments under a letter of credit are made on a "check-paid" basis.

(2) *By advance.* If you do not qualify for a letter of credit, EPA may pay you by the advance payment method. You must negotiate the amount of your initial advance with the award official. The negotiated amount should not exceed the cash you will need for the first three months of operation. You must request the initial advance on Standard Form 270 (SF 270, "Request for Advance or Reimbursement") which will be included in your award package. EPA will issue a check for the first three months or one check each month (at EPA's option) to pay the advance. After your initial advance, you must submit an SF 270 at least quarterly, but not more often than monthly, indicating the amount of your expenditures to date and your request for funds for the coming period.

(3) *By reimbursement.* If you do not meet letter of credit requirements or receive advance payments, EPA will pay you by reimbursement. Also, EPA generally will pay you under the reimbursement method if you are receiving assistance under EPA's wastewater treatment construction grants program (see 40 CFR part 35, subpart I). When EPA pays by this method, you will be reimbursed for costs which you

have incurred and are currently and legally obligated to pay.

§ 30.405 Can I assign my payment to anyone else?

Except as provided for in 40 CFR 35.2025(b)(2) of EPA's wastewater treatment construction grants regulation, you cannot assign your right to receive payments under your assistance agreement. EPA will make payments only to the payee identified in the assistance agreement.

§ 30.410 How does EPA determine allowable costs?

To be allowable, costs must meet applicable statutory provisions and Federal cost principles. EPA uses the following cost principles in determining allowable costs for all EPA assistance agreements and subagreements under them, except as otherwise provided by statute or this subchapter. Regardless of whether the organization is the recipient of the award or is performing services for the recipient, the nature of the organization is the sole criterion for determining applicable cost principles.

(a) *State and local governments* must use OMB Circular A-87 to determine allowable costs;

(b) *Educational institutions* must use: (1) OMB Circular A-21 cost principles for research and development, training, and other educational services under grants, cooperative agreements, and subagreements, and (2) OMB Circular A-88 which provides principles for coordinating the establishment of indirect cost rates and the auditing of grants, cooperative agreements, and subagreements;

(c) *Other non-profit institutions* must use OMB Circular A-122, as revised;

(d) *Profit-making organizations* must use Federal Acquisition Regulation 48 CFR subparts 31.1 and 31.2;

(e) *Hospitals* must use 45 CFR part 74, Appendix E.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38944, Oct. 2, 1984]

§ 30.412 How are costs categorized?

(a) Costs are categorized as being either a direct cost if they support a specific project only or as an indirect cost as described in the applicable cost principles (see § 30.410). To receive payment for indirect costs, you must have negotiated an indirect cost rate with your cognizant Federal Agency and your assistance agreement must provide for the use of that rate.

(b) You may request a special indirect cost rate, if (1) your project is conducted at an off-site location; or (2) your project is a large, one-time project and its costs would distort the normal direct cost base used in computing the indirect cost rate.

Subpart E—How do I Manage My Award?

§ 30.500 What records must I maintain?

(a) You must maintain official records for each assistance award you receive and identify them with EPA assistance identification numbers. These records must contain the following information:

(1) Amount received and expended for the project, including all Federal and cost sharing funds;

(2) Program income;

(3) Total cost of the project (both direct and indirect costs);

(4) Property purchased under the award or used as part of your in-kind contribution;

(5) *Time records and other supporting data.* Institutions of higher education may account for the distribution of salaries and wages of professorial or professional staff by budgeted, planned, or assigned work activity if the system for wages and salaries meets the requirements in OMB Circular A-21;

(6) Documentation of compliance with applicable statutes and regulations.

(b) Your contractor must maintain books, documents, papers, and records pertinent to the project.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38945, Oct. 2, 1984]

§ 30.501 How long must I keep these records?

(a) Generally you and your contractor must keep all records for three years from the end of the project. Except for real property and nonex-

pendable personal property records, the beginning date of the three year period depends on the type of project you are conducting, as follows:

(1) For research, demonstration, and training programs, the submission date of a final Financial Status Report (SF-269);

(2) For construction awards, the approval date of EPA's final payment for the project.

(b) You must keep your records on real property and nonexpendable personal property for three years from the date of final disposition.

(c) If EPA terminates your award, you must keep all records for three years from the termination date, except as provided in paragraph (b) of this section.

(d) If litigation, a claim, a dispute under subpart L, or an audit is begun before the end of the three year period, you must keep all records until the three years have passed or until the litigation, dispute, claim, or audit is completed and resolved, whichever is longer.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984, as amended at 53 FR 8076, Mar. 11, 1988]

§ 30.502 To whom must my contractor and I show these records?

You and your contractor must allow the project officer and any authorized representative of EPA, including the Office of Inspector General, the Comptroller General of the United States, the Department of Labor, or a representative of delegated States under the wastewater treatment construction grants program, to inspect, copy, and audit records pertinent to the project. Access to records is not limited to the required retention periods. You and your contractor must allow access to records at any reasonable time for as long as the records are kept.

§ 30.503 What type of quality assurance practices am I required to have?

(a) If your project involves environmentally related measurements or data generation, you must develop and implement quality assurance practices consisting of policies, procedures, specifications, standards, and documentation which will produce data of quality adequate to meet project objectives and will minimize loss of data due to out-of-control conditions or malfunctions.

(b) Your quality assurance practices must assure the reliability of monitoring and measurement data and integrate quality planning, quality assessment, and quality improvement efforts.

(c) As required in § 30.302(d), you must develop and implement a quality assurance program which is acceptable to the award official in order to receive an EPA assistance award. All applications for financial assistance must include a document as specified in paragraphs (d), (e), or (f) of this section.

(d) If your application is for research financial assistance it must include a quality assurance narrative statement which either addresses the following areas or provides justification why any of these areas do not apply to the proposal:

(1) The intended use of the data and the associated acceptance criteria for data quality (precision, accuracy, representativeness, completeness, comparability);

(2) Project requirements for precision, accuracy, representativeness, completeness, comparability, and how these will be determined;

(3) Procedures for selection of samples or sampling sites and collection or preparation of samples;

(4) Procedures for sample handling, identification, preservation, transportation, and storage;

(5) Description of measurement methods or test precedures with a statement of performance characteristics if methods are non-standard;

(6) Standard quality assurance/quality control procedures (e.g., American Society for Testing Materials, American Public Health Association standard procedures) to be followed. Nonstandard procedures must be documented; and

(7) Data reduction and reporting procedures, including description of statistical analyses to be used.

(e) All other applicants for financial assistance must submit with their application (see § 30. 302(d)) a quality as-

surance project plan acceptable to the award official. (For assistance in preparing a quality assurance project plan see "Interim Guidelines and Specifications for Preparing Quality Assurance Projects Plans" QAMS-005/80. This document (EPA-600/4-83-004; NTIS PB 83-170514) may be obtained from the National Technical Information Service, 5885 Port Royal Road, Springfield, Virginia 22161.) The project plan must address the following items:

(1) Title of project and name of principal investigator(s);

(2) Table of contents of project plan;

(3) Project description;

(4) Project organization and responsibilities;

(5) Quality assurance objectives and criteria for determining precision, accuracy, completeness, representativeness, and compatability of data;

(6) Sampling procedures;

(7) Sample custody;

(8) Calibration procedures and frequency and traceability of standards;

(9) Analytical procedures;

(10) Data reduction, validation, and reporting;

(11) Internal quality control checks;

(12) Performance and system audits;

(13) Preventive maintenance;

(14) Specific standard operating procedures used to assess data precision, accuracy, representativeness, and comparability;

(15) Corrective action for out-of-control situations; and

(16) Quality assurance reporting procedures.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984, as amended at 53 FR 8076, Mar. 11, 1988]

§ 30.505 What reports must I submit?

(a) *Interim and final progress reports.* You must submit interim and final progress reports if the assistance agreement or EPA regulations require them. See 40 CFR parts 35, 40, and 45 for specific requirements. EPA or its authorized representatives may inspect your project at any reasonable time to review its progress.

(b) *Financial reports.* (1) You must submit a Financial Status Report (SF 269) within 90 days after each budget period and within 90 days after the end of your project completion or termination. If either the Financial Status Report (FSR) you submit after the budget period or the FSR you submit after your project is completed or terminated includes unliquidated obligations, you must submit a final FSR immediately after those obligations are liquidated. If you do not submit a final FSR within a reasonable time after the 90 day period, the award official may disallow the unliquidated obligations.

(2) Recipients of fellowship assistance agreements do not have to submit FSR's.

(c) *Invention reports.* You must report all inventions to the award official (see subpart K for details).

(d) *Report on federally-owned property.* You must submit an annual inventory of all Federally-owned property used on your project. At the end of the project period, or when you no longer need the property, you must submit a final inventory which states the present condition of each item and requests disposition instructions.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38945, Oct. 2, 1984, as amended at 53 FR 8076, Mar. 11, 1988]

§ 30.510 What type of financial management system must I maintain?

You must maintain a financial management system that consistently applies accepted accounting principles and practices and at least includes:

(a) An accurate, current, and complete accounting of all financial transactions for your project;

(b) Records, together with supporting documents showing the source and application of all project funds, including assistance awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays, and income;

(c) Control over, and accountability for, all project funds, property, and other assets, and an assurance that you used these solely for their authorized purpose;

(d) A comparison of actual costs versus budgeted object class amounts;

(e) Procedures to ensure prompt disbursement of Federal funds after you receive them;

(f) Procedures for determining allowable, allocable, and reasonable costs;

(g) Audits at least every other year on an organization-wide basis or as required by OMB Circular A-128, if applicable (see § 30.540); and

(h) A systematic method to resolve audit findings and recommendations.

[48 FR 45062, Sept. 30, 1983, as amended at 51 FR 6353, Feb. 21, 1986]

§ 30.515 What restrictions on signs, surveys, and questionnaires must I observe?

(a) *Signs.* You must place a visible project identification sign at a construction site. The sign must give project information and credit EPA for funding. Your project officer will give you specifications for sign design, content, and placement. The cost of making and erecting the sign is an allowable cost.

(b) *Surveys and questionnaires.* If your survey or questionnaire states that information is being collected for the Federal Government, you must request written approval from EPA to use Agency funds to cover the costs of data collection. To assure compliance with the Paperwork Reduction Act of 1980, Pub. L. 96-511 (44 U.S.C. 3501 et seq.), the project officer can grant approval only with the agreement of the EPA Headquarters reports management officer. You must also receive the project officer's approval to list EPA as a recipient of the survey information.

§ 30.518 What are the procedures for publishing scientific, informational, and educational documents?

(a) EPA encourages publication of the results of its assistance agreements.

(b) You must comply with EPA's peer and administrative review process if you intend to release to the public informational materials, reports, and other products produced under an EPA assistance agreement.

(1) Except for articles published under paragraph (d) of this section, you must submit three copies of the documents to your project officer for EPA review. EPA will evaluate the documents and will provide you with written, suggested changes, if any.

(2) You should make every effort to accommodate suggestions arising from the EPA review process while preparing a revised draft. You should alert EPA reviewers to suggestions you cannot accommodate and to changes initiated by you in the revised draft.

(3) If an agreement is reached that the material is appropriate for release as an EPA publication, the following statement must be included in the document:

> The information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement (number) to (recipient). It has been subjected to the Agency's peer and administrative review and has been approved for publication as an EPA document. Mention of trade names or commercial products does not constitute endorsement or recommendation for use.

(c) If agreement cannot be reached that the material is appropriate for release as an EPA publication, you may independently publish and distribute the document for your own use and at your own expense provided you include the following statement in the document:

> Although the information in this document has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement (number) to (recipient), it may not necessarily reflect the views of the Agency and no official endorsement should be inferred.

(d) EPA also encourages independent publication of reports in referred journals at any time. You must submit a copy of the article to your project officer when you send it for publication. Following publication, three copies of the article should be submitted to the project officer. The article must include the following statement:

> Although the research described in this article has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement (number) to (recipient), it has not been subjected to the Agency's peer and administrative review and therefore may not necessarily reflect the views of the Agency and no official endorsement should be inferred.

(e) Documents that are not to be released to the public as EPA publications but are part of a recipient's regular pollution control activities are not subject to the EPA peer and administrative review process, e.g., State pollution control agency-published newsletters and operation and maintenance manuals under the wasterwater treatment construction grants program. However, EPA encourages you to establish a similar reveiw process before publishing any documents at your own expense. You may publish such documents only if you include the following statement:

This project has been funded wholly or in part by the United States Environmental Protection Agency under assistance agreement (number) to (recipient). The contents of this document do not necessarily reflect the views and policies of the Environmental Protection Agency, nor does mention of trade names or commercial products constitute endorsement or recommendation for use.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.520 When may I use my own employees ("force account")?

If costs will exceed $25,000, you must get prior written authorization from your project officer to use your own employees or equipment for construction, construction-related activities, or for repairs or improvements to a facility ("force account"). You must demonstrate that (a) your employees can competently and more economically complete the work than contractors or (b) an emergency circumstance makes the use of "force account" necessary.

§ 30.525 How should I treat program income?

(a) You may use program income to fund additional eligible project activities, or if approved by the award official, to meet your non-Federal share of project costs.

(b) If you do not use the program income to fund additional eligible activities or you are not permitted to use program income to meet your non-Federal share of project costs, EPA will subtract the income from the total allowable project cost to determine the net cost on which the Federal share will be based.

(c) Unless the assistance agreement provides otherwise, you do not owe EPA any of the royalties you earn on copyrights or patents produced under the assistance agreement. (See subpart K of this part for EPA's rights regarding copyrights and patents.)

(d) You must keep complete records showing all receipts and expenditures related to program income.

§ 30.526 How do I treat interest earned on EPA funds?

If you earn interest on an EPA advance, you must return it to EPA unless you are:

(a) A State, or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, (42 U.S.C. 4213), or

(b) A tribal organization as defined under sections 102, 103, or 104 of the Indian Self Determination Act (25 U.S.C. 450f, 450g, and 450h).

§ 30.530 May I purchase personal property using EPA assistance funds?

(a) *Nonprofit institutions of higher education conducting basic or applied research and nonprofit organizations whose primary purpose is the conduct of scientific research.* You may purchase personal property for the conduct of basic or applied research if authorized to do so in your assistance agreement. Before you purchase property or equipment with a unit acquisition cost of $10,000 or more, you must receive the award official's approval. Title will be vested in you but may be limited as provided in paragraph (a)(1) of this section.

(1) If EPA determines that it is in the best interest of the Agency, EPA may reserve the right to transfer the title for personal property having a unit acquisition cost of $1,000 or more to the Federal Government or a third party, within 120 days after project completion. EPA must identify such property in the assistance agreement, or otherwise notify you in writing that EPA reserves the right to transfer the title.

(2) If EPA does not reserve the right to transfer the title, you have no other obligations or accountability to EPA.

(b) *Other recipients.* You may purchase personal property with EPA assistance funds if authorized to do so in your assistance agreement. Before you purchase personal property with a unit cost of $10,000 or more, you must receive the award official's approval. Title will be vested in you, subject to the following conditions:

(1) You must use the property in the EPA assisted project for which it was acquired as long as needed, whether or not the project continues to be supported with EPA funds;

(2) You must assure that EPA's interest (the percentage of EPA's participation in the total award) is adequately reflected and protected in compliance with all recordation or registration requirements of the Uniform Commercial Code or other applicable local laws on all nonexpendable personal property with a unit acquisition cost of $10,000 or more;

(3) You must follow the property management standards in § 30.531;

(4) You must follow the disposition requirements in § 30.532; and

(5) EPA reserves the right to transfer the title for nonexpendable personal property having a unit acquisition cost of $1,000 or more to the Federal Government or a third party, within 120 days after project completion. EPA must identify such property in the assistance agreement.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.531 What property management standards must I follow for nonexpendable personal property purchased with an EPA award?

Nonprofit institutions of higher education conducting basic or applied research and nonprofit organizations whose primary purpose is to conduct scientific research are exempt from the following standards. All other recipients must comply with the following property management standards. Recipients may use their own property management system if the system meets the following minimum standards.

(a) Maintain accurate records reflecting:

(1) A description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including assistance identification number;

(4) Whether title is vested in the recipient or the Federal Government;

(5) Unit acquisition date and cost;

(6) The percentage of the Federal share of the cost;

(7) Location, use, and condition of property and the date the information was recorded; and

(8) Ultimate disposition data, including sales price or the method used to determine the price, or the method used to determine current fair market value where a recipient compensates EPA for its share under § 30.532 of this part.

(b) Conduct a physical inventory of property, and reconcile the results with the property records, at least once every two years. Your inventory must verify the current use and continued need for the property.

(c) Maintain a control system to prevent loss, damage, or theft. (You must thoroughly investigate and document any loss, damage, or theft of nonexpendable personal property.)

(d) Maintain adequate maintenance procedures that ensure the property is in good condition and that instruments used for precision measurements are periodically calibrated.

(e) Maintain proper sales procedures which provide for competition resulting in the highest possible return.

(f) Maintain identification of Federally-owned property.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.532 How do I dispose of personal property?

Nonprofit institutions of higher education conducting basic or applied research, and nonprofit organizations whose primary purpose is the conduct of scientific research are exempt from the following requirements. All other recipients must comply with the following requirements. When personal property is no longer needed for the

original project, you may use it on other EPA projects. If you do not have other EPA projects, you may use it on other Federal projects. If you wish to use the property on other than Federally sponsored activities, you must comply with the following requirements;

(a) Generally, if you purchased nonexpendable personal property for less than $1,000 per unit, you may either keep it or sell it and keep the proceeds. However, if you are a profit-making organization, you may keep nonexpendable personal property only if you reimburse EPA for its proportionate share of the current fair market value of the property.

(b) EPA is entitled to compensation on nonexpendable personal property you purchased for more than $1,000. You may keep it, provided you compensate EPA for its proportionate share of the current fair market value. If you do not want to keep the property, your project officer will give you instructions for disposition.

(c) If, at the end of your project, you have expendable personal property with a total aggregate fair market value exceeding $1,000, you may use the property on other Federally sponsored projects. If you do not use the property on other Federally sponsored projects you must keep it or sell it, but in either case you must compensate EPA for its proportionate share of the current fair market value.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38945, Oct. 2, 1984]

§ 30.535 May I purchase real property with EPA awarded funds?

You may purchase real property subject to the following conditions:

(a) The award official must approve the purchase.

(b) Except as provided in paragraph (f) of this section, you must use the real property only for the purpose for which it was purchased under the assistance award.

(c) You comply with the requirements in 40 CFR part 4.

(d) You must also comply with 40 CFR part 35, subpart I, if your award is a wastewater treatment construction grant.

(e) You must assure that EPA's interest is adequately reflected and protected in compliance with all recordation or registration requirements of applicable local laws on real property.

(f) When it is no longer needed for the original project:

(1) You must get approval from EPA to use the property for other Federally supported projects or progams; or

(2) You must contact EPA for instructions on how to dispose of the property. EPA may:

(i) Permit you to retain title to the property provided you compensate EPA for its share; or

(ii) Direct you to sell the property and to compensate EPA for its share, less your expenses; or

(iii) Direct you to transfer the title of the property to the Federal Government and then compensate you based on your percentage of participation in the original cost of the project, which will be applied to the current fair market value of the property.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.536 How do I manage federally-owned property?

You must negotiate the use of federally-owned property with the award official and comply with your lease agreement and § 30.505(d). You must inform the project officer of the availability of the property when the property is no longer needed for the assistance project or when you have completed the project. EPA will give you instructions on where to return the property.

§ 30.537 Are contractors required to comply with EPA property policies?

Generally, contractors are not required to comply with EPA property policies. However, if your contractors acquired personal property with EPA funds, and the subagreement states that ownership vests in you or EPA, the contractor must comply with EPA property policies.

§ 30.538 May I use General Services Administration (GSA) supplies and services?

You may not use GSA sources of supplies and services, or excess Government property. Excess Government property consists of property under the control of any Federal agency that is not required for its needs.

§ 30.540 Who will audit my project?

(a) *General.* EPA may perform preaward or interim audits, as well as a final audit of your project. If EPA audits your project, EPA will rely to the extent practicable on your audits conducted under § 30.510(g) (if done in accordance with applicable audit standards) instead of reauditing the same records.

(b) *Other recipients.* The award official may request a final audit after the submission of, or the due date of, the final Financial Status Report (see § 30.505(b)). Where your organization has a cognizant Federal audit agency, EPA will refer these audits to your organization's cognizant Federal audit agency. Where OMB has not established a cognizant Federal audit agency, EPA staff may perform or arrange for the audit to be performed.

[48 FR 45062, Sept. 30, 1983, as amended at 53 FR 8076, Mar. 11, 1988]

§ 30.600 What Federal laws and policies affect my award?

You must comply with all applicable Federal laws.

(a) *National Environmental Policy Act.* You must comply with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) as amended and other related environmental laws and executive orders that require you to assess the environmental impact of your project. See 40 CFR part 6 for specific requirements.

(b) *Flood Disaster Protection Act.* If your project involves construction or property acquisition in a special flood hazard area, you must comply with the Flood Disaster Protection Act of 1973 (Pub. L. 93-234, December 13, 1973). If your project is located in a community participating in the National Flood Insurance Program (42 U.S.C. 4001-4128), the Act requires you to purchase flood insurance as a condition of receiving EPA assistance. If the community is not participating in the National Flood Insurance Program and the special flood hazard area has been designated by the Federal Insurance Administration of the Federal Emergency Management Agency for at least one year, EPA will not award assistance for your project until the community enters the program and flood insurance is purchased. See 44 CFR parts 59 through 79 for specific requirements.

(c) *Clean Air Act.* Section 306 of the Clean Air Act, (42 U.S.C. 7606), as amended, and Executive Order 11738 prohibit EPA from awarding assistance to you (with certain exceptions) if you intend to use any facility on EPA's List of Violating Facilities to complete work on your agreement. You must include a clause in all subagreements that requires the recipients of those subagreements to comply with the requirements of 40 CFR part 15 (see 40 CFR 33.1020).

(d) *Federal Water Pollution Control Act.* Section 508 of the Federal Water Pollution Control Act, (33 U.S.C. 1368), as amended, and Executive Order 11738 prohibit EPA from awarding assistance to you (with certain exceptions) if you intend to use any facility on EPA's List of Violating Facilities to complete work on your agreement. You must include a clause in all subagreements to comply with the requirements of 40 CFR part 15 (see 40 CFR 33.1020). Section 13 of the 1972 Amendments to the Act prohibits sex discrimination under any program or activity receiving assistance under the Act. See 40 CFR part 7 for specific requirements.

(e) *Civil Rights Act.* You must comply with section 602, Title VI of the Civil Rights Act of 1964, (42 U.S.C. 2000d), and related nondiscrimination laws and Executive Order 11246. These authorities prohibit you from excluding any person from participating in, denying them the benefits of, or discriminating against them on the basis of race, color, or national origin under any program or activity involving Federal financial assistance. See 40 CFR parts 7 and 8 for specific requirements.

(f) *Rehabilitation Act.* You must comply with section 504 of the Rehabilitation Act of 1973, (29 U.S.C. 794), as amended, which prohibits discrimination on the basis of handicap in Federally assisted programs. See 40 CFR part 7 for specific requirements.

(g) *Age Discrimination Act.* You must comply with the provisions of the Age Discrimination Act of 1975, (42 U.S.C. 6101 *et seq.*), which prohibit discrimination on the basis of age in Federally assisted programs. See 40 CFR part 7 for specific requirements.

(h) *Title IX of the Education Amendments of 1972.* You must comply with Title IX of the Education Amendments of 1972, (20 U.S.C. 1681 *et seq.*) which prohibits sex discrimination in Federally assisted education programs. See 40 CFR part 7 for specific requirements.

(i) *Uniform Relocation Assistance and Real Property Acquisition Policies Act.* You must comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, (42 U.S.C. 4601 *et seq.*), if your project involves acquiring an interest in real property and/or any displacement of persons, businesses, or farm operations. See 40 CFR part 4 for specific requirements.

(j) *The Indian Self-Determination and Education Assistance Act.* You must comply with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638). If your project will benefit Indians, the Act requires you to give Indians preference in training and employment opportunities and in the award of subagreements.

(k) *The Hatch Act.* If you are a State or local government recipient, you must ensure compliance with the Hatch Act, (5 U.S.C. 1501 *et seq.*), as amended. The Act requires State and local government employees to comply with the restrictions on political activities imposed by the Act if their principal employment activities are funded wholly or in part by Federal assistance. See 5 CFR part 151 for specific prohibitions and exemptions.

(l) *Safe Drinking Water Act.* Section 1424(e) of the Safe Drinking Water Act (42 U.S.C. 300h-3(e)), prohibits EPA from awarding assistance to you if EPA determines that your project may contaminate a sole source aquifer which will result in a significant hazard to public health. See CFR part 149.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.601 Are there restrictions on the use of assistance funds for advocacy purposes?

(a) You may not use assistance funds for:

(1) Lobbying or influencing legislation before Congress;

(2) Partisan or political advocacy purposes; or

(3) An activity whose objective could affect or influence the outcome of an EPA regulatory or adjudicatory proceeding.

(b) For nonprofit recipient organizations other than educational institutions, EPA will implement § 30.601(a)(1) and (2) consistent with the requirements of OMB Circular A-122, as revised (see § 30.410(c)).

[49 FR 38945, Oct. 2, 1984]

§ 30.603 What additional Federal laws apply to EPA assisted construction projects?

If you receive EPA assistance for a project involving construction, you must ensure compliance with the following additional requirements:

(a) *The Davis-Bacon Act.* The Davis-Bacon Act (40 U.S.C. 276a *et seq.*) as amended, and implementing regulations of the Department of Labor under 29 CFR part 5 require you to ensure that on construction subagreements in excess of $2,000, your contractors and subcontractors pay wages to laborers and mechanics at least equal to the minimum wages specified by the Secretary of Labor if required in the program statute.

(b) *The Copeland Act.* The Copeland (Anti-Kickback) Act, and the regulations of the Department of Labor under 29 CFR part 3 prohibit your contractors and subcontractors from inducing any person involved in your project to give up any part of the compensation to which that person is entitled under an employment contract.

(c) *The Contract Work Hours and Safety Standards Act.* The Contract Work Hours and Safety Standards Act (40 U.S.C. 327 *et seq.*) and the regulations of the Department of Labor under 29 CFR part 5 require your contractors and subcontractors to pay wages to laborers and mechanics on the basis of an eight hour work day and 40 hour work week and to pay at least time-and-a-half for work performed in excess of these time limitations. Also, the Act prohibits your contractors and subcontractors from requiring laborers and mechanics to work in hazardous, unsanitary, or dangerous conditions (see 29 CFR part 1926).

(d) *Convict labor.* You may not use convict labor unless the convicts are on work release, parole, or probation (see 18 U.S.C. 436).

§ 30.610 What are my responsibilities for preventing and detecting fraud and other corrupt practices?

(a) You bear the primary responsibility for preventing, detecting, and prosecuting corrupt practices under your assistance agreement.

(b) If you become aware of allegations, evidence, or the appearance of corrupt practices, you must:

(1) Immediately inform the EPA project officer and the EPA Office of Inspector General; and

(2) Promptly pursue available State and local legal and administrative remedies.

§ 30.611 Can I hire a person or agency to solicit EPA assistance for me?

Yes, but you may not reimburse with EPA assistance funds any person, corporation, partnership, agency, or other entity which solicits or secures EPA assistance for you in exchange for a commission, a percentage fee, a brokerage fee, or a contingent fee.

§ 30.612 May an EPA employee act as my representative?

(a) An EPA employee may not represent you as an agent or attorney in any proceeding before EPA or any other Federal agency in which the United States is a party or has a direct or substantial interest unless:

(1) You are a State or local government agency;

(2) The EPA employee is on detail to the agency under the Intergovernmental Personnel Act (5 U.S.C. 3371-3376); and

(3) The representation takes place in the context of carrying out programs for which EPA and your agency have a joint responsibility under the environmental statutes.

(b) Except as provided for in paragraph (a) of this section, an EPA employee must not act as an agent or attorney for a recipient or for a contractor or subcontractor of a recipient in any claim against the United States.

§ 30.613 What is EPA's policy on conflict of interest?

EPA's policy is to prevent personal or organizational conflict of interest, or the appearance of such conflict of interest in the award and administration of EPA assistance, including subagreements. (For restrictions on EPA employees, see 40 CFR part 3.)

(a) An official or employee of a recipient may not participate in any activity relating to EPA assistance if any of the following persons or organizations, to the official's or employee's knowledge, has a financial interest in the activity:

(1) The official or employee himself;

(2) The official or employee's spouse or minor child;

(3) A partner of the official or employee;

(4) An organization (other than a public agency) in which the official or employee serves as an officer, director, trustee, partner, or employee; or

(5) Any person or organization with whom the official or employee is negotiating or has any arrangement concerning prospective employment.

(b) Officials and employees of recipients must avoid any action which might result in, or create the appearance of:

(1) Using official position for private gain;

(2) Giving preferential treatment to any person;

(3) Losing independence or impartiality;

(4) Making an official decision outside official channels; or

(5) Undermining public confidence in the integrity of EPA programs.

§ 30.615 May I employ a former EPA employee and still receive assistance?

You may hire a former EPA employee and still receive assistance provided the former employee complies with the restrictions on post-employment activities established by 18 U.S.C. 207. These restrictions are explained in regulations issued by the Office of Personnel Management under 5 CFR part 737 and EPA regulations under 40 CFR part 3.

Subpart G—Can an Assistance Agreement be Changed?

§ 30.700 What changes to my assistance agreement require a formal amendment?

You must receive from the award official a formal amendment before implementing:

(a) A transfer of an award to another recipient;

(b) Changes in the objectives of the project;

(c) Changes in the assistance amount;

(d) Substantial changes within the scope of the project; or

(e) A rebudgeting of the following:

(1) Amounts budgeted for either construction or non-construction activities if transferred from one activity to the other;

(2) Amounts budgeted for indirect costs to absorb increases in direct costs; or

(3) Amounts budgeted for training allowances if transferred to other cost categories.

§ 30.705 What changes can I make to my assistance agreement without a formal amendment?

Minor changes in the project work that are consistent with the objective of the project and within the scope of the assistance agreement do not require the execution of a formal amendment before the recipient's implementation of the change. However, such changes do not obligate EPA to provide Federal funds for any costs incurred by you in excess of the assistance amount, unless approved in advance under § 30.700.

§ 30.710 Can I terminate a part or all of my assistance agreement?

(a) You and EPA may terminate a part or all of your assistance agreement, when both parties agree that the continuation of the project will not produce beneficial results. You and the award official must agree on the conditions of the termination, the effective date, and in the case of partial termination, the portion to be terminated. EPA may unilaterally terminate for cause your assistance agreement under § 30.903 of this part.

(b) EPA will pay you the Federal share of allowable costs incurred up to the date of termination and allowable costs related to commitments you made prior to termination that you cannot cancel.

Subpart H—How do I Close out my Project?

§ 30.800 What records and reports must I keep after I complete my project?

You and your contractors must keep all books, records, documents, and other evidence (including accounting procedures and practices and subagreement documents) that track the progress of your project in accordance with the requirements under § 30.501.

§ 30.802 Under what conditions will I owe money to EPA?

(a) If the award official determines that you owe funds, you must reimburse the Federal government that amount. EPA will take appropriate legal and administrative action to collect the amount you owe the Agency if reimbursement is not made in a timely manner. EPA may offset the debt against other funds payable to you under an EPA or other Federal agency assistance agreement if not explicitly prohibited by another statute.

(b) EPA will charge you interest if you fail to pay within 30 days from the date of the Agency's decision that a debt is owed. The interest rate will be the rate established by the Secretary of the Treasury in accordance

with the Treasury Fiscal Requirements Manual 6-8020.20. The rates are published quarterly in the FEDERAL REGISTER.

(c) If you are not a State or local government, EPA will charge you its cost to process and handle the overdue debt at the end of each 30 day period the debt is overdue, and a penalty of 6% per annum if the debt is not paid within 120 days after the date of the Agency's decision that a debt is owed.

[48 FR 45062, Sept. 30, 1983, as amended at 51 FR 6353, Feb. 21, 1986]

Subpart I—What Measures may EPA Take for Non-compliance?

§ 30.900 What measures may EPA take for non-compliance?

If you do not comply with all of the terms and conditions of your assistance agreement, the award official may apply any of the following:

(a) Issue a stop-work order;

(b) Withold payment;

(c) Suspend or terminate your assistance agreement for cause;

(d) Annul your assistance agreement;

(e) Request that the Director, Grants Administration Division, debar or suspend you as an eligible recipient;

(f) Take other appropriate administrative action; or

(g) Institute judicial proceedings.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38945, Oct. 2, 1984]

§ 30.901 What are the consequences of a stop-work order?

(a) A stop-work order requires you to immediately stop the work or activities described in the order and to take all reasonable steps to minimize costs incurred on the work. The award official will issue the order in writing. The order will be in effect for forty-five days after you receive it unless cancelled or extended by mutual agreement between you and EPA. If the problem cannot be resolved during the stop-work period and EPA is likely to terminate or annul the agreement, the award official will so inform you.

(b) If the stop-work order is cancelled and it caused any increase in the cost of and/or the time for completing the project, you may request an adjustment in the project period, budget period, or assistance amount. You must submit a request for adjustment to the project officer within sixty days after the stop-work order ended.

§ 30.902 What are the consequences of withholding payments?

(a) The award official may withhold payments when you fail to comply with the tasks, reporting requirements, or conditions of your assistance agreement. The award official will provide you reasonable notice in writing before withholding payment.

(b) The award official may withhold only the amount necessary to assure compliance with your assistance agreement.

(c) The award official may withhold payment to the extent you are indebted to the United States, unless the collection of the indebtedness will impair the accomplishment of the project and the continuation of the project is in the best interest of the United States.

§ 30.903 What are the consequences of termination for cause?

(a) The award official may unilaterally terminate your agreement in whole or in part at any time before the date of completion, whenever he determines that you have failed to comply with the conditions of your agreement. The award official will provide you an opportunity for consultation before issuing a notice of termination.

(b) If EPA terminates your agreement, the award official will notify you in writing of his determination, the reasons for the termination, and the effective date. Upon receiving the termination notice, you must stop work immediately. EPA will not reimburse you for any new commitments you make after you receive the termination notice.

(c) EPA will pay you the Federal share of allowable costs incurred up to the date of termination and allowable costs related to commitments you made prior to termination that you cannot cancel.

§ 30.904 What are the consequences of annulment?

(a) The award official may unilaterally annul in whole or in part your assistance agreement in any of the following cases:

(1) You have made no substantial progress on the project without good cause;

(2) You obtained an assistance agreement by fraud or misrepresentation;

(3) You are found to practice corrupt administrative procedures;

(4) You have inordinately delayed project completion without good cause; or

(5) You have failed to meet the project purpose to the extent that the fundamental purpose stated in the assistance agreement is frustrated.

(b) If EPA intends to issue an annulment, the award official will inform you of the annulment in writing. The award official will provide you an opportunity for consultation before issuing a notice of annulment. If your assistance agreement is annulled, you must return all funds received for the project including those already expended. EPA may pursue other available remedies under Federal, State, and local laws.

§ 30.905 May I request a review of a termination or annulment?

You may request a review of EPA's decision to terminate or annul an assistance agreement. Within thirty days after the notice of termination or annulment is issued, you must file a written request for review to the appropriate Assistant or Regional Administrator. Your request for review must follow the procedures under subpart L of this part.

[49 FR 38945, Oct. 2, 1984]

§ 30.906 What are the consequences of suspension or debarment?

EPA may suspend or debar you in accordance with 40 CFR part 32. You may not receive assistance or a subagreement if your name or organization appears on EPA's Master List of Debarred and Suspended Firms and Individuals.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

Subpart J—Can I get An Exception ("Deviation") From These Regulations?

§ 30.1001 Will EPA approve any exceptions to these regulations?

(a) On a case-by-case basis, EPA will consider requests for exceptions to these regulations.

(b) EPA may issue a "deviation" from any of its assistance related regulations, except for those that implement statutory and executive order requirements.

(c) The award official may "waive" certain requirements of this subchapter for foreign awards. All provisions waived will be stated in the assistance agreement.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

§ 30.1002 Who may request a deviation?

You, your project officer, or an EPA program office may request a deviation from EPA regulations. If you are the initiator, you must send your written request to your project officer if the request is for a Headquarters program or to the Regional Administrator for a Regionally administered program, who will then forward the request to the Director, Grants Administration Division, with a recommendation for approval or disapproval.

§ 30.1003 What information must I include in a deviation request?

Your request must include the following information:

(a) Your name, the assistance identification number, date of award, and the dollar value of the application or award;

(b) The section of the regulation from which you need a deviation;

(c) A complete description of what the deviation will do and a justification of why the deviation is necessary; and

(d) A statement of whether the same or a similar deviation has been previously requested. If such a request has been made previously, explain why it was made and the outcome.

§ 30.1004 Who approves or disapproves a deviation request?

(a) The Director, Grants Administration Division (GAD), approves or disapproves your deviation request. Assistant Administrators in the affected program areas must review and concur on deviations affecting a class of applicants or recipients.

(b) If EPA approves the deviation before an award, the revised requirement will be included in your assistance agreement. Approval of a deviation before an award does not guarantee an award.

§ 30.1005 May I request a review of a deviation decision?

You may not request a review of a deviation decision under the procedures in subpart L of this part. However, you may request the Director of the Grants Administration Division to reconsider his decision.

[48 FR 45062, Sept. 30, 1983; 49 FR 38945, Oct. 2, 1984]

Subpart K—What Policies Apply to Patents, Data, and Copyrights?

§ 30.1100 What assistance agreements are subject to EPA patent rules?

Except for wastewater treatment construction grants awarded under Title II of the Clean Water Act, as amended, all EPA assistance agreements involving experimentation, development, special investigations, surveys, studies, or research are subject to the EPA patent rules.

§ 30.1101 What Federal patent laws or policies govern my assistance agreement?

The nature of your organization will determine which laws and policies govern your assistance agreement:

(a) Small business firms and nonprofit organizations, including educational institutions, are entitled to the benefits of, and must comply with 35 U.S.C. Chapter 18 (1982), and the patent rights clause in OMB Circular A-124, Attachment A (49 FR 10393).

(b) A profitmaking firm that is not defined as a small business firm, and whose assistance agreement is funded under section 6914 of the Resource Conservation and Recovery Act (RCRA), must comply with section 6981(c) of RCRA. See Federal Acquisition Regulation 48 CFR part 27 and 48 CFR 52.227-13 (49 FR 12972).

(c) If you are neither a small business firm nor a profitmaking firm with an award under section 6914 of RCRA, you are subject to the guidelines in the President's Memorandum on Government Patent Policy issued on February 18, 1983 (Weekly Compilation of Presidential Documents, vol. 19, no. 7, page 252), and, therefore, must comply with 35 U.S.C. Chapter 118 (1982) and the patent rights clause cited in § 30.1101(a).

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

§ 30.1102 What are my invention rights and my reporting requirements if my award is other than an award under section 6914 of RCRA?

You must report all inventions to the Award Official and decide whether you wish to retain domestic and/or foreign rights to your invention. You must report your invention and notify the Award Official of your decision within the time periods specified in the patent rights clause cited in § 30.1101(a). If you do not retain the rights to your invention, EPA may acquire the title from you. If you retain title, EPA acquires a royalty-free, irrevocable license to use the invention throughout the world by, and on behalf of, the Federal Government.

[49 FR 38946, Oct. 2, 1984]

§ 30.1103 What are my invention rights and obligations if I am a profitmaking firm with an award under section 6914 of RCRA?

If you are not a small business and your assistance agreement does not indicate otherwise, you must comply with the patent rights clause, entitled "Patent Rights Acquisition by the Government" (48 CFR 52.227-13), which implements section 6981(c) of RCRA. Under this section, EPA normally obtains title to your invention.

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

§ 30.1104 Can I get a waiver from section 6981(c) of RCRA?

On a case by case basis, you may ask EPA for a deviation from section 6981(c) of RCRA. You must follow the procedures in subpart J.

§ 30.1106 Do the patent rules apply to subagreements?

(a) Yes, if the subagreements involve experimentation, development, special investigations, surveys, studies, or research, you must include the appropriate patent rights clause in the subagreement. All business firms and nonprofit organizations awarded subagreements are entitled to the benefits and must comply with 35 U.S.C. Chapter 18 (1982) and the President's Memorandum on Government Patent Policy of February 18, 1983, except that a party to a subagreement awarded under section 6914 of RCRA which is a profitmaking firm not defined as a small business firm, is subject to §§ 30.1101(b) and 30.1103.

(b) Subagreements must be in compliance with the "Patent and data and copyright clause" in 40 CFR part 33, and generally must contain the same patent rights clause as contained in your assistance agreement.

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

§ 30.1108 Does EPA require any type of licensing of background patents that I own?

Generally, EPA does not require such licensing. However, in awards subject to 35 U.S.C. Chapter 18 (1982) the Administrator may approve such a requirement under exceptional circumstances.

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

§ 30.1112 Are there any other patent clauses or conditions that apply to my award?

Your award is subject to both the Notice and Assistance Clause and the Authorization and Consent Clause in Appendix B to this part.

§ 30.1130 What rights in data and copyrights does EPA acquire?

All assistance agreements and subagreements are subject to Appendix C. As set forth in Appendix C, the Federal Government has an unrestricted right to use any data or information generated using assistance funds or specified to be delivered to EPA in the assistance agreement. The Federal Government has a royalty-free, irrevocable license to use any copyrighted data in any manner for Federal Government purposes.

Subpart L—How are Disputes Between EPA Officials and me Resolved?

§ 30.1200 What happens if an EPA official and I disagree about an assistance agreement requirement?

(a) Disagreements should be resolved at the lowest level possible.

(b) If you can not reach an agreement, the EPA disputes decision official will provide you with a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning your assistance agreement.

(c) The disputes decison official's decision will constitute final agency action unless you file a request for review by registered mail, return receipt requested, within 30 calendar days of the date of the decision.

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

§ 30.1205 If I file a request for review, with whom must I file?

(a) For final decisions issued by an EPA disputes decision official at Headquarters, you must file your request with the Assistant Administrator responsible for the assistance program.

(b) For final decisions issued by a Regional disputes decision official, you must file your request for review with the Regional Administrator. If the Regional Administrator issued the final decision, you must request the Regional Administrator to reconsider that decision.

§ 30.1210 What must I include in my request for review or reconsideration?

Your request must include:

(a) A copy of the EPA disputes decision official's final decision;

(b) A statement of the amount in dispute;

(c) A description of the issues involved; and

(d) A concise statement of your objections to the final decision.

§ 30.1215 What are my rights after I file a request for review or reconsideration?

(a) You may be represented by counsel and may submit documentary evidence and briefs for inclusion in a written record;

(b) You are entitled to an informal conference with EPA officials; and

(c) You are entitled to a written decision from the appropriate Regional or Assistant Administrator.

§ 30.1220 If the Assistant Administrator confirms the final decision of the Headquarters disputes decision official, may I seek further administrative review?

A decision by the Assistant Administrator to confirm the final decision of a Headquarters disputes decision official will constitute the final Agency action.

§ 30.1225 If the Regional Administrator confirms the final decision of the Regional disputes decision official, may I seek further administrative review at EPA Headquarters?

(a) A determination by the Regional Administrator to confirm the Regional disputes decision official's decision will constitute the final Agency action. However, you may file a petition for discretionary review by the Assistant Administrator responsible for the assistance program within 30 calendar days of the Regional Administrator's decision. Your petition must be sent to the Assistant Administrator by registered mail, return receipt requested, and must include:

(1) A copy of the Regional Administrator's decision; and

(2) A concise statement of the reasons why you believe the decision is erroneous.

(b) If the Assistant Administrator decides not to review the Regional Administrator's decision, the Assistant Administrator will advise you in writing that the Regional Administrator's decision remains the final Agency action.

(c) If the Assistant Administrator decides to review the Regional Administrator's decision, the review will generally be limited to the written record on which the Regional Administrator's decision was based. The Assistant Administrator may allow you to submit briefs in support of your petition for review and may provide you an opportunity for an informal conference in order to clarify factual or legal issues. After reviewing the Regional Administrator's decision, the Assistant Administrator will issue a written decision which will then become the final Agency action.

§ 30.1230 Will I be charged interest if I owe money to EPA?

(a) Interest will accrue on any amounts of money due and payable to EPA from the date of the disputes decision official's final decision, even if you request review of the decision under this subpart. Only full payment of the debt within 30 days of the disputes decision officials' final decision will prevent EPA from charging interest. If you pay a debt but request review under this subpart and the amount of the debt is reduced as a result of the review, EPA will refund the interest and penalty charges that you paid on the adjustment. However, processing and handling charges which you may have paid are refundable only if EPA determines that the entire amount of the debt is not owed.

(b) State and local government recipients are not subject to the penalty and handling charges in this section, but are subject to the interest charges.

[48 FR 45062, Sept. 30, 1983, as amended at 51 FR 6353, Feb. 21, 1986]

§ 30.1235 Are there any EPA decisions which may not be reviewed under this subpart?

You may not request a review of:

(a) Disapprovals of deviations under subpart J;

(b) Bid protest decisions under part 33;

(c) National Environmental Policy Act decisions under part 6;

(d) Advanced wastewater treatment decisions of the Administrator; and

(e) Policy decisions of the EPA Audit Resolution Board.

[48 FR 45062, Sept. 30, 1983, as amended at 49 FR 38946, Oct. 2, 1984]

Appendices to Part 30

Appendix A—EPA Programs

The following chart identifies EPA's assistance programs and the types of awards (grants or cooperative agreements) that EPA will award under these programs.

Catalog of Federal domestic assistance No.	Title	Funding mechanism
66.001	Air Pollution Control Program	(1)
66.003	Air Pollution Control Manpower Training	(1)
66.006	Air Pollution Control—Technical Training	(1)
	Air Pollution Control Fellowships	(4)
66.418	Construction Grants for Wastewater Treatment Works	(3)
66.419	Water Pollution Control—State and Interstate Program	(1)
66.420	Water Pollution Control—State and Local Manpower Program Development	(3)
	Water Pollution Control Fellowships	(4)
66.428	Water Pollution Control—Professional Training	(2)
66.432	State Public Water System Supervision Program	(2)
66.433	State Underground Water Source Protection Program	(2)
66.435	Water Pollution Control—Lake Restoration Cooperative Agreements	(3)
66.438	Construction Management Assistance	(1)
66.451	Hazardous Waste Management Financial Assistance to States	(1)
66.454	Water Quality Management Planning	(1)
	Safe Drinking Water Professional Training	(2)
	Safe Drinking Water Occupational Training	(3)
	Safe Drinking Water Fellowships	(4)
66.500	Environmental Protection—Consolidated Research	(3)
66.501	Air Pollution Control Research	(3)
66.502	Pesticides Control Research	(3)
66.504	Solid Waste Disposal Research	(3)
66.505	Water Pollution Control—Research, Development, and Demonstration	(3)
66.506	Safe Drinking Water Research and Demonstration	(3)
66.507	Toxic Substances Research	(3)
66.600	Environmental Protection Consolidated Grants—Program Support	(?)
66.603	Loan Guarantees for Construction of Treatment Works	(4)
66.700	Pesticides Enforcement Program Grants	(1)
	State Inventories of Uncontrolled Hazardous Waste Sites	(?)
66.802	Hazardous Substance Response Trust Fund (Superfund)	(?)

[1] Cooperative Agreement.
[2] Grant Agreement.
[3] Either.
[4] Loan or Fellowship.

Appendix B—Patents and Copyrights Clauses

Notice and Assistance Clause

(a) The recipient must report to the project officer, promptly and in reasonable written detail, each known notice or claim of patent or copyright infringement on this agreement.

(b) In the event of any claim or suit against the Government, on account of any alleged patent or copyright infringement arising out of the performance of this agreement or out of the use of any supplies furnished or work or services performed hereunder, the recipient must furnish to the Government, when requested by the project officer, all evidence and information in possession of the recipient pertaining to such suit or claim. Such evidence and information must be furnished at the expense of the Government except where the recipient has agreed to indemnify the Government.

(c) The recipient must include in each subagreement (including any lower tier subagreement) in excess of $10,000 a clause substantially similar to the foregoing provisions.

Authorization and Consent Clause

EPA gives its authorization and consent for all use and manufacture of any invention described in and covered by a patent held by the United States in the performance of an assistance agreement and any subagreement.

Appendix C—Rights in Data and Copyrights

(a) The term *subject data* as used in this clause includes writing, technical reports, sound recordings, magnetic recordings, computer programs, computerized data bases, data bases in hard copy, pictorial reproductions, plans, drawings, including engineering or manufacturing drawings, specifications, or other graphical representations, and works of any similar nature (whether or not copyrighted) which an applicant submits or which EPA specifies to be delivered under this assistance agreement or which a recipient develops or produces and EPA pays for under this assistance agreement. The term does not include financial reports, cost analyses, and other information incidental to assistance agreement administration.

(b) Except as may otherwise be provided in this assistance agreement, when publications, films, or similar materials are developed directly or indirectly from a project supported by EPA, the author is free to arrange for copyright without approval. However such materials shall be subject to the provisions of 40 CFR 30.518. The recipient agrees to and does hereby grant to the Government, and to its officers, agents, and employees acting within the scope of their official duties, a royalty-free, nonexclusive, and irrevocable license throughout the world for Government purposes to publish, translate, reproduce, deliver, perform, dispose of and to authorize others so to do, all subject data, or copyrightable material based on such data, covered by copyright now or in the future.

(c) The recipient shall not include in the subject data any copyrighted matter without the written approval of the project officer, unless he provides the Government with the written permission of the copyright owner for the Government to use the copyrighted matter in the manner provided in paragraph (b) above.

(d) Nothing contained in this Appendix shall imply a license to the Government under any patent or be construed as affecting the scope of any license or other rights otherwise granted to the Government under any patent.

(e) Unless otherwise limited below, the Government may, without additional compensation to the recipient, duplicate, use, and disclose in any manner and for any purpose whatsoever, and have others so do, all subject data.

(f) Notwithstanding any provisions of this assistance agreement concerning inspection and acceptance, the Government shall have the right at any time to modify, remove, obliterate, or ignore any marking restricting disclosure of subject data if the marking is not authorized by the terms of this assistance agreement.

(g) Data need not be furnished for standard commercial items or services which are normally sold, or have been sold, or offered to the public commercially by any supplier and which are incorporated as component parts in or to be used with the product or process being developed or investigated under this assistance agreement, if in lieu thereof identification of source and characteristics (including performance specifications, when necessary) sufficient to enable the Government to procure the part or practice the process, or acquire an adequate substitute, are furnished.

(h) In addition to any data specified elsewhere in this assistance agreement to be furnished to EPA, the recipient shall retain and, upon written request of the project officer at any time during project performance or within two years after project performance is completed, deliver any subject data not previously delivered.

Appendix D—Part 30 Reporting Requirements

Application for EPA assistance and application related forms	OMB clearance No.
(1) EPA Form 5700–12 "Application for Federal Assistance (Research, Training & Demonstration)." (See § 30.302)	[1] 2010–0004
(2) EPA Form 5700–20A "EPA Assistance Agreement/Amendment." (See § 30.302)	[1] 2010–0004
(3) EPA Form 5700–20B "Assistance Amendment (Optional)." (See § 30.302)	[1] 2010–0004
(4) EPA Form 5700–30 "Preapplication for Federal Assistance (Optional)." (See § 30.302)	[1] 2010–0004
(5) EPA Form 5700–31 "Application for Federal Assistance (Short Form)." (See § 30.302)	2010–0005
(6) EPA Form 5700–32 "Application for Federal Assistance (Construction)." (See § 30.302)	2010–0003
(7) EPA Form 5700–33 "Application for Federal Assistance (Nonconstruction Programs)." (See § 30.302)	[1] 2010–0004
(8) EPA Fellowship Forms:	
(a) EPA Form 5770–2 "Fellowship Application" (See § 30.302)	[1] 2010–0004
(b) EPA Form 5770–3 "Fellowship Facilities and Commitment Statement" (See § 30.302)	[1] 2010–0004
(c) EPA Form 5770–4 "Fellowship Applicant Qualifications Inquiry" (See § 30.302)	[1] 2010–0004
(d) EPA Form 5770–5 "Agency Fellowship Certification" (See § 30.302)	[1] 2010–0004
(e) EPA Form 5770–6 "Fellowship Amendment" (See § 30.302)	[1] 2010–0004
(f) EPA Form 5770–7 "Fellowship Activation Notice" (See § 30.302)	[1] 2010–0004
(g) EPA Form 5770–8 "Fellowship Agreement" (See § 30.302)	[1] 2010–0004
(h) EPA Form 5770–9 "EPA Fellowship Termination Notice" (See § 30.302)	[1] 2010–0004

Application for EPA assistance and application related forms	OMB clearance No.
(9) SF-269 "Financial Status Report." (See § 30.505)	[1] 2010-0004
(10) SF-270 "Request for Advance or Reimbursement" (See § 30.400)	[1] 2010-0004
(11) SF-271 "Outlay Report and Request for Reimbursement for Construction Programs" (See § 30.505)	[1] 2010-0004
(12) SF-272 "Federal Cash Transactions Report" (See § 30.400)	[1] 2010-0004
B. Other Reporting Requirements and Processes	
(1) Establish a separate bank account if the recipient uses the letter of credit method of payment	[1] 2010-0004
(2) Establish official records for each assistance award and keep them for specified periods of time	[1] 2010-0004
(3) Develop and implement quality assurance practices to meet project objectives and minimize loss of data due to out-of-control conditions or malfunctions	2000-0403
(4) Submit interim and final progress reports	[1] 2010-0004
(5) Report all inventions developed with EPA assistance funds	[2]
(6) Report on all Federally-owned property used on a project	[1] 2010-0004
(7) Maintain a financial management system that consistently applies accepted accounting principles and practices	[1] 2010-0004
(9) Comply with EPA peer and administrative review requirements	[3]
(10) Obtain EPA's written authorization to use the recipient's own employees or equipment for construction, construction-related activities, or for repairs or improvements to a facility ("force account")	[1] 2010-0004
(11) Obtain EPA's approval before purchasing property or equipment with a unit acquisition cost of $10,000 or more	[1] 2010-0004
(12) Comply with certain property management standards	[1] 2010-0004
(13) Comply with EPA requirements when disposing of property with a purchase price of $1,000 or more	[1] 2010-0004
(14) Obtain EPA approval for the purchase of real property	[1] 2010-0004
(15) Comply with EPA requirements for management of Federally-owned property	[1] 2010-0004
(16) Request EPA approval to deviate from EPA regulations	[1] 2010-0004
(17) Follow certain procedures to request a review of an award official's written final decision on a dispute over the requirements in an assistance agreement	[1] 2010-0004

[1] OMB Clearance Number 2010-0004 was submitted to OMB for a time extension on September 19, 1983. We will publish OMB's extension in the FEDERAL REGISTER.
[2] Will be submitted to OMB.
[3] No clearance required.

[48 FR 45062, Sept. 30, 1983; 49 FR 38946, Oct. 2, 1984]

PART 31—UNIFORM ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND COOPERATIVE AGREEMENTS TO STATE AND LOCAL GOVERNMENTS

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APPENDIX A—PART 30 AUDIT REQUIREMENTS FOR STATE AND LOCAL GOVERNMENT RECIPIENTS

AUTHORITY: 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 42 U.S.C. 9601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1401 *et seq.*

SOURCE: 53 FR 8075 and 8087, Mar. 11, 1988, unless otherwise noted.

Subpart A—General

§ 31.1 Purpose and scope of this part.

This part establishes uniform administrative rules for Federal grants and cooperative agreements and subawards to State, local and Indian tribal governments.

§ 31.2 Scope of subpart.

This subpart contains general rules pertaining to this part and procedures for control of exceptions from this part.

§ 31.3 Definitions.

As used in this part:

Accrued expenditures mean the charges incurred by the grantee during a given period requiring the provision of funds for: (1) Goods and other tangible property received; (2) services performed by employees, contractors, subgrantees, subcontractors, and other payees; and (3) other amounts becoming owed under programs for which no current services or performance is required, such as annuities, insurance claims, and other benefit payments.

Accrued income means the sum of: (1) Earnings during a given period from services performed by the grantee and goods and other tangible property delivered to purchasers, and (2) amounts becoming owed to the grantee for which no current services or performance is required by the grantee.

Acquisition cost of an item of purchased equipment means the net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges such as the cost of installation, transportation, taxes, duty or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the grantee's regular accounting practices.

Administrative requirements mean those matters common to grants in general, such as financial management, kinds and frequency of reports, and retention of records. These are distinguished from *programmatic* requirements, which concern matters that can be treated only on a program-by-program or grant-by-grant basis, such as kinds of activities that can be supported by grants under a particular program.

Awarding agency means (1) with respect to a grant, the Federal agency, and (2) with respect to a subgrant, the party that awarded the subgrant.

Cash contributions means the grantee's cash outlay, including the outlay of money contributed to the grantee or subgrantee by other public agencies and institutions, and private organizations and individuals. When authorized by Federal legislation, Federal funds received from other assistance agreements may be considered as grantee or subgrantee cash contributions.

Contract means (except as used in the definitions for *grant* and *subgrant* in this section and except where qualified by *Federal*) a procurement contract under a grant or subgrant, and means a procurement subcontract under a contract.

Cost sharing or matching means the value of the third party in-kind contributions and the portion of the costs of a federally assisted project or program not borne by the Federal Government.

Cost-type contract means a contract or subcontract under a grant in which the contractor or subcontractor is paid on the basis of the costs it incurs, with or without a fee.

Equipment means tangible, nonexpendable, personal property having a useful life of more than one year and

an acquisition cost of $5,000 or more per unit. A grantee may use its own definition of equipment provided that such definition would at least include all equipment defined above.

Expenditure report means: (1) For nonconstruction grants, the SF-269 "Financial Status Report" (or other equivalent report); (2) for construction grants, the SF-271 "Outlay Report and Request for Reimbursement" (or other equivalent report).

Federally recognized Indian tribal government means the governing body or a governmental agency of any Indian tribe, band, nation, or other organized group or community (including any Native village as defined in section 3 of the Alaska Native Claims Settlement Act, 85 Stat 688) certified by the Secretary of the Interior as eligible for the special programs and services provided by him through the Bureau of Indian Affairs.

Government means a State or local government or a federally recognized Indian tribal government.

Grant means an award of financial assistance, including cooperative agreements, in the form of money, or property in lieu of money, by the Federal Government to an eligible grantee. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance, or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, which the grantee is not required to account for.

Grantee means the government to which a grant is awarded and which is accountable for the use of the funds provided. The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Local government means a county, municipality, city, town, township, local public authority (including any public and Indian housing agency under the United States Housing Act of 1937) school district, special district, intrastate district, council of governments (whether or not incorporated as a nonprofit corporation under state law), any other regional or interstate government entity, or any agency or instrumentality of a local government.

Obligations means the amounts of orders placed, contracts and subgrants awarded, goods and services received, and similar transactions during a given period that will require payment by the grantee during the same or a future period.

OMB means the U.S. Office of Management and Budget.

Outlays (expenditures) mean charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of actual cash disbursement for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the amount of cash advances and payments made to contractors and subgrantees. For reports prepared on an accrued expenditure basis, outlays are the sum of actual cash disbursements, the amount of indirect expense incurred, the value of inkind contributions applied, and the new increase (or decrease) in the amounts owed by the grantee for goods and other property received, for services performed by employees, contractors, subgrantees, subcontractors, and other payees, and other amounts becoming owed under programs for which no current services or performance are required, such as annuities, insurance claims, and other benefit payments.

Percentage of completion method refers to a system under which payments are made for construction work according to the percentage of completion of the work, rather than to the grantee's cost incurred.

Prior approval means documentation evidencing consent prior to incurring specific cost.

Real property means land, including land improvements, structures and appurtenances thereto, excluding movable machinery and equipment.

Share, when referring to the awarding agency's portion of real property, equipment or supplies, means the same percentage as the awarding agency's portion of the acquiring party's total costs under the grant to which the acquisition costs under the grant to which the acquisition cost of the

property was charged. Only costs are to be counted—not the value of third-party in-kind contributions.

State means any of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency or instrumentality of a State exclusive of local governments. The term does not include any public and Indian housing agency under United States Housing Act of 1937.

Subgrant means an award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee. The term includes financial assistance when provided by contractual legal agreement, but does not include procurement purchases, nor does it include any form of assistance which is excluded from the definition of *grant* in this part.

Subgrantee means the government or other legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.

Supplies means all tangible personal property other than *equipment* as defined in this part.

Suspension means depending on the context, either (1) temporary withdrawal of the authority to obligate grant funds pending corrective action by the grantee or subgrantee or a decision to terminate the grant, or (2) an action taken by a suspending official in accordance with agency regulations implementing E.O. 12549 to immediately exclude a person from participating in grant transactions for a period, pending completion of an investigation and such legal or debarment proceedings as may ensue.

Termination means permanent withdrawal of the authority to obligate previously-awarded grant funds before that authority would otherwise expire. It also means the voluntary relinquishment of that authority by the grantee or subgrantee. *Termination* does not include:

(1) Withdrawal of funds awarded on the basis of the grantee's underestimate of the unobligated balance in a prior period;

(2) Withdrawal of the unobligated balance as of the expiration of a grant;

(3) Refusal to extend a grant or award additional funds, to make a competing or noncompeting continuation, renewal, extension, or supplemental award; or

(4) Voiding of a grant upon determination that the award was obtained fraudulently, or was otherwise illegal or invalid from inception.

Terms of a grant or subgrant mean all requirements of the grant or subgrant, whether in statute, regulations, or the award document.

Third party in-kind contributions mean property or services which benefit a federally assisted project or program and which are contributed by non-Federal third parties without charge to the grantee, or a cost-type contractor under the grant agreement.

Unliquidated obligations for reports prepared on a cash basis mean the amount of obligations incurred by the grantee that has not been paid. For reports prepared on an accrued expenditure basis, they represent the amount of obligations incurred by the grantee for which an outlay has not been recorded.

Unobligated balance means the portion of the funds authorized by the Federal agency that has not been obligated by the grantee and is determined by deducting the cumulative obligations from the cumulative funds authorized.

§ 31.4 Applicability.

(a) *General.* Subparts A–D of this part apply to all grants and subgrants to governments, except where inconsistent with Federal statutes or with regulations authorized in accordance with the exception provision of § 31.6, or:

(1) Grants and subgrants to State and local institutions of higher education or State and local hospitals.

(2) The block grants authorized by the Omnibus Budget Reconciliation Act of 1981 (Community Services; Preventive Health and Health Services; Alcohol, Drug Abuse, and Mental Health Services; Maternal and Child Health Services; Social Services; Low-Income Home Energy Assistance;

States' Program of Community Development Block Grants for Small Cities; and Elementary and Secondary Education other than programs administered by the Secretary of Education under Title V, Subtitle D, Chapter 2, Section 583—the Secretary's discretionary grant program) and Titles I-III of the Job Training Partnership Act of 1982 and under the Public Health Services Act (Section 1921), Alcohol and Drug Abuse Treatment and Rehabilitation Block Grant and Part C of Title V, Mental Health Service for the Homeless Block Grant).

(3) Entitlement grants to carry out the following programs of the Social Security Act:

(i) Aid to Needy Families with Dependent Children (Title IV-A of the Act, not including the Work Incentive Program (WIN) authorized by section 402(a)19(G); HHS grants for WIN are subject to this part);

(ii) Child Support Enforcement and Establishment of Paternity (Title IV-D of the Act);

(iii) Foster Care and Adoption Assistance (Title IV-E of the Act);

(iv) Aid to the Aged, Blind, and Disabled (Titles I, X, XIV, and XVI-AABD of the Act); and

(v) Medical Assistance (Medicaid) (Title XIX of the Act) not including the State Medicaid Fraud Control program authorized by section 1903(a)(6)(B).

(4) Entitlement grants under the following programs of The National School Lunch Act:

(i) School Lunch (section 4 of the Act),

(ii) Commodity Assistance (section 6 of the Act),

(iii) Special Meal Assistance (section 11 of the Act),

(iv) Summer Food Service for Children (section 13 of the Act), and

(v) Child Care Food Program (section 17 of the Act).

(5) Entitlement grants under the following programs of The Child Nutrition Act of 1966:

(i) Special Milk (section 3 of the Act), and

(ii) School Breakfast (section 4 of the Act).

(6) Entitlement grants for State Administrative expenses under The Food Stamp Act of 1977 (section 16 of the Act).

(7) A grant for an experimental, pilot, or demonstration project that is also supported by a grant listed in paragraph (a)(3) of this section;

(8) Grant funds awarded under subsection 412(e) of the Immigration and Nationality Act (8 U.S.C. 1522(e)) and subsection 501(a) of the Refugee Education Assistance Act of 1980 (Pub. L. 96-422, 94 Stat. 1809), for cash assistance, medical assistance, and supplemental security income benefits to refugees and entrants and the administrative costs of providing the assistance and benefits;

(9) Grants to local education agencies under 20 U.S.C. 236 through 241-1(a), and 242 through 244 (portions of the Impact Aid program), except for 20 U.S.C. 238(d)(2)(c) and 240(f) (Entitlement Increase for Handicapped Children); and

(10) Payments under the Veterans Administration's State Home Per Diem Program (38 U.S.C. 641(a)).

(b) *Entitlement programs.* Entitlement programs enumerated above in § 31.4(a) (3) through (8) are subject to subpart E.

§ 31.5 Effect on other issuances.

All other grants administration provisions of codified program regulations, program manuals, handbooks and other nonregulatory materials which are inconsistent with this part are superseded, except to the extent they are required by statute, or authorized in accordance with the exception provision in § 31.6.

§ 31.6 Additions and exceptions

(a) For classes of grants and grantees subject to this part, Federal agencies may not impose additional administrative requirements except in codified regulations published in the FEDERAL REGISTER.

(b) Exceptions for classes of grants or grantees may be authorized only by OMB.

(c) Exceptions on a case-by-case basis and for subgrantees may be authorized by the affected Federal agencies.

(1) In the Environmental Protection Agency, the Director, Grants Administration Division, is authorized to grant the exceptions.

(d) The EPA Director is also authorized to approve exceptions, on a class or an individual case basis, to EPA program–specific assistance regulations other than those which implement statutory and executive order requirements.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988]

Subpart B—Pre-Award Requirements

§ 31.10 Forms for applying for grants.

(a) *Scope.* (1) This section prescribes forms and instructions to be used by governmental organizations (except hospitals and institutions of higher education operated by a government) in applying for grants. This section is not applicable, however, to formula grant programs which do not require applicants to apply for funds on a project basis.

(2) This section applies only to applications to Federal agencies for grants, and is not required to be applied by grantees in dealing with applicants for subgrants. However, grantees are encouraged to avoid more detailed or burdensome application requirements for subgrants.

(b) *Authorized forms and instructions for governmental organizations.* (1) In applying for grants, applicants shall only use standard application forms or those prescribed by the granting agency with the approval of OMB under the Paperwork Reduction Act of 1980.

(2) Applicants are not required to submit more than the original and two copies of preapplications or applications.

(3) Applicants must follow all applicable instructions that bear OMB clearance numbers. Federal agencies may specify and describe the programs, functions, or activities that will be used to plan, budget, and evaluate the work under a grant. Other supplementary instructions may be issued only with the approval of OMB to the extent required under the Paperwork Reduction Act of 1980. For any standard form, except the SF–424 facesheet, Federal agencies may shade out or instruct the applicant to disregard any line item that is not needed.

(4) When a grantee applies for additional funding (such as a continuation or supplemental award) or amends a previously submitted application, only the affected pages need be submitted. Previously submitted pages with information that is still current need not be resubmitted.

§ 31.11 State plans.

(a) *Scope.* The statutes for some programs require States to submit plans before receiving grants. Under regulations implementing Executive Order 12372, "Intergovernmental Review of Federal Programs," States are allowed to simplify, consolidate and substitute plans. This section contains additional provisions for plans that are subject to regulations implementing the Executive Order.

(b) *Requirements.* A State need meet only Federal administrative or programmatic requirements for a plan that are in statutes or codified regulations.

(c) *Assurances.* In each plan the State will include an assurance that the State shall comply with all applicable Federal statutes and regulations in effect with respect to the periods for which it receives grant funding. For this assurance and other assurances required in the plan, the State may:

(1) Cite by number the statutory or regulatory provisions requiring the assurances and affirm that it gives the assurances required by those provisions,

(2) Repeat the assurance language in the statutes or regulations, or

(3) Develop its own language to the extent permitted by law.

(d) *Amendments.* A State will amend a plan whenever necessary to reflect: (1) New or revised Federal statutes or regulations or (2) a material change in any State law, organization, policy, or State agency operation. The State will obtain approval for the amendment and its effective date but need submit for approval only the amended portions of the plan.

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§ 31.12 Special grant or subgrant conditions for "high-risk" grantees.

(a) A grantee or subgrantee may be considered "high risk" if an awarding agency determines that a grantee or subgrantee:

(1) Has a history of unsatisfactory performance, or

(2) Is not financially stable, or

(3) Has a management system which does not meet the management standards set forth in this part, or

(4) Has not conformed to terms and conditions of previous awards, or

(5) Is otherwise not responsible; and if the awarding agency determines that an award will be made, special conditions and/or restrictions shall correspond to the high risk condition and shall be included in the award.

(b) Special conditions or restrictions may include:

(1) Payment on a reimbursement basis;

(2) Withholding authority to proceed to the next phase until receipt of evidence of acceptable performance within a given funding period;

(3) Requiring additional, more detailed financial reports;

(4) Additional project monitoring;

(5) Requiring the grante or subgrantee to obtain technical or management assistance; or

(6) Establishing additional prior approvals.

(c) If an awarding agency decides to impose such conditions, the awarding official will notify the grantee or subgrantee as early as possible, in writing, of:

(1) The nature of the special conditions/restrictions;

(2) The reason(s) for imposing them;

(3) The corrective actions which must be taken before they will be removed and the time allowed for completing the corrective actions and

(4) The method of requesting reconsideration of the conditions/restrictions imposed.

§ 31.13 Principal environmental statutory provisions applicable to EPA assistance awards.

Grantees shall comply with all applicable Federal laws including:

(a) Section 306 of the Clean Air Act, (42 U.S.C. 7606).

(b) Section 508 of the Federal Water Pollution Control Act, as amended, (33 U.S.C. 1368).

(c) Section 1424(e) of the Safe Drinking Water Act, (42 U.S.C. 300h-3(e)).

[53 FR 8075, Mar. 11, 1988]

Subpart C—Post-Award Requirements

FINANCIAL ADMINISTRATION

§ 31.20 Standards for financial management systems.

(a) A State must expand and account for grant funds in accordance with State laws and procedures for expending and accounting for its own funds. Fiscal control and accounting procedures of the State, as well as its subgrantees and cost-type contractors, must be sufficient to—

(1) Permit preparation of reports required by this part and the statutes authorizing the grant, and

(2) Permit the tracing of funds to a level of expenditures adequate to establish that such funds have not been used in violation of the restrictions and prohibitions of applicable statutes.

(b) The financial management systems of other grantees and subgrantees must meet the following standards:

(1) *Financial reporting.* Accurate, current, and complete disclosure of the financial results of financially assisted activities must be made in accordance with the financial reporting requirements of the grant or subgrant.

(2) *Accounting records.* Grantees and subgrantees must maintain records which adequately identify the source and application of funds provided for financially-assisted activities. These records must contain information pertaining to grant or subgrant awards and authorizations, obligations, unobligated balances, assets, liabilities, outlays or expenditures, and income.

(3) *Internal control.* Effective control and accountability must be maintained for all grant and subgrant cash, real and personal property, and other assets. Grantees and subgrantees must adequately safeguard all such proper-

ty and must assure that it is used solely for authorized purposes.

(4) *Budget control.* Actual expenditures or outlays must be compared with budgeted amounts for each grant or subgrant. Financial information must be related to performance or productivity data, including the development of unit cost information whenever appropriate or specifically required in the grant or subgrant agreement. If unit cost data are required, estimates based on available documentation will be accepted whenever possible.

(5) *Allowable cost.* Applicable OMB cost principles, agency program regulations, and the terms of grant and subgrant agreements will be followed in determining the reasonableness, allowability, and allocability of costs.

(6) *Source documentation.* Accounting records must be supported by such source documentation as cancelled checks, paid bills, payrolls, time and attendance records, contract and subgrant award documents, etc.

(7) *Cash management.* Procedures for minimizing the time elapsing between the transfer of funds from the U.S. Treasury and disbursement by grantees and subgrantees must be followed whenever advance payment procedures are used. Grantees must establish reasonable procedures to ensure the receipt of reports on subgrantees' cash balances and cash disbursements in sufficient time to enable them to prepare complete and accurate cash transactions reports to the awarding agency. When advances are made by letter-of-credit or electronic transfer of funds methods, the grantee must make drawdowns as close as possible to the time of making disbursements. Grantees must monitor cash drawdowns by their subgrantees to assure that they conform substantially to the same standards of timing and amount as apply to advances to the grantees.

(c) An awarding agency may review the adequacy of the financial management system of any applicant for financial assistance as part of a preaward review or at any time subsequent to award.

§ 31.21 Payment.

(a) *Scope.* This section prescribes the basic standard and the methods under which a Federal agency will make payments to grantees, and grantees will make payments to subgrantees and contractors.

(b) *Basic standard.* Methods and procedures for payment shall minimize the time elapsing between the transfer of funds and disbursement by the grantee or subgrantee, in accordance with Treasury regulations at 31 CFR part 205.

(c) *Advances.* Grantees and subgrantees shall be paid in advance, provided they maintain or demonstrate the willingness and ability to maintain procedures to minimize the time elapsing between the transfer of the funds and their disbursement by the grantee or subgrantee.

(d) *Reimbursement.* Reimbursement shall be the preferred method when the requirements in paragraph (c) of this section are not met. Grantees and subgrantees may also be paid by reimbursement for any construction grant. Except as otherwise specified in regulation, Federal agencies shall not use the percentage of completion method to pay construction grants. The grantee or subgrantee may use that method to pay its construction contractor, and if it does, the awarding agency's payments to the grantee or subgrantee will be based on the grantee's or subgrantee's actual rate of disbursement.

(e) *Working capital advances.* If a grantee cannot meet the criteria for advance payments described in paragraph (c) of this section, and the Federal agency has determined that reimbursement is not feasible because the grantee lacks sufficient working capital, the awarding agency may provide cash or a working capital advance basis. Under this procedure the awarding agency shall advance cash to the grantee to cover its estimated disbursement needs for an initial period generally geared to the grantee's disbursing cycle. Thereafter, the awarding agency shall reimburse the grantee for its actual cash disbursements. The working capital advance method of payment shall not be used by grantees or subgrantees if the reason for using

such method is the unwillingness or inability of the grantee to provide timely advances to the subgrantee to meet the subgrantee's actual cash disbursements.

(f) *Effect of program income, refunds, and audit recoveries on payment.* (1) Grantees and subgrantees shall disburse repayments to and interest earned on a revolving fund before requesting additional cash payments for the same activity.

(2) Except as provided in paragraph (f)(1) of this section, grantees and subgrantees shall disburse program income, rebates, refunds, contract settlements, audit recoveries and interest earned on such funds before requesting additional cash payments.

(g) *Withholding payments.* (1) Unless otherwise required by Federal statute, awarding agencies shall not withhold payments for proper charges incurred by grantees or subgrantees unless—

(i) The grantee or subgrantee has failed to comply with grant award conditions or

(ii) The grantee or subgrantee is indebted to the United States.

(2) Cash withheld for failure to comply with grant award condition, but without suspension of the grant, shall be released to the grantee upon subsequent compliance. When a grant is suspended, payment adjustments will be made in accordance with § 31.43(c).

(3) A Federal agency shall not make payment to grantees for amounts that are withheld by grantees or subgrantees from payment to contractors to assure satisfactory completion of work. Payments shall be made by the Federal agency when the grantees or subgrantees actually disburse the withheld funds to the contractors or to escrow accounts established to assure satisfactory completion of work.

(h) *Cash depositories.* (1) Consistent with the national goal of expanding the opportunities for minority business enterprises, grantees and subgrantees are encouraged to use minority banks (a bank which is owned at least 50 percent by minority group members). A list of minority owned banks can be obtained from the Minority Business Development Agency, Department of Commerce, Washington, DC 20230.

(2) A grantee or subgrantee shall maintain a separate bank account only when required by Federal-State agreement.

(i) *Interest earned on advances.* Except for interest earned on advances of funds exempt under the Intergovernmental Cooperation Act (31 U.S.C. 6501 et seq.) and the Indian Self-Determination Act (23 U.S.C. 450), grantees and subgrantees shall promptly, but at least quarterly, remit interest earned on advances to the Federal agency. The grantee or subgrantee may keep interest amounts up to $100 per year for administrative expenses.

§ 31.22 Allowable costs.

(a) *Limitation on use of funds.* Grant funds may be used only for:

(1) The allowable costs of the grantees, subgrantees and cost-type contractors, including allowable costs in the form of payments to fixed-price contractors; and

(2) Reasonable fees or profit to cost-type contractors but not any fee or profit (or other increment above allowable costs) to the grantee or subgrantee.

(b) *Applicable cost principles.* For each kind of organization, there is a set of Federal principles for determining allowable costs. Allowable costs will be determined in accordance with the cost principles applicable to the organization incurring the costs. The following chart lists the kinds of organizations and the applicable cost principles.

For the costs of a—	Use the principles in—
State, local or Indian tribal government.	OMB Circular A-87.
Private nonprofit organization other than an (1) institution of higher education, (2) hospital, or (3) organization named in OMB Circular A-122 as not subject to that circular.	OBM Circular A-122.
Educational institutions.	OMB Circular A-21.

—Continued

For the costs of a—	Use the principles in—
For-profit organization other than a hospital and an organization named in OBM Circular A–122 as not subject to that circular.	48 CFR part 31. Contract Cost Principles and Procedures, or uniform cost accounting standards that comply with cost principles acceptable to the Federal agency.

§ 31.23 Period fo availability of funds.

(a) *General.* Where a funding period is specified, a grantee may charge to the award only costs resulting from obligations of the funding period unless carryover of unobligated balances is permitted, in which case the carryover balances may be charged for costs resulting from obligations of the subsequent funding period.

(b) *Liquidation of obligations.* A grantee must liquidate all obligations incurred under the award not later than 90 days after the end of the funding period (or as specified in a program regulatibn) to coincide with the submission of the annual Financial Status Report (SF–269). The Federal agency may extend this deadline at the request of the grantee.

§ 31.24 Matching or cost sharing.

(a) *Basic rule: Costs and contributions acceptable.* With the qualifications and exceptions listed in paragraph (b) of this section, a matching or cost sharing requirement may be satisfied by either or both of the following:

(1) Allowable costs incurred by the grantee, subgrantee or a cost-type contractor under the assistance agreement. This includes allowable costs borne by non-Federal grants or by others cash donations from non-Federal third parties.

(2) The value of third party in-kind contributions applicable to the period to which the cost sharing or matching requirements applies.

(b) *Qualifications and exceptions—*(1) *Costs borne by other Federal grant agreements.* Except as provided by Federal statute, a cost sharing or matching requirement may not be met by costs borne by another Federal grant. This prohibition does not apply to income earned by a grantee or subgrantee from a contract awarded under another Federal grant.

(2) *General revenue sharing.* For the purpose of this section, general revenue sharing funds distributed under 31 U.S.C. 6702 are not considered Federal grant funds.

(3) *Cost or contributions counted towards other Federal costs-sharing requirements.* Neither costs nor the values of third party in-kind contributions may count towards satisfying a cost sharing or matching requirement of a grant agreement if they have been or will be counted towards satisfying a cost sharing or matching requirement of another Federal grant agreement, a Federal procurement contract, or any other award of Federal funds.

(4) *Costs financed by program income.* Costs financed by program income, as defined in § 31.25, shall not count towards satisfying a cost sharing or matching requirement unless they are expressly permitted in the terms of the assistance agreement. (This use of general program income is described in § 31.25(g).)

(5) *Services or property financed by income earned by contractors.* Contractors under a grant may earn income from the activities carried out under the contract in addition to the amounts earned from the party awarding the contract. No costs of services or property supported by this income may count toward satisfying a cost sharing or matching requirement unless other provisions of the grant agreement expressly permit this kind of income to be used to meet the requirement.

(6) *Records.* Costs and third party in-kind contributions counting towards satisfying a cost sharing or matching requirement must be verifiable from the records of grantees and subgrantee or cost-type contractors. These records must show how the value placed on third party in-kind contributions was derived. To the extent feasible, volunteer services will be supported by the same methods that the organization uses to support the allocability of regular personnel costs.

(7) *Special standards for third party in-kind contributions.* (i) Third party

in-kind contributions count towards satisfying a cost sharing or matching requirement only where, if the party receiving the contributions were to pay for them, the payments would be allowable costs.

(ii) Some third party in-kind contributions are goods and services that, if the grantee, subgrantee, or contractor receiving the contribution had to pay for them, the payments would have been an indirect costs. Costs sharing or matching credit for such contributions shall be given only if the grantee, subgrantee, or contractor has established, along with its regular indirect cost rate, a special rate for allocating to individual projects or programs the value of the contributions.

(iii) A third party in-kind contribution to a fixed-price contract may count towards satisfying a cost sharing or matching requirement only if it results in:

(A) An increase in the services or property provided under the contract (without additional cost to the grantee or subgrantee) or

(B) A cost savings to the grantee or subgrantee.

(iv) The values placed on third party in-kind contributions for cost sharing or matching purposes will conform to the rules in the succeeding sections of this part. If a third party in-kind contribution is a type not treated in those sections, the value placed upon it shall be fair and reasonable.

(c) *Valuation of donated services*—(1) *Volunteer services.* Unpaid services provided to a grantee or subgrantee by individuals will be valued at rates consistent with those ordinarily paid for similar work in the grantee's or subgrantee's organization. If the grantee or subgrantee does not have employees performing similar work, the rates will be consistent with those ordinarily paid by other employers for similar work in the same labor market. In either case, a reasonable amount for fringe benefits may be included in the valuation.

(2) *Employees of other organizations.* When an employer other than a grantee, subgrantee, or cost-type contractor furnishes free of charge the services of an employee in the employee's normal line of work, the services will be valued at the employee's regular rate of pay exclusive of the employee's fringe benefits and overhead costs. If the services are in a different line of work, paragraph (c)(1) of this section applies.

(d) *Valuation of third party donated supplies and loaned equipment or space.* (1) If a third party donates supplies, the contribution will be valued at the market value of the supplies at the time of donation.

(2) If a third party donates the use of equipment or space in a building but retains title, the contribution will be valued at the fair rental rate of the equipment or space.

(e) *Valuation of third party donated equipment, buildings, and land.* If a third party donates equipment, buildings, or land, and title passes to a grantee or subgrantee, the treatment of the donated property will depend upon the purpose of the grant or subgrant, as follows:

(1) *Awards for capital expenditures.* If the purpose of the grant or subgrant is to assist the grantee or subgrantee in the acquisition of property, the market value of that property at the time of donation may be counted as cost sharing or matching.

(2) *Other awards.* If assisting in the acquisition of property is not the purpose of the grant or subgrant, paragraphs (e)(2) (i) and (ii) of this section apply:

(i) If approval is obtained from the awarding agency, the market value at the time of donation of the donated equipment or buildings and the fair rental rate of the donated land may be counted as cost sharing or matching. In the case of a subgrant, the terms of the grant agreement may require that the approval be obtained from the Federal agency as well as the grantee. In all cases, the approval may be given only if a purchase of the equipment or rental of the land would be approved as an allowable direct cost. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost-sharing or matching.

(ii) If approval is not obtained under paragraph (e)(2)(i) of this section, no amount may be counted for donated land, and only depreciation or use al-

lowances may be counted for donated equipment and buildings. The depreciation or use allowances for this property are not treated as third party in-kind contributions. Instead, they are treated as costs incurred by the grantee or subgrantee. They are computed and allocated (usually as indirect costs) in accordance with the cost principles specified in § __.22, in the same way as depreciation or use allowances for purchased equipment and buildings. The amount of depreciation or use allowances for donated equipment and buildings is based on the property's market value at the time it was donated.

(f) *Valuation of grantee or subgrantee donated real property for construction/acquisition.* If a grantee or subgrantee donates real property for a construction or facilities acquisition project, the current market value of that property may be counted as cost sharing or matching. If any part of the donated property was acquired with Federal funds, only the non-federal share of the property may be counted as cost sharing or matching.

(g) *Appraisal of real property.* In some cases under paragraphs (d), (e) and (f) of this section, it will be necessary to establish the market value of land or a building or the fair rental rate of land or of space in a building. In these cases, the Federal agency may require the market value or fair rental value be set by an independent appraiser, and that the value or rate be certified by the grantee. This requirement will also be imposed by the grantee on subgrantees.

§ 31.25 Program income.

(a) *General.* Grantees are encouraged to earn income to defray program costs. Program income includes income from fees for services performed, from the use or rental of real or personal property acquired with grant funds, from the sale of commodities or items fabricated under a grant agreement, and from payments of principal and interest on loans made with grant funds. Except as otherwise provided in regulations of the Federal agency, program income does not include interest on grant funds, rebates, credits, discounts, refunds, etc. and interest earned on any of them.

(b) *Definition of program income.* Program income means gross income received by the grantee or subgrantee directly generated by a grant supported activity, or earned only as a result of the grant agreement during the grant period. "During the grant period" is the time between the effective date of the award and the ending date of the award reflected in the final financial report.

(c) *Cost of generating program income.* If authorized by Federal regulations or the grant agreement, costs incident to the generation of program income may be deducted from gross income to determine program income.

(d) *Governmental revenues.* Taxes, special assessments, levies, fines, and other such revenues raised by a grantee or subgrantee are not program income unless the revenues are specifically identified in the grant agreement or Federal agency regulations as program income.

(e) *Royalties.* Income from royalties and license fees for copyrighted material, patents, and inventions developed by a grantee or subgrantee is program income only if the revenues are specifically identified in the grant agreement or Federal agency regulations as program income. (See § 31.34.)

(f) *Property.* Proceeds from the sale of real property or equipment will be handled in accordance with the requirements of §§ 31.31 and 31.32.

(g) *Use of program income.* Program income shall be deducted from outlays which may be both Federal and non-Federal as described below, unless the Federal agency regulations or the grant agreement specify another alternative (or a combination of the alternatives). In specifying alternatives, the Federal agency may distinguish between income earned by the grantee and income earned by subgrantees and between the sources, kinds, or amounts of income. When Federal agencies authorize the alternatives in paragraphs (g) (2) and (3) of this section, program income in excess of any limits stipulated shall also be deducted from outlays.

(1) *Deduction.* Ordinarily program income shall be deducted from total

allowable costs to determine the net allowable costs. Program income shall be used for current costs unless the Federal agency authorizes otherwise. Program income which the grantee did not anticipate at the time of the award shall be used to reduce the Federal agency and grantee contributions rather than to increase the funds committed to the project.

(2) *Addition.* When authorized, program income may be added to the funds committed to the grant agreement by the Federal agency and the grantee. The program income shall be used for the purposes and under the conditions of the grant agreement.

(3) *Cost sharing or matching.* When authorized, program income may be used to meet the cost sharing or matching requirement of the grant agreement. The amount of the Federal grant award remains the same.

(h) *Income after the award period.* There are no Federal requirements governing the disposition of program income earned after the end of the award period (i.e., until the ending date of the final financial report, see paragraph (a) of this section), unless the terms of the agreement or the Federal agency regulations provide otherwise.

§ 31.26 Non-Federal audit.

(a) *Basic rule.* Grantees and subgrantees are responsible for obtaining audits in accordance with the Single Audit Act of 1984 (31 U.S.C. 7501-7) and Federal agency implementing regulations. The audits shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

(b) *Subgrantees.* State or local governments, as those terms are defined for purposes of the Single Audit Act, that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subgrantee shall:

(1) Determine whether State or local subgrantees have met the audit requirements of the Act and whether subgrantees covered by OMB Circular A-110, "Uniform Requirements for Grants and Other Agreements with Institutions of Higher Education, Hospitals and Other Nonprofit Organizations" have met the audit requirement. Commercial contractors (private forprofit and private and governmental organizations) providing goods and services to State and local governments are not required to have a single audit performed. State and local govenments should use their own procedures to ensure that the contractor has complied with laws and regulations affecting the expenditure of Federal funds;

(2) Determine whether the subgrantee spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subgrantee made in accordance with the Act, Circular A-110, or through other means (e.g., program reviews) if the subgrantee has not had such an audit;

(3) Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instance of noncompliance with Federal laws and regulations;

(4) Consider whether subgrantee audits necessitate adjustment of the grantee's own records; and

(5) Require each subgrantee to permit independent auditors to have access to the records and financial statements.

(c) *Auditor selection.* In arranging for audit services, § 31.36 shall be followed.

Changes, Property, and Subawards

§ 31.30 Changes.

(a) *General.* Grantees and subgrantees are permitted to rebudget within the approved direct cost budget to meet unanticipated requirements and may make limited program changes to the approved project. However, unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency.

(b) *Relation to cost principles.* The applicable cost principles (see § 31.22) contain requirements for prior approval of certain types of costs. Except where waived, those requirements apply to all grants and subgrants even

if paragraphs (c) through (f) of this section do not.

(c) *Budget changes.* (1) *Nonconstruction projects.* Except as stated in other regulations or an award document, grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated under a nonconstruction award:

(i) Any revision which would result in the need for additional funding.

(ii) Unless waived by the awarding agency, cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds $100,000.

(iii) Transfer of funds allotted for training allowances (i.e., from direct payments to trainees to other expense categories).

(2) *Construction projects.* Grantees and subgrantees shall obtain prior written approval for any budget revision which would result in the need for additional funds.

(3) *Combined construction and nonconstruction projects.* When a grant or subgrant provides funding for both construction and nonconstruction activities, the grantee or subgrantee must obtain prior written approval from the awarding agency before making any fund or budget transfer from nonconstruction to construction or vice versa.

(d) *Programmatic changes.* Grantees or subgrantees must obtain the prior approval of the awarding agency whenever any of the following actions is anticipated:

(1) Any revision of the scope or objectives of the project (regardless of whether there is an associated budget revision requiring prior approval).

(2) Need to extend the period of availability of funds.

(3) Changes in key persons in cases where specified in an application or a grant award. In research projects, a change in the project director or principal investigator shall always require approval unless waived by the awarding agency.

(4) Under nonconstruction projects, contracting out, subgranting (if authorized by law) or otherwise obtaining the services of a third party to perform activities which are central to the purposes of the award. This approval requirement is in addition to the approval requirements of § 31.36 but does not apply to the procurement of equipment, supplies, and general support services.

(e) *Additional prior approval requirements.* The awarding agency may not require prior approval for any budget revision which is not described in paragraph (c) of this section.

(f) *Requesting prior approval.* (1) A request for prior approval of any budget revision will be in the same budget formal the grantee used in its application and shall be accompanied by a narrative justification for the proposed revision.

(2) A request for a prior approval under the applicable Federal cost principles (see § 31.22) may be made by letter.

(3) A request by a subgrantee for prior approval will be addressed in writing to the grantee. The grantee will promptly review such request and shall approve or disapprove the request in writing. A grantee will not approve any budget or project revision which is inconsistent with the purpose or terms and conditions of the Federal grant to the grantee. If the revision, requested by the subgrantee would result in a change to the grantee's approved project which requires Federal prior approval, the grantee will obtain the Federal agency's approval before approving the subgrantee's request.

§ 31.31 Real property.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *Use.* Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.

(c) *Disposition.* When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:

(1) *Retention of title.* Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.

(2) *Sale of property.* Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) *Transfer of title.* Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

§ 31.32 Equipment.

(a) *Title.* Subject to the obligations and conditions set forth in this section, title to equipment acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.

(b) *States.* A State will use, manage, and dispose of equipment acquired under a grant by the State in accordance with State laws and procedures. Other grantees and subgrantees will follow paragraphs (c) through (e) of this section.

(c) *Use.* (1) Equipment shall be used by the grantee or subgrantee in the program or project for which it was acquired as long as needed, whether or not the project or program continues to be supported by Federal funds. When no longer needed for the original program or project, the equipment may be used in other activities currently or previously supported by a Federal agency.

(2) The grantee or subgrantee shall also make equipment available for use on other projects or programs currently or previously supported by the Federal Government, providing such use will not interfere with the work on the projects or program for which it was originally acquired. First preference for other use shall be given to other programs or projects supported by the awarding agency. User fees should be considered if appropriate.

(3) Notwithstanding the encouragement in § 31.25(a) to earn program income, the grantee or subgrantee must not use equipment acquired with grant funds to provide services for a fee to compete unfairly with private companies that provide equivalent services, unless specifically permitted or contemplated by Federal statute.

(4) When acquiring replacement equipment, the grantee or subgrantee may use the equipment to be replaced as a trade-in or sell the property and use the proceeds to offset the cost of the replacement property, subject to the approval of the awarding agency.

(d) *Management requirements.* Procedures for managing equipment (including replacement equipment), whether acquired in whole or in part with grant funds, until disposition takes place will, as a minimum, meet the following requirements:

(1) Property records must be maintained that include a description of the property, a serial number or other identification number, the source of property, who holds title, the acquisition date, and cost of the property.

percentage of Federal participation in the cost of the property, the location, use and condition of the property, and any ultimate disposition data including the date of disposal and sale price of the property.

(2) A physical inventory of the property must be taken and the results reconciled with the property records at least once every two years.

(3) A control system must be developed to ensure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft shall be investigated.

(4) Adequate maintenance procedures must be developed to keep the property in good condition.

(5) If the grantee or subgrantee is authorized or required to sell the property, proper sales procedures must be established to ensure the highest possible return.

(e) *Disposition.* When original or replacement equipment acquired under a grant or subgrant is no longer needed for the original project or program or for other activities currently or previously supported by a Federal agency, disposition of the equipment will be made as follows:

(1) Items of equipment with a current per-unit fair market value of less than $5,000 may be retained, sold or otherwise disposed of with no further obligation to the awarding agency.

(2) Items of equipment with a current per unit fair market value in excess of $5,000 may be retained or sold and the awarding agency shall have a right to an amount calculated by multiplying the current market value or proceeds from sale by the awarding agency's share of the equipment.

(3) In cases where a grantee or subgrantee fails to take appropriate disposition actions, the awarding agency may direct the grantee or subgrantee to take excess and disposition actions.

(f) *Federal equipment.* In the event a grantee or subgrantee is provided federally-owned equipment:

(1) Title will remain vested in the Federal Government.

(2) Grantees or subgrantees will manage the equipment in accordance with Federal agency rules and procedures, and submit an annual inventory listing.

(3) When the equipment is no longer needed, the grantee or subgrantee will request disposition instructions from the Federal agency.

(g) *Right to transfer title.* The Federal awarding agency may reserve the right to transfer title to the Federal Government or a third part named by the awarding agency when such a third party is otherwise eligible under existing statutes. Such transfers shall be subject to the following standards:

(1) The property shall be identified in the grant or otherwise made known to the grantee in writing.

(2) The Federal awarding agency shall issue disposition instruction within 120 calendar days after the end of the Federal support of the project for which it was acquired. If the Federal awarding agency fails to issue disposition instructions within the 120 calendar-day period the grantee shall follow 31.32(e).

(3) When title to equipment is transferred, the grantee shall be paid an amount calculated by applying the percentage of participation in the purchase to the current fair market value of the property.

§ 31.33 Supplies.

(a) *Title.* Title to supplies acquired under a grant or subgrant will vest, upon acquisition, in the grantee or subgrantee respectively.

(b) *Disposition.* If there is a residual inventory of unused supplies exceeding $5,000 in total aggregate fair market value upon termination or completion of the award, and if the supplies are not needed for any other federally sponsored programs or projects, the grantee or subgrantee shall compensate the awarding agency for its share.

§ 31.34 Copyrights.

The Federal awarding agency reserves a royalty-free, nonexclusive, and irrevocable license to reproduce, publish or otherwise use, and to authorize others to use, for Federal Government purposes:

(a) The copyright in any work developed under a grant, subgrant, or contract under a grant or subgrant; and

(b) Any rights of copyright to which a grantee, subgrantee or a contractor purchases ownership with grant support.

§ 31.35 Subawards to debarred and suspended parties.

Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in Federal assistance programs under Executive Order 12549, "Debarment and Suspension."

§ 31.36 Procurement.

(a) *States.* When procuring property and services under a grant, a State will follow the same policies and procedures it uses for procurements from its non-Federal funds. The State will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations. Other grantees and subgrantees will follow paragraphs (b) through (i) in this section.

(b) *Procurement standards.* (1) Grantees and subgrantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in this section.

(2) Grantees and subgrantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.

(3) Grantees and subgrantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

(i) The employee, officer or agent,

(ii) Any member of his immediate family,

(iii) His or her partner, or

(iv) An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to subagreements. Grantee and subgrantees may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

(4) Grantee and subgrantee procedures will provide for a review of proposed procurements to avoid purchase of unnecessary or duplicative items. Consideration should be given to consolidating or breaking out procurements to obtain a more economical purchase. Where appropriate, an analysis will be made of lease versus purchase alternatives, and any other appropriate analysis to determine the most economical approach.

(5) To foster greater economy and efficiency, grantees and subgrantees are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(6) Grantees and subgrantees are encouraged to use Federal excess and surplus property in lieu of purchasing new equipment and property whenever such use is feasible and reduces project costs.

(7) Grantees and subgrantees are encouraged to use value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reduc-

tions. Value engineering is a systematic and creative anaylsis of each contract item or task to ensure that its essential function is provided at the overall lower cost.

(8) Grantees and subgrantees will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of a proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

(9) Grantees and subgrantees will maintain records sufficient to detail the significant history of a procurement. These records will include, but are not necessarily limited to the following: rationale for the method of procurement, selection of contract type, contractor selection or rejection, and the basis for the contract price.

(10) Grantees and subgrantees will use time and material type contracts only—

(i) After a determination that no other contract is suitable, and

(ii) If the contract includes a ceiling price that the contractor exceeds at its own risk.

(11) Grantees and subgrantees alone will be responsible, in accordance with good administrative practice and sound business judgment, for the settlement of all contractual and administrative issues arising out of procurements. These issues include, but are not limited to source evaluation, protests, disputes, and claims. These standards do not relieve the grantee or subgrantee of any contractual responsibilities under its contracts. Federal agencies will not substitute their judgment for that of the grantee or subgrantee unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, or Federal authority having proper jurisdiction.

(12) Grantees and subgrantees will have protest procedures to handle and resolve disputes relating to their procurements and shall in all instances disclose information regarding the protest to the awarding agency. A protestor must exhaust all administrative remedies with the grantee and subgrantee before pursuing a protest with the Federal agency. Reviews of protests by the Federal agency will be limited to:

(i) Violations of Federal law or regulations and the standards of this section (violations of State or local law will be under the jurisdiction of State or local authorities) and

(ii) Violations of the grantee's or subgrantee's protest procedures for failure to review a complaint or protest. Protests received by the Federal agency other than those specified above will be referred to the grantee or subgrantee.

(c) *Competition.* (1) All procurement transactions will be conducted in a manner providing full and open competition consistent with the standards of § 31.36. Some of the situations considered to be restrictive of competition include but are not limited to:

(i) Placing unreasonable requirements on firms in order for them to qualify to do business,

(ii) Requiring unnecessary experience and excessive bonding,

(iii) Noncompetitive pricing practices between firms or between affiliated companies,

(iv) Noncompetitive awards to consultants that are on retainer contracts,

(v) Organizational conflicts of interest,

(vi) Specifying only a "brand name" product instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement, and

(vii) Any arbitrary action in the procurement process.

(2) Grantees and subgrantees will conduct procurements in a manner that prohibits the use of statutorily or administratively imposed in-State or local geographical preferences in the evaluation of bids or proposals, except in those cases where applicable Federal statutes expressly mandate or encourage geographic preference. Nothing in this section preempts State licensing laws. When contracting for architectural and engineering (A/E) services, geographic location may be a selection criteria provided its application leaves an appropriate number of qualified firms, given the nature and

size of the project, to compete for the contract.

(3) Grantees will have written selection procedures for procurement transactions. These procedures will ensure that all solicitations:

(i) Incorporate a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. The description may include a statement of the qualitative nature of the material, product or service to be procured, and when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use. Detailed product specifications should be avoided if at all possible. When it is impractical or uneconomical to make a clear and accurate description of the technical requirements, a "brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement. The specific features of the named brand which must be met by offerors shall be clearly stated; and

(ii) Identify all requirements which the offerors must fulfill and all other factors to be used in evaluating bids or proposals.

(4) Grantees and subgrantees will ensure that all prequalified lists of persons, firms, or products which are used in acquiring goods and services are current and include enough qualified sources to ensure maximum open and free competition. Also, grantees and subgrantees will not preclude potential bidders from qualifying during the solicitation period.

(5) Construction grants awarded under Title II of the Clean Water Act are subject to the following "Buy American" requirements in paragraphs (c)(5)(i)-(iii) of this section. Section 215 of the Clean Water Act requires that contractors give preference to the use of domestic material in the construction of EPA-funded treatment works.

(i) Contractors must use domestic construction materials in preference to nondomestic material if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic material, including all costs of delivery to the construction site and any applicable duty, whether or not assessed. The grantee will normally base the computations on prices and costs in effect on the date of opening bids or proposals.

(ii) The award official may waive the Buy American provision based on factors the award official considers relevant, including:

(A) Such use is not in the public interest;

(B) The cost is unreasonable;

(C) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(D) The articles, materials or supplies of the class or kind to be used or the articles, materials or supplies from which they are manufactured are not mined, produced or manufactured in the United States in sufficient and reasonably available commerical quantities or satisfactory quality for the particular project; or

(E) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(iii) All bidding documents, subagreements, and, if appropriate, requests for proposals must contain the following "Buy American" provision: In accordance with section 215 of the Clean Water Act (33 U.S.C. 1251 et seq.) and implementing EPA regulations, the contractor agrees that preference will be given to domestic construction materials by the contractor, subcontractors, materialmen and suppliers in the performance of this subagreement.

(d) *Methods of procurement to be followed.* (1) Procurement by *small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, price or rate quotations will be obtained from an adequate number of qualified sources.

(2) Procurement by *sealed bids* (formal advertising). Bids are publicly solicited and a firm-fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price. The sealed bid method is the preferred method for procuring construction, if the conditions in §31.36(d)(2)(i) apply.

(i) In order for sealed bidding to be feasible, the following conditions should be present:

(A) A complete, adequate, and realistic specification or purchase description is available;

(B) Two or more responsible bidders are willing and able to compete effectively for the business; and

(C) The procurement lends itself to a firm fixed price contract and the selection of the successful bidder can be made principally on the basis of price.

(ii) If sealed bids are used, the following requirements apply:

(A) The invitation for bids will be publicly advertised and bids shall be solicited from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(B) The invitation for bids, which will include any specifications and pertinent attachments, shall define the items or services in order for the bidder to properly respond;

(C) All bids will be publicly opened at the time and place prescribed in the invitation for bids;

(D) A firm fixed-price contract award will be made in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, factors such as discounts, transportation cost, and life cycle costs shall be considered in determining which bid is lowest. Payment discounts will only be used to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(E) Any or all bids may be rejected if there is a sound documented reason.

(3) Procurement by *competitive proposals*. The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If this method is used, the following requirements apply:

(i) Requests for proposals will be publicized and identify all evaluation factors and their relative importance. Any response to publicized requests for proposals shall be honored to the maximum extent practical;

(ii) Proposals will be solicited from an adequate number of qualified sources;

(iii) Grantees and subgrantees will have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(iv) Awards will be made to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(v) Grantees and subgrantees may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitors' qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. The method, where price is not used as a selection factor, can only be used in procurement of A/E professional services. It cannot be used to purchase other types of services though A/E firms are a potential source to perform the proposed effort.

(4) Procurement by *noncompetitive proposals* is procurement through solicitation of a proposal from only one source, or after solicitation of a number of sources, competition is determined inadequate.

(i) Procurement by noncompetitive proposals may be used only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals and one of the following circumstances applies:

(A) The item is available only from a single source;

(B) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation.

(C) The awarding agency authorizes noncompetitive proposals; or

(D) After solicitation of a number of sources, competition is determined inadequate.

(ii) Cost analysis, i.e., verifying the proposed cost data, the projections of the data, and the evaluation of the specific elements of costs and profit, is required.

(iii) Grantees and subgrantees may be required to submit the proposed procurement to the awarding agency for pre-award review in accordance with paragraph (g) of this section.

(e) *Contracting with small and minority firms, women's business enterprise and labor surplus area firms.* (1) The grantee and subgrantee will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.

(2) Affirmative steps shall include:

(i) Placing qualified small and minority businesses and women's business enterprises on solicitation lists;

(ii) Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources;

(iii) Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises;

(iv) Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises;

(v) Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce; and

(vi) Requiring the prime contractor, if subcontracts are to be let, to take the affirmative steps listed in paragraphs (e)(2) (i) through (v) of this section.

(f) *Contract cost and price.* (1) Grantees and subgrantees must perform a cost or price analysis in connection with every procurement action including contract modifications. The method and degree of analysis is dependent on the facts surrounding the particular procurement situation, but as a starting point, grantees must make independent estimates before receiving bids or proposals. A cost analysis must be performed when the offeror is required to submit the elements of his estimated cost, e.g., under professional, consulting, and architectural engineering services contracts. A cost analysis will be necessary when adequate price competition is lacking, and for sole source procurements, including contract modifications or change orders, unless price resonableness can be established on the basis of a catalog or market price of a commercial product sold in substantial quantities to the general public or based on prices set by law or regulation. A price analysis will be used in all other instances to determine the reasonableness of the proposed contract price.

(2) Grantees and subgrantees will negotiate profit as a separate element of the price for each contract in which there is no price competition and in all cases where cost analysis is performed. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

(3) Costs or prices based on estimated costs for contracts under grants will be allowable only to the extent that costs incurred or cost estimates included in negotiated prices are consistent with Federal cost principles (see § 31.22). Grantees may reference their own cost principles that comply with the applicable Federal cost principles.

(4) The cost plus a percentage of cost and percentage of construction cost methods of contracting shall not be used.

(g) *Awarding agency review.* (1) Grantees and subgrantees must make available, upon request of the awarding agency, technical specifications on proposed procurements where the awarding agency believes such review is needed to ensure that the item and/or service specified is the one being proposed for purchase. This review generally will take place prior to the time the specification is incorporated into a solicitation document. However,

if the grantee or subgrantee desires to have the review accomplished after a solication has been developed, the awarding agency may still review the specifications, with such review usually limited to the technical aspects of the proposed purchase.

(2) Grantees and subgrantees must on request make available for awarding agency pre-award review [delete ","] procurement documents, such as requests for proposals or invitations for bids, independent cost estimates, etc., when:

(i) A grantee's or subgrantee's procurement procedures or operation fails to comply with the procurement standards in this seciton; or

(ii) The procurement is expected to exceed $25,000 and is to be awarded without competition or only one bid or offer is received in response to a solicitation; or

(iii) The procurement, which is expected to exceed $25,000, specifies a "brand name" product; or

(iv) The proposed award over $25,000 is to be awarded to other than the apparent low bidder under a sealed bid procurement; or

(v) A proposed contract modification changes the scope of a contract or increases the contract amount by more than $25,000.

(3) A grantee or subgrantee will be exempt from the pre-award review in paragraph (g)(2) of this section if the awarding agency determines that its procurement systems comply with the standards of this section.

(i) A grantee or subgrantee may request that its procurement system be reviewed by the awarding agency to determine whether its system meets these standards in order for its system to be certified. Generally, these reviews shall occur where there is a continuous high-dollar funding, and third-party contracts are awarded on a regular basis;

(ii) A grantee or subgrantee may self-certify its procurement system. Such self-certification shall not limit the awarding agency's right to survey the system. Under a self-certification procedure, awarding agencies may wish to rely on written assurances from the grantee or subgrantee that it is complying with these standards. A grantee or subgrantee will cite specific procedures, regulations, standards, etc., as being in compliance with these requirements and have its system available for review.

(h) *Bonding requirements.* For construction or facility improvement contracts or subconstracts exceeding $100,000, the awarding agency may accept the bonding policy and requirements of the grantee or subgrantee provided the awarding agency has made a determination that the awarding agency's interest is adequately protected. If such a determination has not been made, the minimum requirements shall be as follows:

(1) *A bid guarantee from each bidder equivalent to five percent of the bid price.* The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

(2) *A performance bond on the part of the contractor for 100 percent of the contract price.* A "performance bond" is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

(3) *A payment bond on the part of the contractor for 100 percent of the contract price.* A "payment bond" is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

(i) *Contract provisions.* A grantee's and subgrantee's contracts must contain provisions in paragraph (i) of this section. Federal agencies are permitted to require changes, remedies, changed conditions, access and records retention, suspension of work, and other clauses approved by the Office of Procurement Policy.

(1) Administrative, contractual, or legal remedies in instances where contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. (Contracts other than small purchases)

(2) Termination for cause and for convenience by the grantee or subgrantee including the manner by which it will be effected and the basis for settlement. (All contracts in excess of $10,000)

(3) Compliance with Executive Order 11246 of September 24, 1965 entitled "Equal Employment Opportunity," as amended by Executive Order 11375 of October 13, 1967 and as supplemented in Department of Labor regulations (41 CFR Chapter 60). (All construction contracts awarded in excess of $10,000 by grantees and their contractors or subgrantees)

(4) Compliance with the Copeland "Anti-Kickback" Act (18 U.S.C. 874) as supplemented in Department of Labor regulations (29 CFR part 3). (All contracts and subgrants for construction or repair)

(5) Compliance with the Davis-Bacon Act (40 U.S.C. 276a to a-7) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts in excess of $2,000 awarded by grantees and subgrantees when required by Federal grant program legislation)

(6) Compliance with sections 103 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 327-330) as supplemented by Department of Labor regulations (29 CFR part 5). (Construction contracts awarded by grantees and subgrantees in excess of $2,000, and in excess of $2,500 for other contracts which involve the employment of mechanics or laborers)

(7) Notice of awarding agency requirements and regulations pertaining to reporting.

(8) Notice of awarding agency requirements and regulations pertaining to patent rights with respect to any discovery or invention which arises or is developed in the course of or under such contract.

(9) Awarding agency requirements and regulations pertaining to copyrights and rights in data.

(10) Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

(11) Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.

(12) Compliance with all applicable standards, orders, or requirements issued under section 306 of the Clear Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and Environmental Protection Agency regulations (40 CFR part 15). (Contracts, subcontracts, and subgrants of amounts in excess of $100,000)

(13) Mandatory standards and policies relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(j) *Payment to consultants.* (1) EPA will limit its participation in the salary rate (excluding overhead) paid to individual consultants retained by grantees or by a grantee's contractors or subcontractors to the maximum daily rate for a GS-18. (Grantees may, however, pay consultants more than this amount). This limitation applies to consultation services of designated individuals with specialized skills who are paid at a daily or hourly rate. This rate does not include transportation and subsistence costs for travel performed; grantees will pay these in accordance with their normal travel reimbursement practices. (Pub. L. 99-591).

(2) Subagreements with firms for services which are awarded using the procurement requirements in this part are not affected by this limitation.

(k) *Use of the same architect or engineer during construction.* (1) If the grantee is satisfied with the qualifications and performance of the architect or engineer who provided any or all of the facilities planning or design services for a waste-water treatment works project and wishes to retain that firm or individual during construction of the project, it may do so without further public notice and evaluation of qualifications, provided:

(i) The grantee received a facilities planning (Step 1) or design grant (Step 2), and selected the architect or engineer in accordance with EPA's procurement regulations in effect when EPA awarded the grant; or

(ii) The award official approves noncompetitive procurement under § 31.36(d)(4) for reasons other than simply using the same individual or firm that provided facilities planning or design services for the project; or

(iii) The grantee attests that:

(A) The initial request for proposals clearly stated the possibility that the firm or individual selected could be awarded a subagreement for services during construction; and

(B) The firm or individual was selected for facilities planning or design services in accordance with procedures specified in this section.

(C) No employee, officer or agent of the grantee, any member of their immediate families, or their partners have financial or other interest in the firm selected for award; and

(D) None of the grantee's officers, employees or agents solicited or accepted gratuities, favors or anything of monetary value from contractors or other parties to subagreements.

(2) However, if the grantee uses the procedures in paragraph (k)(1) of this section to retain an architect or engineer, any Step 3 subagreements between the architect or engineer and the grantee must meet all of the other procurement provisions in § 31.36.

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8075, Mar. 11, 1988]

§ 31.37 Subgrants.

(a) *States.* States shall follow state law and procedures when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. States shall:

(1) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations;

(2) Ensure that subgrantees are aware of requirements imposed upon them by Federal statute and regulation;

(3) Ensure that a provision for compliance with § 31.42 is placed in every cost reimbursement subgrant; and

(4) Conform any advances of grant funds to subgrantees substantially to the same standards of timing and amount that apply to cash advances by Federal agencies.

(b) *All other grantees.* All other grantees shall follow the provisions of this part which are applicable to awarding agencies when awarding and administering subgrants (whether on a cost reimbursement or fixed amount basis) of financial assistance to local and Indian tribal governments. Grantees shall:

(1) Ensure that every subgrant includes a provision for compliance with this part;

(2) Ensure that every subgrant includes any clauses required by Federal statute and executive orders and their implementing regulations; and

(3) Ensure that subgrantees are aware of requirements imposed upon them by Federal statutes and regulations.

(c) *Exceptions.* By their own terms, certain provisions of this part do not apply to the award and administration of subgrants:

(1) Section 31.10;

(2) Section 31.11;

(3) The letter-of-credit procedures specified in Treasury Regulations at 31 CFR part 205, cited in § 31.21; and

(4) Section 31.50.

Reports, Records, Retention, and Enforcement

§ 31.40 Monitoring and reporting program performance.

(a) *Monitoring by grantees.* Grantees are responsible for managing the day-to-day operations of grant and subgrant supported activities. Grantees must monitor grant and subgrant supported activities to assure compliance with applicable Federal requirements and that performance goals are being achieved. Grantee monitoring must cover each program, function or activity.

(b) *Nonconstruction performance reports.* The Federal agency may, if it decides that performance information available from subsequent applications

contains sufficient information to meet its programmatic needs, require the grantee to submit a performance report only upon expiration or termination of grant support. Unless waived by the Federal agency this report will be due on the same date as the final Financial Status Report.

(1) Grantees shall submit annual performance reports unless the awarding agency requires quarterly or semi-annual reports. However, performance reports will not be required more frequently than quarterly. Annual reports shall be due 90 days after the grant year, quarterly or semi-annual reports shall be due 30 days after the reporting period. The final performance report will be due 90 days after the expiration or termination of grant support. If a justified request is submitted by a grantee, the Federal agency may extend the due date for any performance report. Additionally, requirements for unnecessary performance reports may be waived by the Federal agency.

(2) Performance reports will contain, for each grant, brief information on the following:

(i) A comparison of actual accomplishments to the objectives established for the period. Where the output of the project can be quantified, a computation of the cost per unit of output may be required if that information will be useful.

(ii) The reasons for slippage if established objectives were not met.

(iii) Additional pertinent information including, when appropriate, analysis and explanation of cost overruns or high unit costs.

(3) Grantees will not be required to submit more than the original and two copies of performance reports.

(4) Grantees will adhere to the standards in this section in prescribing performance reporting requirements for subgrantees.

(c) *Construction performance reports.* For the most part, on-site technical inspections and certified percentage-of-completion data are relied on heavily by Federal agencies to monitor progress under construction grants and subgrants. The Federal agency will require additional formal performance reports only when considered necessary, and never more frequently than quarterly.

(d) *Significant developments.* Events may occur between the scheduled performance reporting dates which have significant impact upon the grant or subgrant supported activity. In such cases, the grantee must inform the Federal agency as soon as the following types of conditions become known:

(1) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(2) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

(e) Federal agencies may make site visits as warranted by program needs.

(f) *Waivers, extensions.* (1) Federal agencies may waive any performance report required by this part if not needed.

(2) The grantee may waive any performance report from a subgrantee when not needed. The grantee may extend the due date for any performance report from a subgrantee if the grantee will still be able to meet its performance reporting obligations to the Federal agency.

§ 31.41 Financial Reporting.

(a) *General.* (1) Except as provided in paragraphs (a) (2) and (5) of this section, grantees will use only the forms specified in paragraphs (a) through (e) of this section, and such supplementary or other forms as may from time to time be authorized by OMB, for:

(i) Submitting financial reports to Federal agencies, or

(ii) Requesting advances or reimbursements when letters of credit are not used.

(2) Grantees need not apply the forms prescribed in this section in dealing with their subgrantees. However, grantees shall not impose more burdensome requirements on subgrantees.

(3) Grantees shall follow all applicable standard and supplemental Federal agency instructions approved by OMB to the extend required under the Paperwork Reduction Act of 1980 for use in connection with forms specified in paragraphs (b) through (e) of this section. Federal agencies may issue substantive supplementary instructions only with the approval of OMB. Federal agencies may shade out or instruct the grantee to disregard any line item that the Federal agency finds unnecessary for its decisionmaking purposes.

(4) Grantees will not be required to submit more than the original and two copies of forms required under this part.

(5) Federal agencies may provide computer outputs to grantees to expedite or contribute to the accuracy of reporting. Federal agencies may accept the required information from grantees in machine usable format or computer printouts instead of prescribed forms.

(6) Federal agencies may waive any report required by this section if not needed.

(7) Federal agencies may extend the due date of any financial report upon receiving a justified request from a grantee.

(b) *Financial Status Report*—(1) *Form.* Grantees will use Standard Form 269 or 269A, Financial Status Report, to report the status of funds for all nonconstruction grants and for construction grants when required in accordance with § 31.41(e)(2)(iii).

(2) *Accounting basis.* Each grantee will report program outlays and program income on a cash or accrual basis as prescribed by the awarding agency. If the Federal agency requires accrual information and the grantee's accounting records are not normally kept on the accural basis, the grantee shall not be required to convert its accounting system but shall develop such accrual information through and analysis of the documentation on hand.

(3) *Frequency.* The Federal agency may prescribe the frequency of the report for each project or program. However, the report will not be required more frequently than quarterly. If the Federal agency does not specify the frequency of the report, it will be submitted annually. A final report will be required upon expiration or termination of grant support.

(4) *Due date.* When reports are required on a quarterly or semiannual basis, they will be due 30 days after the reporting period. When required on an annual basis, they will be due 90 days after the grant year. Final reports will be due 90 days after the expiration or termination of grant support.

(c) *Federal Cash Transactions Report*—(1) *Form.* (i) For grants paid by letter or credit, Treasury check advances or electronic transfer of funds, the grantee will submit the Standard Form 272, Federal Cash Transactions Report, and when necessary, its continuation sheet, Standard Form 272a, unless the terms of the award exempt the grantee from this requirement.

(ii) These reports will be used by the Federal agency to monitor cash advanced to grantees and to obtain disbursement or outlay information for each grant from grantees. The format of the report may be adapted as appropriate when reporting is to be accomplished with the assistance of automatic data processing equipment provided that the information to be submitted is not changed in substance.

(2) *Forecasts of Federal cash requirements.* Forecasts of Federal cash requirements may be required in the "Remarks" section of the report.

(3) *Cash in hands of subgrantees.* When considered necessary and feasible by the Federal agency, grantees may be required to report the amount of cash advances in excess of three days' needs in the hands of their subgrantees or contractors and to provide short narrative explanations of actions taken by the grantee to reduce the excess balances.

(4) *Frequency and due date.* Grantees must submit the report no later than 15 working days following the end of each quarter. However, where an advance either by letter of credit or electronic transfer of funds is authorized at an annualized rate of one million dollars or more, the Federal agency may require the report to be

submitted within 15 working days following the end of each month.

(d) *Request for advance or reimbursement*—(1) *Advance payments.* Requests for Treasury check advance payments will be submitted on Standard Form 270, Request for Advance or Reimbursement. (This form will not be used for drawdowns under a letter of credit, electronic funds transfer or when Treasury check advance payments are made to the grantee automatically on a predetermined basis.)

(2) *Reimbursements.* Requests for reimbursement under nonconstruction grants will also be submitted on Standard Form 270. (For reimbursement requests under construction grants, see paragraph (e)(1) of this section.)

(3) The frequency for submitting payment requests is treated in § 31.41(b)(3).

(e) *Outlay report and request for reimbursement for construction programs.* (1) Grants that support construction activities paid by reimbursement method.

(i) Requests for reimbursement under construction grants will be submitted on Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. Federal agencies may, however, prescribe the Request for Advance or Reimbursement form, specified in § 31.41(d), instead of this form.

(ii) The frequency for submitting reimbursement requests is treated in § 31.41(b)(3).

(2) *Grants that support construction activities paid by letter of credit, electronic funds transfer or Treasury check advance.* (i) When a construction grant is paid by letter of credit, electronic funds transfer or Treasury check advances, the grantee will report its outlays to the Federal agency using Standard Form 271, Outlay Report and Request for Reimbursement for Construction Programs. The Federal agency will provide any necessary special instruction. However, frequency and due date shall be governed by § 31.41(b) (3) and (4).

(ii) When a construction grant is paid by Treasury check advances based on periodic requests from the grantee, the advances will be requested on the form specified in § 31.41(d).

(iii) The Federal agency may substitute the Financial Status Report specified in § 31.41(b) for the Outlay Report and Request for Reimbursement for Construction Programs.

(3) *Accounting basis.* The accounting basis for the Outlay Report and Request for Reimbursement for Construction Programs shall be governed by § 31.41(b)(2).

§ 31.42 Retention and access requirements for records.

(a) *Applicability.* (1) This section applies to all financial and programmatic records, supporting documents, statistical records, and other records of grantees or subgrantees which are:

(i) Required to be maintained by the terms of this part, program regulations or the grant agreement, or

(ii) Otherwise reasonably considered as pertinent to program regulations or the grant agreement.

(2) This section does not apply to records maintained by contractors or subcontractors. For a requirement to place a provision concerning records in certain kinds of contracts, see § 31.36(i)(10).

(b) *Length of retention period.* (1) Except as otherwise provided, records must be retained for three years from the starting date specified in paragraph (c) of this section.

(2) If any litigation, claim, negotiation, audit or other action involving the records has been started before the expiration of the 3-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular 3-year period, whichever is later.

(3) To avoid duplicate recordkeeping, awarding agencies may make special arrangements with grantees and subgrantees to retain any records which are continuously needed for joint use. The awarding agency will request transfer of records to its custody when it determines that the records possess long-term retention value. When the records are transferred to or maintained by the Federal agency, the 3-year retention requirement is not applicable to the grantee or subgrantee.

(c) *Starting date of retention period*—(1) *General.* When grant support is continued or renewed at annual or other intervals, the retention period for the records of each funding period starts on the day the grantee or subgrantee submits to the awarding agency its single or last expenditure report for that period. However, if grant support is continued or renewed quarterly, the retention period for each year's records starts on the day the grantee submits its expenditure report for the last quarter of the Federal fiscal year. In all other cases, the retention period starts on the day the grantee submits its final expenditure report. If an expenditure report has been waived, the retention period starts on the day the report would have been due.

(2) *Real property and equipment records.* The retention period for real property and equipment records starts from the date of the disposition or replacement or transfer at the direction of the awarding agency.

(3) *Records for income transactions after grant or subgrant support.* In some cases grantees must report income after the period of grant support. Where there is such a requirement, the retention period for the records pertaining to the earning of the income starts from the end of the grantee's fiscal year in which the income is earned.

(4) *Indirect cost rate proposals, cost allocations plans, etc.* This paragraph applies to the following types of documents, and their supporting records: indirect cost rate computations or proposals, cost allocation plans, and any similar accounting computations of the rate at which a particular group of costs is chargeable (such as computer usage chargeback rates or composite fringe benefit rates).

(i) *If submitted for negotiation.* If the proposal, plan, or other computation is required to be submitted to the Federal Government (or to the grantee) to form the basis for negotiation of the rate, then the 3-year retention period for its supporting records starts from the date of such submission.

(ii) *If not submitted for negotiation.* If the proposal, plan, or other computation is not required to be submitted to the Federal Government (or to the grantee) for negotiation purposes, then the 3-year retention period for the proposal plan, or computation and its supporting records starts from end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(d) *Substitution of microfilm.* Copies made by microfilming, photocopying, or similar methods may be substituted for the original records.

(e) *Access to records*—(1) *Records of grantees and subgrantees.* The awarding agency and the Comptroller General of the United States, or any of their authorized representatives, shall have the right of access to any pertinent books, documents, papers, or other records of grantees and subgrantees which are pertinent to the grant, in order to make audits, examinations, excerpts, and transcripts.

(2) *Expiration of right of access.* The rights of access in this section must not be limited to the required retention period but shall last as long as the records are retained.

(f) *Restrictions on public access.* The Federal Freedom of Information Act (5 U.S.C. 552) does not apply to records Unless required by Federal, State, or local law, grantees and subgrantees are not required to permit public access to their records.

§ 31.43 Enforcement.

(a) *Remedies for noncompliance.* If a grantee or subgrantee materially fails to comply with any term of an award, whether stated in a Federal statute or regulation, an assurance, in a State plan or application, a notice of award, or elsewhere, the awarding agency may take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the grantee or subgrantee or more severe enforcement action by the awarding agency,

(2) Disallow (that is, deny both use of funds and matching credit for) all or part of the cost of the activity or action not in compliance,

(3) Wholly or partly suspend or terminate the current award for the grantee's or subgrantee's program,

(i) EPA can also wholly or partly annul the current award for the grantee's or subgrantee's program,

(4) Withhold further awards for the program, or

(5) Take other remedies that may be legally available.

(b) *Hearings, appeals.* In taking an enforcement action, the awarding agency will provide the grantee or subgrantee an opportunity for such hearing, appeal, or other administrative proceeding to which the grantee or subgrantee is entitled under any statute or regulation applicable to the action involved.

(c) *Effects of suspension and termination.* Costs of grantee or subgrantee resulting from obligations incurred by the grantee or subgrantee during a suspension or after termination of an award are not allowable unless the awarding agency expressly authorizes them in the notice of suspension or termination or subsequently. Other grantee or subgrantee costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if:

(1) The costs result from obligations which were properly incurred by the grantee or subgrantee before the effective date of suspension or termination, are not in anticipation of it, and, in the case of a termination, are noncancellable, and,

(2) The costs would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to Debarment and Suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude grantee or subgrantee from being subject to "Debarment and Suspension" under E.O. 12549 (see § 31.35).

[53 FR 8068 and 8087, Mar. 11, 1988, and amended at 53 FR 8076, Mar. 11, 1988]

§ 31.44 Termination for convenience.

Except as provided in § 31.43 awards may be terminated in whole or in part only as follows:

(a) By the awarding agency with the consent of the grantee or subgrantee in which case the two parties shall agree upon the termination conditions, including the effective date and in the case of partial termination, the portion to be terminated, or

(b) By the grantee or subgrantee upon written notification to the awarding agency, setting forth the reasons for such termination, the effective date, and in the case of partial termination, the portion to be terminated. However, if, in the case of a partial termination, the awarding agency determines that the remaining portion of the award will not accomplish the purposes for which the award was made, the awarding agency may terminate the award in its entirety under either § 31.43 or paragraph (a) of this section.

§ 31.45 Quality assurance.

If the grantee's project involves environmentally related measurements or data generation, the grantee shall develop and implement quality assurance practices consisting of policies, procedures, specifications, standards, and documentation sufficient to produce data of quality adequate to meet project objectives and to minimize loss of data due to out-of-control conditions or malfunctions.

[53 FR 8076, Mar. 11, 1988]

Subpart D—After-The-Grant Requirements

§ 31.50 Closeout.

(a) *General.* The Federal agency will close out the award when it determines that all applicable administrative actions and all required work of the grant has been completed.

(b) *Reports.* Within 90 days after the expiration or termination of the grant, the grantee must submit all financial, performance, and other reports required as a condition of the grant. Upon request by the grantee, Federal agencies may extend this timeframe. These may include but are not limited to:

(1) *Final performance or progress report.*

(2) *Financial Status Report (SF 269) or Outlay Report and Request for Reimbursement for Construction Programs (SF-271) (as applicable.)*

(3) *Final request for payment (SF-270) (if applicable).*

(4) *Invention disclosure (if applicable).*

(5) *Federally-owned property report:* In accordance with § 31.32(f), a grantee must submit an inventory of all federally owned property (as distinct from property acquired with grant funds) for which it is accountable and request disposition instructions from the Federal agency of property no longer needed.

(c) *Cost adjustment.* The Federal agency will, within 90 days after receipt of reports in paragraph (b) of this section, make upward or downward adjustments to the allowable costs.

(d) *Cash adjustments.* (1) The Federal agency will make prompt payment to the grantee for allowable reimbursable costs.

(2) The grantee must immediately refund to the Federal agency any balance of unobligated (unencumbered) cash advanced that is not authorized to be retained for use on other grants.

§ 31.51 Later disallowances and adjustments.

The closeout of a grant does not affect:

(a) The Federal agency's right to disallow costs and recover funds on the basis of a later audit or other review;

(b) The grantee's obligation to return any funds due as a result of later refunds, corrections, or other transactions;

(c) Records retention as required in § 31.42;

(d) Property management requirements in §§ 31.31 and 31.32; and

(e) Audit requirements in § 31.26.

§ 31.52 Collection of amounts due.

(a) Any funds paid to a grantee in excess of the amount to which the grantee is finally determined to be entitled under the terms of the award constitute a debt to the Federal Government. If not paid within a reasonable period after demand, the Federal agency may reduce the debt by:

(1) Making an adminstrative offset against other requests for reimbursements,

(2) Withholding advance payments otherwise due to the grantee, or

(3) Other action permitted by law.

(b) Except where otherwise provided by statutes or regulations, the Federal agency will charge interest on an overdue debt in accordance with the Federal Claims Collection Standards (4 CFR Ch. II). The date from which interest is computed is not extended by litigation or the filing of any form of appeal.

Subpart E—Entitlement [Reserved]

Subpart F—Disputes

SOURCE: 53 FR 8076, Mar. 11, 1988, unless otherwise noted.

§ 31.70 Disputes.

(a) Disagreements should be resolved at the lowest level possible.

(b) If an agreement cannot be reached, the EPA disputes decision official will provide a written final decision. The EPA disputes decision official is the individual designated by the award official to resolve disputes concerning assistance agreements.

(c) The disputes decision official's decision will constitute final agency action unless a request for review is filed by registered mail, return receipt requested, within 30 calendar days of the date of the decision.

(1) For final decisions issued by an EPA disputes decision official at Headquarters, the request for review shall be filed with the Assistant Administrator responsible for the assistance program.

(2) For final decisions issued by a Regional disputes decision official, the request for review shall be filed with the Regional Administrator. If the Regional Administrator issued the final decision, the request for reconsideration shall be filed with the Regional Administrator.

(d) The request shall include:

(1) A copy of the EPA disputes decision official's final decision;

(2) A statement of the amount in dispute;

(3) A description of the issues involved; and

(4) A concise statement of the objections to the final decision.

(e) The disputant(s) may be represented by counsel and may submit documentary evidence and briefs for inclusion in a written record.

(f) Disputants are entitled to an informal conference with EPA officials.

(g) Disputants are entitled to a written decision from the appropriate Regional or Assistant Administrator.

(h) A decision by the Assistant Administrator to confirm the final decision of a Headquarters disputes decision official will constitute the final Agency action.

(i) A decision by the Regional Administrator to confirm the Regional disputes decision official's decision will constitute the final Agency action. However, a petition for discretionary review by the Assistant Administrator responsible for the assistance program may be filed within 30 calendar days of the Regional Administrator's decision. The petition shall be sent to the Assistant Administrator by registered mail, return receipt requested, and shall include:

(1) A copy of the Regional Administrator's decision; and

(2) A concise statement of the objections to the decision.

(j) If the Assistant Administrator decides not to review the Regional Administrator's decision, the Assistant Administrator will advise the disputant(s) in writing that the Regional Administrator's decision remains the final Agency action.

(k) If the Assistant Administrator decides to review the Regional Administrator's decision, the review will generally be limited to the written record on which the Regional Administrator's decision was based. The Assistant Administrator may allow the disputant(s) to submit briefs in support of the petition for review and may provide an opportunity for an informal conference in order to clarify technical or legal issues. After reviewing the Regional Administrator's decision, the Assistant Administrator will issue a written decision which will then become the final Agency action.

(l) Reviews may not be requested of:

(1) Decisions on requests for exceptions under § 31.6;

(2) Bid protest decisions under § 31.36(b)(12);

(3) National Environmental Policy Act decisions under part 6;

(4) Advanced wastewater treatment decisions of the Administrator; and

(5) Policy decisions of the EPA Audit Resolution Board.

Appendix A—Part 31 Audit Requirements for State and Local Government Recipients

EXECUTIVE OFFICE OF THE PRESIDENT

Office of Management and Budget

Circular No. A-128

April 12, 1985

To the Heads of Executive Departments and Establishments.

Subject: Audits of State and Local Governments.

1. *Purpose.* This Circular is issued pursuant to the Single Audit Act of 1984, Pub. L. 98-502. It establishes audit requirements for State and local governments that receive Federal aid, and defines Federal responsibilities for implementing and monitoring those requirements.

2. *Supersession.* The Circular supersedes Attachment P, "Audit Requirements," of Circular A-102, "Uniform requirements for grants to State and local governments."

3. *Background.* The Single Audit Act builds upon earlier efforts to improve audits of Federal aid programs. The Act requires State or local governments that receive $100,000 or more a year in Federal funds to have an audit made for that year. Section 7505 of the Act requires the Director of the Office of Management and Budget to prescribe policies, procedures and guidelines to implement the Act. It specifies that the Director shall designate "cognizant" Federal agencies, determine criteria for making appropriate charges to Federal programs for the cost of audits, and provide procedures to assure that small firms or firms owned and controlled by disadvantaged individuals have the opportunity to participate in contracts for single audits.

4. *Policy.* The Single Audit Act requires the following:

a. State or local governments that receive $100,000 or more a year in Federal financial assistance shall have an audit made in accordance with this Circular.

b. State or local governments that receive between $25,000 and $100,000 a year shall have an audit made in accordance with this Circular, or in accordance with Federal laws and regulations governing the programs they participate in.

c. State or local governments that receive less than $25,000 a year shall be exempt from compliance with the Act and other Federal audit requirements. These State and local governments shall be governed by audit requirements prescribed by State or local law or regulation.

d. Nothing in this paragraph exempts State or local governments from maintaining records of Federal financial assistance or from providing access to such records to Federal agencies, as provided for in Federal law or in Circular A-102, "Uniform requirements for grants to State or local governments."

5. *Definitions.* For the purposes of this Circular the following definitions from the Single Audit Act apply:

a. *Cognizant agency* means the Federal agency assigned by the Office of Management and Budget to carry out the responsibilities described in paragraph 11 of this Circular.

b. *Federal financial assistance* means assistance provided by a Federal agency in the form of grants, contracts, cooperative agreements, loans, loan guarantees, property, interest subsidies, insurance, or direct appropriations, but does not include direct Federal cash assistance to individuals. It includes awards received directly from Federal agencies, or indirectly through other units of State and local governments.

c. *Federal agency* has the same meaning as the term *agency* in section 551(1) of Title 5, United States Code.

d. *Generally accepted accounting principles* has the meaning specified in the generally accepted government auditing standards.

e. *Generally accepted government auditing standards* means the *Standards for Audit of Government Organizations, Programs, Activities, and Functions,* developed by the Comptroller General, dated February 27, 1981.

f. *Independent auditor* means:

(1) A State or local government auditor who meets the independence standards specified in generally accepted government auditing standards; or

(2) A public accountant who meets such independence standards.

g. *Internal controls* means the plan of organization and methods and procedures adopted by management to ensure that:

(1) Resource use is consistent with laws, regulations, and policies;

(2) Resources are safeguarded against waste, loss, and misuse; and

(3) Reliable data are obtained, maintained, and fairly disclosed in reports.

h. *Indian tribe* means any Indian tribe, band, nations, or other organized group or community, including any Alaskan Native village or regional or village corporations (as defined in, or established under, the Alaskan Native Claims Settlement Act) that is recognized by the United States as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

i. *Local government* means any unit of local government within a State, including a county, a borough, municipality, city, town, township, parish, local public authority, special district, school district, intrastate district, council of governments, and any other instrumentality of local government.

j. *Major Federal Assistance Program,* as defined by Pub. L. 98-502, is described in the Attachment to this Circular.

k. *Public accountants* means those individuals who meet the qualification standards included in generally accepted government auditing standards for personnel performing government audits.

l. *State* means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Trust Territory of the Pacific Islands, any instrumentality thereof, and any multi-State, regional, or interstate entity that has governmental functions and any Indian tribe.

m. *Subrecipient* means any person or government department, agency, or establishment that receives Federal financial assistance to carry out a program through a State or local government, but does not include an individual that is a beneficiary of such a program. A subrecipient may also be a direct recipient of Federal financial assistance.

6. *Scope of audit.* The Single Audit Act provides that:

a. The audit shall be made by an independent auditor in accordance with generally accepted government auditing standards covering financial and compliance audits.

b. The audit shall cover the entire operations of a State or local government or, at the option of that government, it may cover departments, agencies or establishments that received, expended, or otherwise administered Federal financial assistance during the year. However, if a State or local government receives $25,000 or more in General Revenue Sharing Funds in a fiscal year, it shall have an audit of its entire operations. A series of audits of individual departments, agencies, and establishments for the same fiscal year may be considered a single audit.

c. Public hospitals and public colleges and universities may be excluded from State and local audits and the requirements of this Circular. However, if such entities are excluded, audits of these entities shall be made in accordance with statutory requirements and the provisions of Circular A-110. "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations."

d. The auditor shall determine whether:

(1) The financial statements of the government, department, agency or establishment present fairly its financial position and the results of its financial operations in accordance with generally accepted accounting principles:

(2) The organization has internal accounting and other control systems to provide reasonable assurance that it is managing Federal financial assistance programs in compliance with applicable laws and regulations; and

(3) The organization has complied with laws and regulations that may have material effect on its financial statements and on each major Federal assistance program.

7. *Frequency of audit.* Audits shall be made annually unless the State or local government has, by January 1, 1987, a constitutional or statutory requirement for less frequent audits. For those governments, the cognizant agency shall permit biennial audits, covering both years, if the government so requests. It shall also honor requests for biennial audits by governments that have an administrative policy calling for audits less frequent than annual, but only for fiscal years beginning before January 1, 1987.

8. *Internal control and compliance reviews.* The Single Audit Act requires that the independent auditor determine and report on whether the organization has internal control systems to provide reasonable assurance that it is managing Federal assistance programs in compliance with applicable laws and regulations.

a. *Internal control review.* In order to provide this assurance the auditor must make a study and evaluation of internal control systems used in administering Federal assistance programs. The study and evaluation must be made whether or not the auditor intends to place reliance on such systems. As part of this review, the auditor shall:

(1) Test whether these internal control systems are functioning in accordance with prescribed procedures.

(2) Examine the recipient's system for monitoring subrecipients and obtaining and acting on subrecipient audit reports.

b. *Compliance review.* The law also requires the auditor to determine whether the organization has complied with laws and regulations that may have a material effect on each major Federal assistance program.

(1) In order to determine which major programs are to be tested for compliance, State and local governments shall identify in their accounts all Federal funds received and expended and the programs under which they were received. This shall include funds received directly from Federal agencies and through other State and local governments.

(2) The review must include the selection and testing of a representative number of charges from each major Federal assistance program. The selection and testing of transactions shall be based on the auditor's professional judgment considering such factors as the amount of expenditures for the program and the individual awards; the newness of the program or changes in its conditions; prior experience with the program, particularly as revealed in audits and other evaluations (e.g., inspections program reviews); the extent to which the program is carried out through subrecipients; the extent to which the program contracts for goods or services; the level to which the program is already subject to program reviews or other forms of independent oversight; the adequacy of the controls for ensuring compliance; the expectation of adherence or lack of adherence to the applicable laws and regulations; and the potential impact of adverse findings.

(a) In making the test of transactions, the auditor shall determine whether.

—The amounts reported as expenditures were for allowable services, and

—The records show that those who received services or benefits were eligible to receive them.

(b) In addition to transaction testing, the auditor shall determine whether:

—Matching requirements, levels of effort and earmarking limitations were met,

—Federal financial reports and claims for advances and reimbursements contain information that is supported by the books and records from which the basic financial statements have been prepared, and

—Amounts claimed or used for matching were determined in accordance with OMB Circular A-87, "Cost principles for State and local governments," and Attachment F of Circular A-102, "Uniform requirements for grants to State and local governments."

(c) The principal compliance requirements of the largest Federal aid programs may be ascertained by referring to the *Compliance Supplement for Single Audits of State and Local Governments*, issued by OMB and available from the Government Printing Office. For those programs not covered in the Compliance Supplement, the auditor may ascertain compliance requirements by

researching the statutes, regulations, and agreements governing individual programs.

(3) Transactions related to other Federal assistance programs that are selected in connection with examinations of financial statements and evaluations of internal controls shall be tested for compliance with Federal laws and regulations that apply to such transactions.

9. *Subrecipients.* State or local governments that receive Federal financial assistance and provide $25,000 or more of it in a fiscal year to a subrecipient shall:

a. Determine whether State or local subrecipients have met the audit requirements of this Circular and whether subrecipients covered by Circular A-110, "Uniform requirements for grants to universities, hospitals, and other nonprofit organizations," have met that requirement;

b. Determine whether the subrecipient spent Federal assistance funds provided in accordance with applicable laws and regulations. This may be accomplished by reviewing an audit of the subrecipient made in accordance with this Circular, Circular A-110, or through other means (e.g., program reviews) if the subrecipient has not yet had such an audit;

c. Ensure that appropriate corrective action is taken within six months after receipt of the audit report in instances of noncompliance with Federal laws and regulations;

d. Consider whether subrecipient audits necessitate adjustment of the recipient's own records; and

e. Require each subrecipient to permit independent auditors to have access to the records and financial statements as necessary to comply with this Circular.

10. *Relation to other audit requirements.* The Single Audit Act provides that an audit made in accordance with this Circular shall be in lieu of any financial or financial compliance audit required under individual Federal assistance programs. To the extent that a single audit provides Federal agencies with information and assurance they need to carry out their overall responsibilities, they shall rely upon and use such information. However, a Federal agency shall make any additional audits which are necessary to carry out its responsibilities under Federal law and regulation. Any additional Federal audit effort shall be planned and carried out in such a way as to avoid duplication.

a. The provisions of this Circular do not limit the authority of Federal agencies to make, or contract for audits and evaluations of Federal financial assistance programs, nor do they limit the authority of any Federal agency Inspector General or other Federal audit official.

b. The provisions of this Circular do not authorize any State or local government or subrecipient thereof to constrain Federal agencies, in any manner, from carrying out additional audits.

c. A Federal agency that makes or contracts for audits in additon to the audits made by recipients pursuant to this Circular shall, consistent with other applicable laws and regulations, arrange for funding the cost of such additional audits. Such additional audits include economy and efficiency audits, program results audits, and program evaluations.

11. *Cognizant agency responsibilities.* The Single Audit Act provides for congnizant Federal agencies to oversee the implementation of this Circular.

a. The Office of Management and Budget will assign cognizant agencies for States and their subdivisions and larger local governments and their subdivisions. Other Federal agencies may participate with an assigned cognizant agency, in order to fulfill the cognizant responsibilities. Smaller governments not assigned a cognizant agency will be under the general oversight of the Federal agency that provides them the most funds whether directly or indirectly.

b. A cognizant agency shall have the following responsibilities:

(1) Ensure that audits are made and reports are received in a timely manner and in accordance with the requirements of this Circular.

(2) Provide technical advice and liaison to State and local governments and independent auditors.

(3) Obtain or make quality control reviews of selected audits made by non-Federal audit organizations, and provide the results, when appropriate, to other interested organizations.

(4) Promptly inform other affected Federal agencies and appropriate Federal law enforcement officials of any reported illegal acts or irregularities. They should also inform State or local law enforcement and prosecuting authorities, if not advised by the recipient, of any violation of law within their jurisdiction.

(5) Advise the recipient of audits that have been found not to have met the requirements set forth in this Circular. In such instances, the recipient will be expected to work with the auditor to take corrective action. If corrective actionis not taken, the cognizant agency shall notify the recipient and Federal awarding agencies of the facts and make recommendations for follow-up actfon. Major inadequacies or repetitive substandard performance of independent auditors shall be referred to appropriate professional bodies for disciplinary action.

(6) Coordinate, to the extent practicable, audits made by or for Federal agencies that are in addition to the audits made pursuant to this Circular, so that the additional audits build up such audits.

(7) Oversee the resolution of audit findings that affect the programs of more than one agency.

12. *Illegal acts or irregularities.* If the auditor becomes aware of illegal acts or other irregularities, prompt notice shall be given to recipient management officials above the level of involvement. (See also program 13(a)(3) below for the auditor's reporting responsibilities.) The recipient, in turn, shall promptly notify the cognizant agency of the illegal acts or irregularities and of proposed and actual actions, if any. Illegal acts and irregularities include such matters as conflicts of interest, falsification of records or reports, and misappropriations of funds or other assets.

13. *Audit Reports.* Audit reports must be prepared at the completion of the audit. Reports serve many needs of State and local governments as well as meeting the requirements of the Single Audit Act.

a. The audit report shall state that the audit was made in accordance with the provisions of this Circular. The report shall be made up of at least:

(1) The auditor's report on financial statements and on a schedule of Federal assistance; the financial statements; and a schedule of Federal assistance, showing the total expenditures for each Federal assitance program as identified in the *Catalog of Federal Domestic Assistance.* Federal programs or grants that have not been assigned a catalog number shall be identified under the caption "other Federal assistance."

(2) The author's report on the study and evaluation of internal control systems must identify the organization's significant internal accounting controls, and those controls designed to provide reasonable assurance that Federal programs are being managed in compliance with laws and regulations. It must also identify the controls that were evaluated, the controls that were not evaluated, and the material weaknesses identified as a result of the evaluation.

(3) The auditor's report on compliance containing:

—A statement of positive assurance with respect to those items tested for compliance, including compliance with law and regulations pertaining to financial reports and claims for advances and reimbursements;
—Negative assurance on those items not tested;
—A summary of all instances of noncompliance; and
—An identification of total amounts questioned, if any, for each Federal assistance award, as a result of noncompliance.

b. The three parts of the audit report may be bound into a single report, or presented at the same time as separate documents.

c. All fraud abuse, or illegal acts or indications of such acts, including all questioned costs found as the result of these acts that auditors become aware of, should normally be covered in a separate written report submitted in accordance with paragraph 13f.

d. In addition to the audit report, the recipient shall provide comments on the findings and recommendations in the report, including a plan for corrective action taken or planned and comments on the status of corrective action taken on prior findings. If corrective action is not necessary, a statement describing the reason it is not should accompany the audit report.

e. The reports shall be made available by the State or local government for public inspection within 30 days after the completion of the audit.

f. In accordance with generally accepted government audit standards, reports shall be submitted by the auditor to the organization audited and to those requiring or arranging for the audit. In addition, the recipient shall submit copies of the reports to each Federal department or agency that provided Federal assistance funds to the recipient. Subrecipients shall submit copies to recipients that provided them Federal assistance funds. The reports shall be sent within 30 days after the completion of the audit, but no later than one year after the end of the audit period unless a longer period is agreed to with the cognizant agency.

g. Recipients of more than $100,000 in Federal funds shall submit one copy of the audit report within 30 days after issuance to a central clearinghouse to be designated by the Office of Management and Budget. The clearinghouse will keep completed audits on file and follow up with State and local governments that have not submitted required audit reports.

h. Recipients shall keep audit reports on file for three years from their issuance.

14. *Audit Resolution.* As provided in paragraph 11, the cognizant agency shall be responsible for monitoring the resolution of audit findings that affect the programs of more than one Federal agency. Resolution of findings that relate to the programs of a single Federal agency will be the responsibility of the recipient and that agency. Alternate arrangements may be made on a case-by-case basis by agreement among the agencies concerned.

Resolution shall be made within six months after receipt of the report by the Federal departments and agencies. Corrective action should proceed as rapidly as possible.

15. *Audit workpapers and reports.* Workpapers and reports shall be retained for a minimum of three years from the date of the audit report, unless the auditor is notified in writing by the cognizant agency to extend the retention period. Audit work-

best copy available

papers shall be made available upon request to the cognizant agency or its designee or the General Accounting Office, at the completion of the audit.

16. *Audit Costs.* The cost of audits made in accordance with the provisions of this Circular are allowable charges to Federal assistance programs.

a. The charges may be considered a direct cost or an allocated indirect cost, determined in accordance with the provision of Circular A-87, "Cost principles for State and local governments."

b. Generally, the percentage of costs charged to Federal assistance programs for a single audit shall not exceed the percentage that Federal funds expended represent of total funds expended by the recipient during the fiscal year. The percentage may be exceeded, however, if appropriate documentation demonstrates higher actual cost.

17. *Sanctions.* The Single Audit Act provides that no cost may be charged to Federal assistance programs for audits required by the Act that are not made in accordance with this Circular. In cases of continued inability or unwillingness to have a proper audit, Federal agencies must consider other appropriate sanctions including:

—Withholding a percentage of assistance payments until the audit its completed satisfactorily,
—Withholding' or disallowing overhead costs, and
—Suspending the Federal assistance agreement until the audit is made.

18. *Auditor Selection.* In arranging for audit services State and local governments shall follow the procurement standards prescribed by Attachment O of Circular A-102, "Uniform requirements for grants to State and local governments." The standards provide that while recipients are encouraged to enter into intergovernmental agreements for audit and other services, analysis should be made to determine whether it would be more economical to purchase the services from private firms. In instances where use of such intergovernmental agreements are required by State statutes (e.g., audit services) these statutes will take precedence.

19. *Small and Minority Audit Firms.* Small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals shall have the maximum practicable opportunity to participate in contracts awarded to fulfill the requirements of this Circular. Recipients of Federal assistance shall take the following steps to further this goal:

a. Assure that small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals are used to the fullest extent practicable.

b. Make information on forthcoming opportunities available and arrange timeframes for the audit so as to encourage and facilitate participation by small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

c. Consider in the contract process whether firms competing for larger audits intend to subcontract with small audit firms and audit firms owned and controlled by socially and economically disadvantaged individuals.

d. Encourage contracting with small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals which have traditionally audited government programs and, in such cases where this is not possible, assure that these firms are given consideration for audit subcontracting opportunities.

e. Encourage contracting with consortiums of small audit firms as described in paragraph (a) above when a contract is too large for an individual small audit firm or audit firm owned and controlled by socially and economically disadvantaged individuals.

f. Use the services and assistance, as appropriate, of such organizations as the Small Business Administration in the solicitation and utilization of small audit firms or audit firms owned and controlled by socially and economically disadvantaged individuals.

20. *Reporting.* Each Federal agency will report to the Director of OMB on or before March 1, 1987, and annually thereafter on the effectiveness of State and local governments in carrying out the provisions of this Circular. The report must identify each State or local government or Indian tribe that, in the opinion of the agency, is failing to comply with the Circular.

21. *Regulations.* Each Federal agency shall include the provisions of this Circular in its regulations implementing the Single Audit Act.

22. *Effective date.* This Circular is effective upon publication and shall apply to fiscal years of State and local governments that begin after December 31, 1984. Earlier implementation is encouraged. However, until it is implemented, the audit provisions of Attachment P to Circular A-102 shall continue to be observed.

23. *Inquiries.* All questions or inquiries should be addressed to Financial Management Division, Office of Management and Budget, telephone number 202/395-3993.

24. *Sunset review date.* This Circular shall have an independent policy review to ascertain its effectiveness three years from the date of issuance.

DAVID A. STOCKMAN,
Director.

ATTACHMENT—CIRCULAR A-128

Definition of Major Program as Provided in Pub. L. 96-502

Major Federal Assistance Program, for State and local governments having Federal assistance expenditures between $100,000 and $100,000,000, means any program for which Federal expenditures during the applicable year exceed the larger of $308,000, or 3 percent of such total expenditures.

Where total expenditures of Federal assistance exceed $100,000,000, the following criteria apply:

Total expenditures of Federal financial assistance for all programs		Major Federal assistance program means any program that exceeds
More than	But less than	
$100 million	$1 billion	$3 million.
$1 billion	$2 billion	$4 million.
$2 billion	$3 billion	$7 million.
$3 billion	$4 billion	$10 million.
$4 billion	$5 billion	$13 million.
$5 billion	$6 billion	$16 million.
$6 billion	$7 billion	$19 million.
Over $7 billion		$20 million.

[51 FR 6353, Feb. 21, 1986. Redesignated at 53 FR 8076, Mar. 11, 1988]

PART 32—GOVERNMENTWIDE DEPARTMENT AND SUSPENSION (NONPROCUREMENT) AND GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (GRANTS)

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APPENDIX A TO PART 32—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

APPENDIX B TO PART 32—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, INELIGIBILITY AND VOLUNTARY EXCLUSION—LOWER-TIER COVERED TRANSACTION

APPENDIX C TO PART 32—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

AUTHORITY: E.O. 12549; Sec. 5151-5160 of the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, Title V, Subtitle D; 41 U.S.C. 701 *et seq.*); 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 300f, 4901, 6901, 7401, 9601 *et seq.*

SOURCE: 53 FR 19196, 19204, May 26, 1988, unless otherwise noted.

EDITORIAL NOTE: For nomenclature change see 53 FR 19196, May 26, 1988.

CROSS REFERENCE: See also Office of Management and Budget notice published at 55 FR 21679, May 25, 1990.

Subpart A—General

§ 32.100 Purpose.

(a) Executive Order 12549 provides that, to the extent permitted by law, Executive departments and agencies shall participate in a governmentwide system for nonprocurement debarment and suspension. A person who is debarred or suspended shall be excluded from Federal financial and nonfinancial assistance and benefits under Federal programs and activities. Debarment or suspension of a participant in a program by one agency shall have governmentwide effect.

(b) These regulations implement section 3 of Executive Order 12549 and the guidelines promulgated by the Office of Management and Budget under section 6 of the Executive Order by:

(1) Prescribing the programs and activities that are covered by the governmentwide system;

(2) Prescribing the governmentwide criteria and governmentwide minimum due process procedures that each agency shall use;

(3) Providing for the listing of debarred and suspended participants, participants declared ineligible (see definition of "ineligible" in § 32.105(i)), and participants who have voluntarily excluded themselves from participation in covered transactions

(4) Setting forth the consequences of a debarment, suspension, determination of ineligibility, or voluntary exclusion; and

(5) Offering such other guidance as necessary for the effective implementation and administration of the governmentwide system.

(c) Although these regulations cover the listing of ineligible participants and the effect of such listing, they do not prescribe policies and procedures governing declarations of ineligibility.

§ 32.105 Definitions.

(a) *Adequate evidence.* Information sufficient to support the reasonable belief that a particular act or omission has occurred.

(b) *Affiliate.* Persons are affiliates of each another if, directly or indirectly, either one controls or has the power to control the other, *or,* a third person controls or has the power to control both. Indicia of control include, but are not limited to: interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the suspension or debarment of a person which has the same or similar management, ownership, or principal employees as the suspended, debarred, ineligible, or voluntarily excluded person.

(c) *Agency.* Any executive department, military department or defense agency or other agency of the executive branch, excluding the independent regulatory agencies.

(d) *Civil judgment.* The disposition of a civil action by any court of competent jurisdiction, whether entered by verdict, decision, settlement, stipulation, or otherwise creating a civil liability for the wrongful acts complained of; or a final determination of liability under the Program Fraud Civil Remedies Act of 1988 (31 U.S.C. 3801–12).

(e) *Conviction.* A judgment of conviction of a criminal offense by any court of competent jurisdiction, whether entered upon a verdict or a plea, including a plea of nolo contendere.

(f) *Debarment.* An action taken by a debarring official in accordance with these regulations to exclude a person from participating in covered transactions. A person so excluded is "debarred."

(g) *Debarring official.* An official authorized to impose debarment. The debarring official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The Director, Grants Administration Division, is the authorized debarring official.

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(h) *Indictment.* Indictment for a criminal offense. An information or other filing by competent authority charging a criminal offense shall be given the same effect as an indictment.

(i) *Ineligible.* Excluded from participation in Federal nonprocurement programs pursuant to a determination of ineligibility under statutory, executive order, or regulatory authority, other than Executive Order 12549 and its agency implementing regulations; for exemple, excluded pursuant to the Davis-Bacon Act and its implementing regulations, the equal employment opportunity acts and executive orders, or the environmental protection acts and executive orders. A person is ineligible where the determination of ineligibility affects such person's eligibility to participate in more than one covered transaction.

(j) *Legal proceedings.* Any criminal proceeding or any civil judicial proceeding to which the Federal Government or a State of local government or quasi-governmental authority is a party. The term includes appeals from such proceedings.

(k) *Nonprocurement List.* The portion of the *List of Parties Excluded from Federal Procurement or Nonprocurement Programs* complied, maintained and distributed by the General Services Administration (GSA) containing the names and other information about persons who have been debarred, suspended, or voluntarily excluded under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(l) *Notice.* A written communication served in person or sent by certified mail, return receipt requested, or its equivalent, to the last known address of a party, its identified counsel, its agent for service of process, or any partner, officer, director, owner, or joint venturer of the party. Notice, if undeliverable, shall be considered to have been received by the addressee five days after being properly sent to the last address known by the agency.

(m) *Participant.* Any person who submits a proposal for, enters into, or reasonably may be expected to enter into a covered transaction. This term also includes any person who acts on behalf of or is authorized to commit a participant in a covered transaction as an agent or representative of another participant.

(n) *Person.* Any individual, corporation, partnership, association, unit of government or legal entity, however organized, except: foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities.

(o) *Preponderance of the evidence.* Proof by information that, compared with that opposing it, leads to the conclusion that the fact at issue is more probably true than not.

(p) *Principal.* Officer, director, owner, partner, key employee, or other person within a participant with primary management or supervisory responsibilities; or a person who has a critical influence on or substantive control over a covered transaction, whether or not employed by the participant. Persons who have a critical influence on or substantive control over a covered transaction are:

(1) Principal investigators.

(2) Bid and proposal estimators and preparers.

(q) *Proposal.* A solicited or unsolicited bid, application, request, invitation to consider or similar communication by or on behalf of a person seeking to participate or to receive a benefit, directly or indirectly, in or under a covered transaction.

(r) *Respondent.* A person against whom a debarment or suspension action has been initiated.

(s) *State.* Any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers that instrumentality to be an agency of the State government.

(t) *Suspending official.* An official authorized to impose suspension. The suspending official is either:

(1) The agency head, or

(2) An official designated by the agency head.

(3) The Director, Grants Administration Division, is the authorized suspending official.

(u) *Suspension.* An action taken by a suspending official in accordance with these regulations that immediately excludes a person from participating in covered transactions for a temporary period, pending completion of an investigation and such legal, debarment, or Program Fraud Civil Remedies Act proceedings as may ensue. A person so excluded is "suspended."

(v) *Voluntary exclusion or voluntarily excluded.* A status of nonparticipation or limited participation in covered transactions assumed by a person pursuant to the terms of a settlement.

(w) *EPA.* Environmental Protection Agency.

(x) *Agency head.* Administrator of the Environmental Protection Agency.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19196, May 26, 1988]

§ 32.110 Coverage.

(a) These regulations apply to all persons who have participated, are currently participating or may reasonably be expected to participate in transactions under Federal nonprocurement programs. For purposes of these regulations such transactions will be referred to as "covered transactions."

(1) *Covered transaction.* For purposes of these regulations, a covered transaction is a primary covered transaction or a lower tier covered transaction. Covered transactions at any tier need not involve the transfer of Federal funds.

(i) *Primary covered transaction.* Except as noted in paragraph (a)(2) of this section, a primary covered transaction is any nonprocurement transaction between an agency and a person, regardless of type, including: grants, cooperative agreements, scholarships, fellowships, contracts of assistance, loans, loan guarantees, subsidies, insurance, payments for specified use, donation agreements and any other nonprocurement transactions between a Federal agency and a person. Primary covered transactions also include those transactions specially designated by the U.S. Department of Housing and Urban Development in such agency's regulations governing debarment and suspension.

(ii) *Lower tier covered transaction.* A lower tier covered transaction is:

(A) Any transaction between a participant and a person other than a procurement contract for goods or services, regardless of type, under a primary covered transaction.

(B) Any procurement contract for goods or services between a participant and a person, regardless of type, expected to equal or exceed the Federal procurement small purchase threshold fixed at 10 U.S.C. 2304(g) and 41 U.S.C. 253(g) (currently $25,000) under a primary covered transaction.

(C) Any procurement contract for goods or services between a participant and a person under a covered transaction, regardless of amount, under which that person will have a critical influence on or substantive control over that covered transaction. Such persons are:

(*1*) Principal investigators.

(*2*) Providers of federally-required audit services.

(2) *Exceptions.* The following transactions are not covered:

(i) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(ii) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, entities consisting wholly or partially of foreign governments or foreign governmental entities;

(iii) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(iv) Federal employment;

(A) For the purpose of this paragraph, no transactions under EPA assistance programs are deemed to be pursuant to agency-recognized emergencies or disasters.

(v) Transactions pursuant to national or agency-recognized emergencies or disasters;

(vi) Incidental benefits derived from ordinary governmental operations; and

(vii) Other transactions where the application of these regulations would be prohibited by law.

(b) *Relationship to other sections.* This section describes the types of transactions to which a debarment or suspension under the regulations will apply. Subpart B, "Effect of Action," § 32.200, "Debarment or suspension," sets forth the consequences of a debarment or suspension. Those consequences would obtain only with respect to participants and principals in the covered transactions and activities described in § 32.110(a). Sections 32.325, "Scope of debarment," and 32.420, "Scope of suspension," govern the extent to which a specific participant or organizational elements of a participant would be automatically included within a debarment or suspension action, and the conditions under which affiliates or persons associated with a participant may also be brought within the scope of the action.

(c) *Relationship to Federal procurement activities.* Debarment and suspension of Federal procurement contractors and subcontractors under Federal procurement contracts are covered by the Federal Acquisition Regulation (FAR), 48 CFR subpart 9.4.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.115 Policy.

(a) In order to protect the public interest, it is the policy of the Federal Government to conduct business only with responsible persons. Debarment and suspension are discretionary actions that, taken in accordance with Executive Order 12549 and these regulations, are appropriate means to implement this policy.

(b) Debarment and suspension are serious actions which shall be used only in the public interest and for the Federal Government's protection and not for purposes of punishment. Agencies may impose debarment or suspension for the causes and in accordance with the procedures set forth in these regulations.

(c) When more than one agency has an interest in the proposed debarment or suspension of a person, consideration shall be given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods and procedures for coordinating their debarment or suspension actions.

(d) While part 32 does not apply to direct Federal procurement activities, which are governed by the Federal Acquisition Regulations (FAR) at 48 CFR subpart 9.4, it is EPA's policy to integrate its administration of these two complementary debarment and suspension programs.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

Subpart B—Effect of Action

§ 32.200 Debarment or suspension.

(a) *Primary covered transactions.* Except to the extent prohibited by law, persons who are debarred or suspended shall be excluded from primary covered transactions as either participants or principals throughout the executive branch of the Federal Government for the period of their debarment or suspension. Accordingly, no agency shall enter into primary covered transactions with such debarred or suspended persons during such period, except as permitted pursuant to § 32.215.

(b) *Loser tier covered transactions.* Except to the extent prohibited by law, persons who have been debarred or suspended shall be excluded from participating as either participants or principals in all lower tier covered transactions (see § 32.110(a)(1)(ii)) for the period of their debarment or suspension.

(c) *Exceptions.* Debarment or suspension does not affect a person's eligibility for:

(1) Statutory entitlements or mandatory awards (but not subtier awards thereunder which are not themselves mandatory), including deposited funds insured by the Federal Government;

(2) Direct awards to foreign governments or public international organizations, or transactions with foreign governments or foreign governmental entities, public international organizations, foreign government owned (in whole or in part) or controlled entities, and entities consisting wholly or partially of foreign governments or foreign governmental entities;

(3) Benefits to an individual as a personal entitlement without regard to the individual's present responsibility (but benefits received in an individual's business capacity are not excepted);

(4) Federal employment;

(5) Transactions pursuant to national or agency-recognized emergencies or disasters;

(i) For the purposes of this paragraph, no transactions under EPA assistance programs are deemed agency-recognized emergencies or disasters.

(6) Incidental benefits derived from ordinary governmental operations; and

(7) Other transactions where the application of these regulations would be prohibited by law.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.205 Ineligible persons.

Persons who are ineligible, as defined in § 32.105(i), are excluded in accordance with the applicable statutory, executive order, or regulatory authority.

§ 32.210 Voluntary exclusion.

Persons who accept voluntary exclusions under § 32.315 are excluded in accordance with the terms of their settlements. EPA shall, and participants may, contact the original action agency to ascertain the extent of the exclusion.

§ 32.215 Exception provision.

EPA may grant an exception permitting a debarred, suspended, or voluntarily excluded person to participate in a particular covered transaction upon a written determination by the agency head or an authorized designee stating the reason(s) for deviating from the Presidential policy established by Executive Order 12549 and § 32.200 of this rule. However, in accordance with the President's stated intention in the Executive Order, exceptions shall be granted only infrequently. Exceptions shall be reported in accordance with § 32.505(a).

(a) The Director, Grants Administration Division, is the official authorized to grant exceptions.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.220 Continuation of covered transactions.

(a) Notwithstanding the debarment, suspension, determination of ineligibility, or voluntary exclusion of any person by an agency, agencies and participants may continue covered transactions in existence at the time the person was debarred, suspended, declared ineligible, or voluntarily excluded. A decision as to the type of termination action, if any, to be taken should be made only after thorough review to ensure the propriety of the proposed action.

(b) Agencies and participants shall not renew or extend covered transactions (other than no-cost time extensions) with any person who is debarred, suspended, ineligible, or voluntarily excluded, except as provided in § 32.215

§ 32.225 Failure to adhere to restrictions.

Except as permitted under § 32.215 or § 32.220 of these regulations, a participant shall not knowingly do business under a covered transaction with a person who is debarred or suspended, or with a person who is ineligible for or voluntarily excluded from that covered transaction. Violation of this restriction may result in disallowance of costs, annulment or termination of award, issuance of a stop work order, debarment or suspension, or other remedies, as appropriate. A participant may rely upon the certification of a prospective participant in a lower tier covered transaction that it and its principals are not debarred, suspend-

ed, ineligible, or voluntarily excluded from the covered transaction (see Appendix B), unless it knows that the certification is erroneous. An agency has the burden of proof that such participant did knowingly do business with such a person.

Subpart C—Debarment

§ 32.300 General.

The debarring official may debar a person for any of the causes in § 32.305, using procedures established in §§ 32.310 through 32.314. The existence of a cause for debarment, however, does not necessarily require that the person be debarred; the seriousness of the person's acts or omissions and any mitigating factors shall be considered in making any debarment decision.

§ 32.305 Causes for debarment.

Debarment may be imposed in accordance with the provisions of §§ 32.300 through 32.314 for:

(a) Conviction of or civil judgment for:

(1) Commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement or transaction;

(2) Violation of Federal or State antitrust statutes, including those proscribing price fixing between competitors, allocation of customers between competitors, and bid rigging;

(3) Commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, receiving stolen property, making false claims, or obstruction of justice; or

(4) Commission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a person.

(b) Violation of the terms of a public agreement or transaction so serious as to affect the integrity of an agency program, such as:

(1) A willful failure to perform in accordance with the terms of one or more public agreements or transactions;

(2) A history of failure to perform or of unsatisfactory performance of one or more public agreements or transactions; or

(3) A willful violation of a statutory or regulatory provision or requirement applicable to a public agreement or transaction.

(c) Any of the following causes:

(1) A nonprocurement debarment by any Federal agency taken before October 1, 1988, the effective date of these regulations, or a procurement debarment by any Federal agency taken pursuant to 48 CFR subpart 9.4;

(2) Knowingly doing business with a debarred, suspended, ineligible, or voluntarily excluded person, in connection with a covered transaction, except as permitted in §§ 32.215 or 32.220;

(3) Failure to pay a single substantial debt, or a number of outstanding debts (including disallowed costs and overpayments, but not including sums owed the Federal Government under the Internal Revenue Code) owed to any Federal agency or instrumentality, provided the debt is uncontested by the debtor or, if contested, provided that the debtor's legal and administrative remedies have been exhausted;

(4) Violation of a material provision of a voluntary exclusion agreement entered into under § 32.315 or of any settlement of a debarment or suspension action; or

(5) Violation of any requirement of subpart F of this part, relating to providing a drug-free workplace, as set forth in § 32.615 of this part.

(d) Any other cause of so serious or compelling a nature that it affects the present responsibility of a person.

[53 FR 19196, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989]

§ 32.310 Procedures.

EPA shall process debarment actions as informally as practicable, consistent with the principles of fundamental fairness, using the procedures in §§ 32.311 through 32.314.

§ 32.311 Investigation and referral.

Information concerning the existence of a cause for debarment from any source shall be promptly reported, investigated, and referred, when ap-

propriate, to the debarring official for consideration. After consideration, the debarring official may issue a notice of proposed debarment.

§ 32.312 Notice of proposed debarment.

A debarment proceeding shall be initiated by notice to the respondent advising:

(a) That debarment is being considered;

(b) Of the reasons for the proposed debarment in terms sufficient to put the respondent on notice of the conduct or transaction(s) upon which it is based;

(c) Of the cause(s) relied upon under § 32.305 for proposing debarment;

(d) Of the provisions of § 32.311 through § 32.314, and any other EPA procedures, if applicable, governing debarment decisionmaking; and

(e) Of the potential effect of a debarment.

§ 32.313 Opportunity to contest proposed debarment.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of proposed debarment, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the proposed debarment.

(1) If the respondent desires a hearing, it shall submit a written request to the debarring official within the 30-day period following receipt of the notice of proposed debarment.

(b) *Additional proceedings as to disputed material facts.* (1) In actions not based upon a conviction or civil judgment, if the debarring official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the proposed debarment, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents.

(2) A transcribed record of any additional proceedings shall be made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.314 Debarring official's decision.

(a) *No additional proceedings necessary.* In actions based upon a conviction or civil judgment, or in which there is no genuine dispute over material facts, the debarring official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the debarring official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The debarring official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The debarring official may refer disputed material facts to another official for findings of fact. The debarring official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary and capricious or clearly erroneous.

(3) The debarring official's decision shall be made after the conclusion of the proceedings with respect to disputed facts.

(c) (1) *Standard of proof.* In any debarment action, the cause for debarment must be established by a preponderance of the evidence. Where the proposed debarment is based upon a conviction or civil judgment, the standard shall be deemed to have been met.

(2) *Burden of proof.* The burden of proof is on the agency proposing debarment.

(d) *Notice of debarring official's decision.* (1) If the debarring official decides to impose debarment, the respondent shall be given prompt notice:

(i) Referring to the notice of proposed debarment;

(ii) Specifying the reasons for debarment;

(iii) Stating the period of debarment, including effective dates; and

(iv) Advising that the debarment is effective for covered transactions throughout the executive branch of the Federal Government unless an agency head or an authorized designee makes the determination referred to in § 32.215.

(2) If the debarring official decides not to impose debarment, the respondent shall be given prompt notice of that decision. A decision not to impose debarment shall be without prejudice to a subsequent imposition of debarment by any other agency.

§ 32.315 Settlement and voluntary exclusion.

(a) When in the best interest of the Government, EPA may, at any time, settle a debarment or suspension action.

(1) The debarring and suspending official is the official authorized to settle debarment or suspension actions.

(b) If a participant and the agency agree to a voluntary exclusion of the participant, such voluntary exclusion shall be entered on the Nonprocurement List (see subpart E).

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.320 Period of debarment.

(a) Debarment shall be for a period commensurate with the seriousness of the cause(s). If a suspension precedes a debarment, the suspension period shall be considered in determining the debarment period.

(1) Debarment for causes other than those related to a violation of the requirements of subpart F of this part generally should not exceed three years. Where circumstances warrant, a longer period of debarment may be imposed.

(2) In the case of a debarment for a violation of the requirements of subpart F of this part (*see* § 32.305(c)(5)), the period of debarment shall not exceed five years.

(b) The debarring official may extend an existing debarment for an additional period, if that official determines that an extension is necessary to protect the public interest. However, a debarment may not be extended solely on the basis of the facts and circumstances upon which the initial debarment action was based. If debarment for an additional period is determined to be necessary, the procedures of §§ 32.311 through 32.314 shall be followed to extend the debarment.

(c) The respondent may request the debarring official to reverse the debarment decision or to reduce the period or scope of debarment. Such a request shall be in writing and supported by documentation. The debarring official may grant such a request for reasons including, but not limited to:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the debarring official deems appropriate.

[53 FR 19196, 19204, May 26, 1988, as amended at 54 FR 4962, Jan. 31, 1989]

§ 32.325 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person under these regulations constitutes debarment of all its divisions and other organizational elements from all covered transactions, unless the debarment decision is limited by its terms to one or more specifically identified individuals, divisions or other organizational elements or to specific types of transactions.

(2) The debarment action may include any affiliate of the participant that is specifically named and given notice of the proposed debarment and an opportunity to respond (see §§ 32.311 through 32.314).

(b) *Imputing conduct.* For purposes of determining the scope of debarment, conduct may be imputed as follows:

(1) *Conduct imputed to participant.* The fraudulent, criminal or other seriously improper conduct of any officer, director, shareholder, partner, employee, or other individual associated with a participant may be imputed to the participant when the conduct occurred in connection with the individual's

performance of duties for or on behalf of the participant, or with the participant's knowledge, approval, or acquiescence. The participant's acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

(2) *Conduct imputed to individuals associated with participant.* The fraudulent, criminal, or other seriously improper conduct of a participant may be imputed to any officer, director, shareholder, partner, employee, or other individual associated with the participant who participated in, knew of, or had reason to know of the participant's conduct.

(3) *Conduct of one participant imputed to other participants in a joint venture.* The fraudulent, criminal, or other seriously improper conduct of one participant in a joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement may be imputed to other participants if the conduct occurred for or on behalf of the joint venture, grant pursuant to a joint application, or similar arrangement or with the knowledge, approval, or acquiescence of these participants. Acceptance of the benefits derived from the conduct shall be evidence of such knowledge, approval, or acquiescence.

§ 32.330 Reconsideration.

Any party to the action may petition the debarring official to reconsider a debarment determination for alleged errors of fact or law. The petition for reconsideration must be in writing and filed within 10 calendar days from the date of the party's receipt of the determination.

[53 FR 19197, May 26, 1988]

§ 32.335 Appeal.

(a) The debarment determination under § 32.314 shall be final. However, any party to the action may request the Director, Office of Administration (OA Director), to review the findings of the debarring official by filing a request with the OA Director within 30 calendar days of the party's receipt of the debarment determination, or its reconsideration. The request must be in writing and set forth the specific reasons why relief should be granted.

(b) A review under this section shall be at the discretion of the OA Director. If a review is granted, the debarring official may stay the effective date of a debarment order pending resolution of the appeal. If a debarment is stayed, the stay shall be automatically lifted if the OA Director affirms the debarment.

(c) The review shall be based solely upon the record. The OA Director may set aside a determination only if it is found to be arbitrary, capricious, and abuse of discretion, or based upon a clear error of law.

(d) The OA Director's subsequent determination shall be in writing and mailed to all parties.

(e) A determination under § 32.314 or a review under this section shall not be subject to a dispute or a bid protest under parts 30, 31 or 33 of this subchapter.

[53 FR 19197, May 26, 1988]

Subpart D—Suspension

§ 32.400 General.

(a) The suspending official may suspend a person for any of the causes in § 32.405 using procedures established in §§ 32.410 through 32.413.

(b) Suspension is a serious action to be imposed only when:

(1) There exists adequate evidence of one or more of the causes set out in § 32.405, and

(2) Immediate action is necessary to protect the public interest.

(c) In assessing the adequacy of the evidence, the agency should consider how much information is available, how credible it is given the circumstances, whether or not important allegations are corroborated, and what inferences can reasonably be drawn as a result. This assessment should include an examination of basic documents such as grants, cooperative agreements, loan authorizations, and contracts.

§ 32.405 Causes for suspension.

(a) Suspension may be imposed in accordance with the provisions of §§ 32.400 through 32.413 upon adequate evidence:

(1) To suspect the commission of an offense listed in § 32.305(a); or

(2) That a cause for debarment under § 32.305 may exist.

(b) Indictment shall constitute adequate evidence for purposes of suspension actions.

§ 32.410 Procedures.

(a) *Investigation and referral.* Information concerning the existence of a cause for suspension from any source shall be promptly reported, investigated, and referred, when appropriate, to the suspending official for consideration. After consideration, the suspending official may issue a notice of suspension.

(b) *Decisionmaking process.* EPA shall process suspension actions as informally as practicable, consistent with principles of fundamental fairness, using the procedures in § 32.411 through § 32.413.

§ 32.411 Notice of suspension.

When a respondent is suspended, notice shall immediately be given:

(a) That suspension has been imposed;

(b) That the suspension is based on an indictment, conviction, or other adequate evidence that the respondent has committed irregularities seriously reflecting on the propriety of further Federal Government dealings with the respondent;

(c) Describing any such irregularities in terms sufficient to put the respondent on notice without disclosing the Federal Government's evidence;

(d) Of the cause(s) relied upon under § 32.405 for imposing suspension;

(e) That the suspension is for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings;

(f) Of the provisions of § 32.411 through § 32.413 and any other EPA procedures, if applicable, governing suspension decisionmaking; and

(g) Of the effect of the suspension.

§ 32.412 Opportunity to contest suspension.

(a) *Submission in opposition.* Within 30 days after receipt of the notice of suspension, the respondent may submit, in person, in writing, or through a representative, information and argument in opposition to the suspension.

(1) If the respondent desires a hearing, it shall submit a written request to the suspending official within the 30-day period following receipt of the notice of suspension.

(b) *Additional proceedings as to disputed material facts.* (1) If the suspending official finds that the respondent's submission in opposition raises a genuine dispute over facts material to the suspension, respondent(s) shall be afforded an opportunity to appear with a representative, submit documentary evidence, present witnesses, and confront any witness the agency presents, unless:

(i) The action is based on an indictment, conviction or civil judgment, or

(ii) A determination is made, on the basis of Department of Justice advice, that the substantial interests of the Federal Government in pending or contemplated legal proceedings based on the same facts as the suspension would be prejudiced.

(2) A transcribed record of any additional proceedings shall be prepared and made available at cost to the respondent, upon request, unless the respondent and the agency, by mutual agreement, waive the requirement for a transcript.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

§ 32.413 Suspending official's decision.

The suspending official may modify or terminate the suspension (for example, see § 32.320(c) for reasons for reducing the period or scope of debarment) or may leave it in force. However, a decision to modify or terminate the suspension shall be without prejudice to the subsequent imposition of suspension by any other agency or debarment by any agency. The decision shall be rendered in accordance with the following provisions:

(a) *No additional proceedings necessary.* In actions: based on an indictment, conviction, or civil judgment; in which there is no genuine dispute over material facts; or in which additional proceedings to determine disputed material facts have been denied on the basis of Department of Justice advice, the suspending official shall make a decision on the basis of all the information in the administrative record, including any submission made by the respondent. The decision shall be made within 45 days after receipt of any information and argument submitted by the respondent, unless the suspending official extends this period for good cause.

(b) *Additional proceedings necessary.* (1) In actions in which additional proceedings are necessary to determine disputed material facts, written findings of fact shall be prepared. The suspending official shall base the decision on the facts as found, together with any information and argument submitted by the respondent and any other information in the administrative record.

(2) The suspending official may refer matters involving disputed material facts to another official for findings of fact. The suspending official may reject any such findings, in whole or in part, only after specifically determining them to be arbitrary or capricious or clearly erroneous.

(c) *Notice of suspending official's decision.* Prompt written notice of the suspending official's decision shall be sent to the respondent.

§ 32.415 Period of suspension.

(a) Suspension shall be for a temporary period pending the completion of an investigation or ensuing legal, debarment, or Program Fraud Civil Remedies Act proceedings, unless terminated sooner by the suspending official or as provided in paragraph (b) of this section.

(b) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless an Assistant Attorney General or United States Attorney requests its extension in writing, in which case it may be extended for an additional six months. In no event may a suspension extend beyond 18 months, unless such proceedings have been initiated within that period.

(c) The suspending official shall notify the Department of Justice of an impending termination of a suspension, at least 30 days before the 12-month period expires, to give that Department an opportunity to request an extension.

§ 32.420 Scope of suspension.

The scope of a suspension is the same as the scope of a debarment (see § 32.325), except that the procedures of §§ 32.410 through 32.413 shall be used in imposing a suspension.

§ 32.425 Reconsideration.

Any party to the action may petition the suspending official to reconsider a suspension determination for alleged errors of fact or law. The petition for reconsideration must be in writing and filed within 10 calendar days from the date of the party's receipt of the suspension determination.

[53 FR 19197, May 26, 1988]

§ 32.430 Appeal.

(a) The suspension determination under § 32.413 shall be final. However, any party to the action may request the Director, Office of Administration (OA Director), to review the findings of the suspending official by filing a request with the OA Director within 30 calendar days of the party's receipt of the suspension determination, or its reconsideration. The request must be in writing and set forth the specific reasons why relief should be granted.

(b) A review under this section shall be at the discretion of the OA Director. If a review is granted, the suspending official may stay the effective date of a suspension order pending resolution of appeal. If a suspension is stayed, the stay shall be automatically lifted if the OA Director affirms the suspension.

(c) The review shall be based solely upon the record. The OA Director may set aside a determination only if it is found to be arbitrary, capricious, an abuse of discretion, or based upon a clear error of law.

(d) The OA Director's subsequent determination shall be in writing and mailed to all parties.

(e) A determination under § 32.413 or a review under this section shall not be subject to a dispute or a bid protest under parts 30, 31, or 33 of this subchapter.

[53 FR 19197, May 26, 1988]

Subpart E—Responsibilities of GSA, Agency and Participants

§ 32.500 GSA responsibilities.

(a) In accordance with the OMB guidelines, GSA shall compile, maintain, and distribute a list of all persons who have been debarred, suspended, or voluntarily excluded by agencies under Executive Order 12549 and these regulations, and those who have been determined to be ineligible.

(b) At a minimum, this list shall indicate:

(1) The names and addresses of all debarred, suspended, ineligible, and voluntarily excluded persons, in alphabetical order, with cross-references when more than one name is involved in a single action;

(2) The type of action;

(3) The cause for the action;

(4) The scope of the action;

(5) Any termination date for each listing; and

(6) The agency and name and telephone number of the agency point of contact for the action.

§ 32.505 EPA responsibilities.

(a) The agency shall provide GSA with current information concerning debarments, suspension, determinations of ineligibility, and voluntary exclusions it has taken. Until February 18, 1989, the agency shall also provide GSA and OMB with information concerning all transactions in which EPA has granted exceptions under § 32.215 permitting participation by debarred, suspended, or voluntarily excluded persons.

(b) Unless an alternative schedule is agreed to by GSA, the agency shall advise GSA of the information set forth in § 32.500(b) and of the exceptions granted under § 32.215 within five working days after taking such actions.

(c) The agency shall direct inquiries concerning listed persons to the agency that took the action.

(d) Agency officials shall check the Nonprocurement List before entering covered transactions to determine whether a participant in a primary transaction is debarred, suspended, ineligible, or voluntarily excluded (Tel. #).

(e) Agency officials shall check the Nonprocurement List before approving principals or lower tier participants where agency approval of the principal or lower tier participant is required under the terms of the transaction, to determine whether such principals or participants are debarred, suspended, ineligible, or voluntarily excluded.

§ 32.510 Participants' responsibilities.

(a) *Certification by participants in primary covered transactions.* Each participant shall submit the certification in Appendix A to this part for it and its principals at the time the participant submits its proposal in connection with a primary covered transaction, except that States need only complete such certification as to their principals. Participants may decide the method and frequency by which they determine the eligibility of their principals. In addition, each participant may, but is not required to, check the Nonprocurement List for its principals (Tel. #). Adverse information on the certification will not necessarily result in denial of participation. However, the certification, and any additional information pertaining to the certification submitted by the participant, shall be considered in the administration of covered transactions.

(b) *Certification by participants in lower tier covered transactions.* (1) Each participant shall require participants in lower tier covered transactions to include the certification in Appendix B to this part for it and its principals in any proposal submitted in connection with such lower tier covered transactions.

(2) A participant may rely upon the certification of a prospective partici-

pant in a lower tier covered transaction that it and its principals are not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction by any Federal agency, unless it knows that the certification is erroneous. Participants may decide the method and frequency by which they determine the eligiblity of their principals. In addition, a participant may, but is not required to, check the Nonprocurement List for its principals and for participants (Tel. #).

(c) *Changed circumstances regarding certification.* A participant shall provide immediate written notice to EPA if at any time the participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances. Participants in lower tier covered transactions shall provide the same updated notice to the participant to which it submitted its proposals.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 55 FR 21688, 21701, May 25, 1990, unless otherwise noted.

EFFECTIVE DATE NOTE: At 55 FR 21688, 21701, May 25, 1990, subpart F to part 32 was revised, effective July 24, 1990, except for the certification requirement of § 32.630 (c) and (d) for States and State agencies which is effective June 25, 1990. For the convenience of the user, the superseded text follows the new text.

§ 32.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 32.605 Definitions.

(a) Except as amended in this section, the definitions of § 32.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15;

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work under the grant, including:

(i) All *direct charge* employees;

(ii) All *indirect charge* employees, unless their impact or involvement is insignificant to the performance of the grant; and,

(iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll.

This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces);

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any other estab-

lishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide common rule on uniform administrative requirements for grants and cooperative agreements. The term does not include technical assistance that provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency (except another Federal agency);

(9) *Individual* means a natural person;

(10) *State* means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, or any agency of a State, exclusive of institutions of higher education, hospitals, and units of local government. A State instrumentality will be considered part of the State government if it has a written determination from a State government that such State considers the instrumentality to be an agency of the State government.

§ 32.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government. A determination of such inconsistency may be made only by the agency head or his/her designee.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 32.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certification under § 32.630;

(b) With respect to a grantee other than an individual—

(1) The grantee has violated the certification by failing to carry out the requirements of paragraphs (A)(a)-(g) and/or (B) of the certification (Alternate I to Appendix C) or

(2) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

(c) With respect to a grantee who is an individual—

(1) The grantee has violated the certification by failing to carry out its requirements (Alternate II to Appendix C); or

(2) The grantee is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity.

§ 32.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 32.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 32.320(a)(2) of this part).

§ 32.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 32.630 Certification requirements and procedures.

(a)(1) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the Federal agency providing the grant, as provided in Appendix C to this part.

(2) Grantees are not required to make a certification in order to continue receiving funds under a grant awarded before March 18, 1989, or under a no-cost time extension of such a grant. However, the grantee shall make a one-time drug-free workplace certification for a non-automatic continuation of such a grant made on or after March 18, 1989.

(b) Except as provided in this section, all grantees shall make the required certification for each grant. For mandatory formula grants and entitlements that have no application process, grantees shall submit a one-time certification in order to continue receiving awards.

(c) A grantee that is a State may elect to make one certification in each Federal fiscal year. States that previously submitted an annual certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. Except as provided in paragraph (d) of this section, this certification shall cover all grants to all State agencies from any Federal agency. The State shall retain the original of this statewide certification in its Governor's office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency has designated a central location for submission.

(d)(1) The Governor of a State may exclude certain State agencies from the statewide certification and authorize these agencies to submit their own certifications to Federal agencies. The statewide certification shall name any State agencies so excluded.

(2) A State agency to which the statewide certification does not apply, or a State agency in a State that does not have a statewide certification, may elect to make one certification in each Federal fiscal year. State agencies that previously submitted a State agency certification are not required to make a certification for Fiscal Year 1990 until June 30, 1990. The State agency shall retain the original of this State agency-wide certification in its central office and, prior to grant award, shall ensure that a copy is submitted individually with respect to each grant, unless the Federal agency designates a central location for submission.

(3) When the work of a grant is done by more than one State agency, the certification of the State agency directly receiving the grant shall be deemed to certify compliance for all workplaces, including those located in other State agencies.

(e)(1) For a grant of less than 30 days performance duration, grantees shall have this policy statement and program in place as soon as possible, but in any case by a date prior to the date on which performance is expected to be completed.

(2) For a grant of 30 days or more performance duration, grantees shall have this policy statement and program in place within 30 days after award.

(3) Where extraordinary circumstances warrant for a specific grant, the grant officer may determine a different date on which the policy statement and program shall be in place.

§ 32.635 Reporting of and employee sanctions for convictions of criminal drug offenses.

(a) When a grantee other than an individual is notified that an employee has been convicted for a violation of a criminal drug statute occurring in the workplace, it shall take the following actions:

(1) Within 10 calendar days of receiving notice of the conviction, the grantee shall provide written notice, including the convicted employee's position title, to every grant officer, or other designee on whose grant activity the convicted employee was working, unless a Federal agency has designated a central point for the receipt of such notifications. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(2) Within 30 calendar days of receiving notice of the conviction, the grantee shall do the following with respect to the employee who was convicted.

(i) Take appropriate personnel action against the employee, up to and including termination, consistent with requirements of the Rehabilitation Act of 1973, as amended; or

(ii) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency.

(b) A grantee who is an individual who is convicted for a violation of a criminal drug statute occurring during the conduct of any grant activity shall report the conviction, in writing, within 10 calendar days, to his or her Federal agency grant officer, or other designee, unless the Federal agency has designated a central point for the receipt of such notices. Notification shall include the identification number(s) for each of the Federal agency's affected grants.

(Approved by the Office of Management and Budget under control number 0991-0002)

EFFECTIVE DATE NOTE: At 55 FR 21688, 21701, May 25, 1990, subpart F to part 32 was revised, effective July 24, 1990, except for the certification requirement of § 32.630 (c) and (d) for States and State agencies which is effective June 25, 1990. For the convenience of the user, the superseded text of subpart F follows.

Subpart F—Drug-Free Workplace Requirements (Grants)

SOURCE: 54 FR 4950, 4961, Jan. 31, 1989, unless otherwise noted.

§ 32.600 Purpose.

(a) The purpose of this subpart is to carry out the Drug-Free Workplace Act of 1988 by requiring that—

(1) A grantee, other than an individual, shall certify to the agency that it will provide a drug-free workplace;

(2) A grantee who is an individual shall certify to the agency that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

(b) Requirements implementing the Drug-Free Workplace Act of 1988 for contractors with the agency are found at 48 CFR subparts 9.4, 23.5, and 52.2.

§ 32.605 Definitions.

(a) Except as amended in this section, the definitions of § 32.105 apply to this subpart.

(b) For purposes of this subpart—

(1) *Controlled substance* means a controlled substance in schedules I through V of section 202 of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

(2) *Conviction* means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

(3) *Criminal drug statute* means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use or possession of any controlled substance;

(4) *Drug-free workplace* means a site for the performance of work done in connection with a specific grant at which employees of the grantee are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance;

(5) *Employee* means the employee of a grantee directly engaged in the performance of work pursuant to the provisions of the grant;

(6) *Federal agency* or *agency* means any United States executive department, military department, government corporation, government controlled corporation, any

other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency;

(7) *Grant* means an award of financial assistance, including a cooperative agreement, in the form of money, or property in lieu of money, by a Federal agency directly to a grantee. The term grant includes block grant and entitlement grant programs, whether or not exempted from coverage under the grants management government-wide regulation ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"). The term does not include technical assistance which provides services instead of money, or other assistance in the form of loans, loan guarantees, interest subsidies, insurance, or direct appropriations; or any veterans' benefits to individuals, i.e., any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States;

(8) *Grantee* means a person who applies for or receives a grant directly from a Federal agency;

(9) *Individual* means a natural person.

§ 32.610 Coverage.

(a) This subpart applies to any grantee of the agency.

(b) This subpart applies to any grant, except where application of this subpart would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

(c) The provisions of subparts A, B, C, D and E of this part apply to matters covered by this subpart, except where specifically modified by this subpart. In the event of any conflict between provisions of this subpart and other provisions of this part, the provisions of this subpart are deemed to control with respect to the implementation of drug-free workplace requirements concerning grants.

§ 32.615 Grounds for suspension of payments, suspension or termination of grants, or suspension or debarment.

A grantee shall be deemed in violation of the requirements of this subpart if the agency head or his or her official designee determines, in writing, that—

(a) The grantee has made a false certificaiton under § 32.630;

(b) The grantee has violated the certification by failing to carry out the requirements of subparagraphs (A.)(a)-(g) of the certification for grantees other than individuals (Alternate I to Appendix C) or by failing to carry out the requirements of the certification for grantees who are individuals (Alternate II to Appendix C); or

(c) Such a number of employees of the grantee have been convicted of violations of criminal drug statutes for violations occurring in the workplace as to indicate that the grantee has failed to make a good faith effort to provide a drug-free workplace.

§ 32.620 Effect of violation.

(a) In the event of a violation of this subpart as provided in § 32.615, and in accordance with applicable law, the grantee shall be subject to one or more of the following actions:

(1) Suspension of payments under the grant;

(2) Suspension or termination of the grant; and

(3) Suspension or debarment of the grantee under the provisions of this part.

(b) Upon issuance of any final decision under this part requiring debarment of a grantee, the debarred grantee shall be ineligible for award of any grant from any Federal agency for a period specified in the decision, not to exceed five years (*see* § 32.320(a)(2) of this part).

§ 32.625 Exception provision.

The agency head may waive with respect to a particular grant, in writing, a suspension of payments under a grant, suspension or termination of a grant, or suspension or debarment of a grantee if the agency head determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

§ 32.630 Grantees' responsibilities.

(a) As a prior condition of being awarded a grant, each grantee shall make the appropriate certification to the agency, as provided in Appendix C to this part.

(b) Except as provided in this paragraph, a grantee shall make the required certification for each grant. A grantee that is a State may elect to submit an annual certification to each Federal agency from which it obtains grants in lieu of certifications for each grant during the year covered by the certification.

(c) Grantees are not required to provide a certification in order to continue receiving funds under a grant awarded before the effective date of this subpart or under a no-cost time extension of any grant.

APPENDIX A TO PART 32—CERTIFICATION REGARDING DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS—PRIMARY COVERED TRANSACTIONS

Instructions for Certification

1. By signing and submitting this proposal, the prospective primary participant is providing the certification set out below.

2. The inability of a person to provide the certification required below will not necessarily result in denial of participation in this covered transaction. The prospective participant shall submit an explanation of why it cannot provide the certification set out below. The certification or explanation will be considered in connection with the department or agency's determination whether to enter into this transaction. However, failure of the prospective primary participant to furnish a certification or an explanation shall disqualify such person from participation in this transaction.

3. The certification in this clause is a material representation of fact upon which reliance was placed when the department or agency determined to enter into this transaction. If it is later determined that the prospective primary participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause of default.

4. The prospective primary participant shall privide immediate written notice to the department or agency to whom this proposal is submitted if at any time the prospective primary participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

5. The terms *covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal,* and *voluntarily excluded,* as used in this clause, have the meanings set out in the Definitions and Coverage sections of the rules implementing Executive Order 12549. You may contact the department or agency to which this proposal is being submitted for assistance in obtaining a copy of those regulations.

6. The prospective primary participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency entering into this transaction.

7. The prospective primary participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," provided by the department or agency entering into this covered transaction, without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

8. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

9. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

10. Except for transactions authorized under paragraph 6 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency may terminate this transaction for cause or default.

Certification Regarding Debarment, Suspension, and Other Responsibility Matters—Primary Covered Transactions

(1) The prospective primary participant certifies to the best of its knowledge and belief, that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this proposal been convicted of or had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State of local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records,

making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application/proposal had one or more public transactions (Federal, State or local) terminated for cause or default.

(2) Where the prospective primary participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

Appendix B to Part 32—Certification Regarding Debarment, Suspension, Ineligibilty and Voluntary Exclusion—Lower Tier Covered Transactions

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms T3covered transaction, debarred, suspended, ineligible, lower tier covered transaction, participant, person, primary covered transaction, principal, proposal, and *voluntarily excluded*, as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include this clause titled "Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transaction," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may, but is not required to, check the Nonprocurement List (Tel. #).

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion—Lower Tier Covered Transactions

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals is presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

(3) The prospective lower-tier participant also certifies that it and its principals:

(a) Have not within a three-year period preceding this proposal been convicted of or

had a civil judgment rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State or local) transaction or contract under a public transaction; violation of Federal or State anti-trust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(b) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State or local) with commission of any of the offenses enumerated in paragraph (3)(a) of this certification; and

(c) Have not within a three-year period preceding this proposal had one or more public transactions (Federal, State or local) terminated for cause or default. Where the prospective lower-tier participant is unable to certify to any of the above, such prospective participant shall attach an explanation to this proposal.

[53 FR 19196, 19204, May 26, 1988, as amended at 53 FR 19197, May 26, 1988]

Appendix C to Part 32—Certification Regarding Drug-Free Workplace Requirements

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance is placed when the agency awards the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

5. Workplaces under grants, for grantees other than individuals, need not be identified on the certification. If known, they may be identified in the grant application. If the grantee does not identify the workplaces at the time of application, or upon award, if there is no application, the grantee must keep the identity of the workplace(s) on file in its office and make the information available for Federal inspection. Failure to identify all known workplaces constitutes a violation of the grantee's drug-free workplace requirements.

6. Workplace identifications must include the actual address of buildings (or parts of buildings) or other sites where work under the grant takes place. Categorical descriptions may be used (e.g., all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

7. If the workplace identified to the agency changes during the performance of the grant, the grantee shall inform the agency of the change(s), if it previously identified the workplaces in question (see paragraph five).

8. Definitions of terms in the Nonprocurement Suspension and Debarment common rule and Drug-Free Workplace common rule apply to this certification. Grantees' attention is called, in particular, to the following definitions from these rules:

Controlled substance means a controlled substance in Schedules I through V of the Controlled Substances Act (21 U.S.C. 812) and as further defined by regulation (21 CFR 1308.11 through 1308.15);

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes;

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance;

Employee means the employee of a grantee directly engaged in the performance of work under a grant, including: (i) All *direct charge* employees; (ii) All *indirect charge* employees unless their impact or involvement is insignificant to the performance of the grant; and, (iii) Temporary personnel and consultants who are directly engaged in the performance of work under the grant and who are on the grantee's payroll. This definition does not include workers not on the payroll of the grantee (e.g., volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the grantee's payroll; or employees of subrecipients or subcontractors in covered workplaces).

Certification Regarding Drug-Free Workplace Requirements

Alternate I. (Grantees Other Than Individuals)

A. The grantee certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the

grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an ongoing drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency in writing, within ten calendar days after receiving notice under paragraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to every grant officer or other designee on whose grant activity the convicted employee was working, unless the Federal agency has designated a central point for the receipt of such notices. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under paragraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Check ☐ if there are workplaces on file that are not identified here.

Alternate II. (Grantees Who Are Individuals)

(a) The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant;

(b) If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, he or she will report the conviction, in writing, within 10 calendar days of the conviction, to every grant officer or other designee, unless the Federal agency designates a central point for the receipt of such notices. When notice is made to such a central point, it shall include the identification number(s) of each affected grant.

[55 FR 21690, 21701, May 25, 1990]

EFFECTIVE DATE NOTE: At 55 FR 21690, 21701, May 25, 1990, Appendix C to part 32 was revised, effective July 24, 1990. For the convenience of the user, the superseded text follows.

Appendix C to Part 32—CERTIFICATION REGARDING DRUG-FREE WORKPLACE REQUIREMENTS

Instructions for Certification

1. By signing and/or submitting this application or grant agreement, the grantee is providing the certification set out below.

2. The certification set out below is a material representation of fact upon which reliance was placed when the agency determined to award the grant. If it is later determined that the grantee knowingly rendered a false certification, or otherwise violates the requirements of the Drug-Free Workplace Act, the agency, in addition to any other remedies available to the Federal Government, may take action authorized under the Drug-Free Workplace Act.

3. For grantees other than individuals, Alternate I applies.

4. For grantees who are individuals, Alternate II applies.

Certification Regarding Drug-Free Workplace Requirements

Alternate I

A. The grantee certifies that it will provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing a drug-free awareness program to inform employees about—

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will—

(1) Abide by the terms of the statement; and

(2) Notify the employer of any criminal drug statute conviction for a violation occurring in the workplace no later than five days after such conviction;

(e) Notifying the agency within ten days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction;

(f) Taking one of the following actions, within 30 days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted—

(1) Taking appropriate personnel action against such an employee, up to and including termination; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e) and (f).

B. The grantee shall insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address, city, county, state, zip code)

_____

_____

_____

Alternate II

The grantee certifies that, as a condition of the grant, he or she will not engage in the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in conducting any activity with the grant.

[54 FR 4962, Jan. 31, 1989]

PART 33—PROCUREMENT UNDER ASSISTANCE AGREEMENTS

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33.1125 Filing requirements.
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APPENDIX A—PROCEDURAL REQUIREMENTS FOR RECIPIENTS WHO DO NOT CERTIFY THEIR PROCUREMENT SYSTEMS, OR FOR RECIPIENTS WHO HAVE THEIR PROCUREMENT CERTIFICATIONS REVOKED BY EPA

AUTHORITY: 7 U.S.C. 135 *et seq.*; 15 U.S.C. 2601 *et seq.*; 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 241, 242b, 243, 246, 300j-1, 300j-2, 300j-3, 1857 *et seq.*, 6901 *et seq.*; and 42 U.S.C. 9601 *et seq.*

SOURCE: 48 FR 12926, Mar. 28, 1983, unless otherwise noted.

§ 33.001 Applicability and scope of this part.

(a) This part applies to all assistance agreements awarded on or after the effective date of this part. For assistance agreements awarded before the effective date, this part will apply only to those procurement actions initiated by the recipient on or after the date the recipient complies with the self-certification requirements in § 33.110 of this part.

(b) This part:

(1) Describes EPA's procurement system evaluation process.

(2) Identifies the minimum requirements for the procurement of supplies, services, and construction under EPA assistance agreements.

(3) Identifies an additional specification requirement for procurement under assistance agreements for the construction of treatment works awarded under 40 CFR part 35, subparts E and I.

(4) Identifies the procurement standards that institutions of higher education and other nonprofit organizations must follow.

(5) Identifies the provisions that recipients of EPA assistance agreements must include in their subagreements.

(6) Describes the procedures that EPA will use to handle protest appeals concerning the award of a subagreement by the recipient of an EPA assistance agreement.

(c) This part does not apply to work beyond the scope of the project for which an assistance agreement is awarded (i.e., ineligible work).

(d) This part does not apply to expenses for services for which the recipient will receive an allowance or a potential recipient will receive an advance of an allowance under 40 CFR part 35, subpart I.

(e) This part supplements the requirements in:

(1) 40 CFR part 30 "General Regulation for Assistance Programs," and

(2) 40 CFR part 32, "Debarments and Suspensions under EPA Assistance Programs."

(f) The following types of recipients must comply with the specified subparts in this part:

(1) Recipients of assistance agreements for the construction of treatment works awarded under 40 CFR part 35, subparts E and I, must follow the requirements in subparts A, B, C, F and G.

(2) Recipients of remedial action cooperative agreements under the Comprehensive Environmental Response, Compensation, Liability Act of 1980 (Superfund 42 U.S.C. 6901 *et seq.*) must follow the requirements in subparts A, B, E, F and G.

(3) State and local government recipients for other than construction grants and CERCLA remedial action cooperative agreements must follow the requirements in subparts A, B, F and G.

(4) Institutions of higher education, hospitals, and other nonprofit organizations must follow the requirements in subparts A, B, D and G.

(g) In the construction of treatment works program under the Clean Water Act (33 U.S.C. 1251 et. seq.), it is EPA's policy to delegate determinations on individual projects to State agencies to the maximum extent possible (see 40 CFR part 35, subpart F). This part uses the term "award official." To the extent that the award official for a treatment works assistance agreement delegates responsibility for determining compliance with the requirements of this part (except for § 33.115 "Procurement system review," and subpart G "Protests") to a State agency under a delegation agreement (40 CFR 35.1130), the term "award official" may be read "State agency."

(h) This part applies to a grant awarded under 40 CFR part 35 subpart E only if the recipient elects to follow the requirements in this part. If the recipient of a subpart E grant does not elect to follow the requirements in this part, it is subject to the procurement requirements in 40 CFR subpart E.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.005 Definitions.

(a) Words and terms not defined below shall have the meaning given to them in 40 CFR parts 30 and 35.

(b) As used in this part, the following words and terms mean:

Architectural or engineering (A/E) services. Consultation, investigations; reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

Construction. Erection, building, alteration, remodeling, improvement, or extension of buildings, structures or other property. Construction also includes remedial actions in response to a release, or a threat of a release, of a hazardous substance into the environment as determined by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980.

Contractor. Any party to whom a recipient awards a subagreement.

Cost analysis. The review and evaluation of each element of subagreement cost to determine reasonableness, allocability and allowability.

Intergovernmental Agreement. Any written agreement between units of government under which one public agency performs duties for or in concert with another public agency using EPA assistance. This includes substate and interagency agreements.

Minority business enterprise. A minority business enterprise is a business which is: (1) Certified as socially and economically disadvantaged by the Small Business Administration, (2) certified as a minority business enterprise by a State or Federal agency, or (3) an independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(i) Black American;

(ii) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(iii) Native American (American Indian, Eskimo, Aleut, native Hawaiian), or

(iv) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

Price analysis. The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed subagreement price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

Profit. The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

Services. A contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents, (e.g., reports, design drawing, specifications). This term does not include employment agreements or collective bargaining agreements.

Small business. A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

Subagreement. A written agreement between an EPA recipient and another party (other than another public agency) and any lower tier agreement for services, supplies, or construction necessary to complete the project. Subagreements include contracts and subcontracts for personal and professional services, agreements with consultants, and purchase orders.

Supplies. All property, including equipment, materials, printing, insurances, and leases of real property, but excluding land or a permanent interest in land.

Women's business enterprise. A women's business enterprise is a business which is certified as such by a State or Federal agency, or which meets the following definition: A women's business enterprise is an independent business concern which is at least 51 percent owned by a woman or women who also control and operate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws. For example, an otherwise qualified WBE which is 51 percent owned by a married woman in a community property state will not be disqualified because her husband has a 50 percent interest in her share. Similarly, a business which is 51 percent owned by a married man and 49 percent owned by an unmarried woman will not become a qualified WBE by virtue of his wife's 50 percent interest in his share of the business.

Subpart A—Procurement System Evaluation

§ 33.105 Applicability and scope of this subpart.

(a) This subpart applies to all recipients of EPA assistance agreements.

(b) For procurements involving EPA funds, recipients shall use their own procurement policies and procedures if those policies and procedures reflect applicable Federal, State, and local laws and regulations, and at least meet the requirements set forth in this part.

(c) This subpart describes when EPA will review the recipient's procurement practices.

§ 33.110 Applicant and recipient certification.

(a) It is the applicant's and recipient's responsibility to evaluate its own procurement system and to determine whether its system meets the applicable requirements in this part (see § 33.001).

(b) After evaluating its procurement system, the applicant or recipient will complete the "Procurement System Certification" (EPA Form 5700–48). The applicant or recipient will either certify that:

(1) Its system will meet the intent of all the requirements in this part before any procurement action with EPA assistance is undertaken, or

(2) Its current system does not meet the intent of the requirements of this part and, therefore, the applicant will follow the requirements of 40 CFR part 33 and allow EPA preaward review of proposed procurement actions that will use EPA funds. The additional requirements for EPA review and approval are contained in Appendix A to this part.

(c) The applicant must submit the signed certification form with the assistance application to the award official.

(d) The certification will be valid for two years or for the length of the project period specified in the assistance agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part (see § 33.115(b)). If the recipient substantially revises its procurement system, the recipient must re-evaluate its system and submit a revised EPA Form 5700-48.

(e) Even when a recipient certifies its procurement system, the EPA award official retains the authority stated in:

(1) Section 33.210(h) "Recipient's procurement responsibilities," which requires the recipient to receive the award official's prior written approval if the recipient wants to use an innovative procurement method,

(2) Section 33.211 "Recipient reporting requirements," which requires the award official to notify the Department of Labor of certain construction subagreement awards, and obtain all bid or offer tabulations,

(3) Section 33.605(d) "Noncompetitive negotiation procurement method," to authorize a noncompetitive award,

(4) Section 33.820(b) "Additional procurement requirements," which requires the award official's prior approval for a sole source award over $10,000 by an institute of higher education or other nonprofit organization,

(5) Subpart G "Protests."

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983, as amended at 53 FR 8077, Mar. 11, 1988]

§ 33.115 Procurement system review.

(a) EPA will not substitute its judgment for that of the recipient unless the matter is primarily a Federal concern.

(b) Even if a recipient has a certified procurement system, EPA reserves the right to review a recipient's procurement system or procurement action under an assistance agreement:

(1) To determine if the recipient is following the procurement requirements in this part; or

(2) When there is sufficient reason to believe that the recipient's system may be unacceptable based on:

(i) Information concerning the review or certification of the recipient's procurement system or actions by other Federal agencies or Congress;

(ii) Information from the recipient's cognizant audit agency;

(iii) Information from State agencies and organizations independent of the recipient's procurement activity;

(iv) Recipient responses to the procurement system certification form;

(v) Previous EPA experience with the recipient; or

(vi) Information from contractors or prospective contractors.

(c) If the award official determines that the recipient is not following the procurement requirements it certified it would follow, the award official shall revoke the recipient's certification and:

(1) Require that the recipient follow the procurement requirements in this part, including Appendix A, for future procurement actions and, if appropriate,

(2) Apply the sanctions in 40 CFR part 30.

(d) The recipient may recertify its procurement system if it shows the award official that it has corrected the procurement deficiencies noted by the award official, and the award official accepts the recertification.

Subpart B—Procurement Requirements

§ 33.205 Applicability and scope of this subpart.

This subpart contains:

(a) The recipient's and EPA's responsibilities, and

(b) The minimum procurement standards for each recipient's procurement system.

§ 33.210 Recipient responsibility.

(a) The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgment and good administrative practice of all contractual and administrative issues arising out of subagreements entered into under the assistance agreement. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of subagreements, settlement of protests, claims, disputes and other related procurement matters.

(b) The recipient shall maintain a subagreement administration system to assure that contractors perform in accordance with the terms, conditions and specifications of their subagreements.

(c) The recipient shall review its proposed procurement actions to avoid purchasing unnecessary or duplicative items.

(d) The recipient shall consider consolidating its procurement or dividing it into parts to obtain a more economical purchase.

(e) Where appropriate, the recipient shall make an analysis of lease versus purchase alternatives in its procurement actions.

(f) A recipient may request technical and legal assistance from the award official for the administration and enforcement of any subagreement awarded under this part. However, such assistance does not relieve the recipient of its responsibilities under this part.

(g) A recipient may use innovative procurement methods or procedures only if it receives the award officials' prior written approval.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983, as amended at 53 FR 8077, Mar. 11, 1988]

§ 33.211 Recipient reporting requirements.

Recipients shall notify the award official, in writing, of each construction subagreement which has or is expected to have an aggregate value over $10,000 within a 12-month period. The recipient shall notify the award official within ten (10) calendar days after the award of each construction subagreement. The notice shall include:

(a) Name, address, telephone number and employee identification number of the construction contractor,

(b) Amount of the award,

(c) Estimated starting and completion dates,

(d) Project number, name and site location of the project, and

(e) Copy of the tabulations of bids or offers and the name of each bidder or offeror.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.220 Limitation of subagreement award.

(a) The recipient shall award subagreements only to responsible contractors that possess the potential ability to perform successfully under the terms and conditions of a proposed procurement. A responsible contractor is one that has:

(1) Financial resources, technical qualifications, experience, organization and facilities adequate to carry out the project, or a demonstrated ability to obtain these;

(2) Resources to meet the completion schedule contained in the subagreement;

(3) A satisfactory performance record for completion of subagreements;

(4) Accounting and auditing procedures adequate to control property, funds and assets, as required in this part and 40 CFR part 30; and

(5) Demonstrated compliance or willingness to comply with the civil rights, equal employment opportunity, labor law and other statutory requirements under 40 CFR part 30.

(b) The recipient shall not make awards to contractors who have been suspended, debarred, or voluntarily excluded under 40 CFR part 32 nor shall it permit any portion of the work required by the subagreement to be performed at any facility listed on the EPA List of Violating Facilities (see 40 CFR part 15).

§ 33.225 Violations.

The recipient shall refer violations of law to the local, State or Federal authority with jurisdiction over the matter (see 40 CFR 30.610).

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.230 Competition.

(a) The recipient shall conduct all procurement transactions in a manner that provides maximum open and free competition.

(b) Procurement practices shall not unduly restrict or eliminate competition. Examples of practices considered to be unduly restrictive include:

(1) Noncompetitive practices between firms;

(2) Organizational conflicts of interest;

(3) Unnecessary experience and bonding requirements;

(4) State or local laws, ordinances, regulations or procedures which give local or in-State bidders or proposers preference over other bidders or proposers in evaluating bids or proposals; or

(5) Placing unreasonable requirements on firms in order for them to qualify to do business.

(c) The recipient may use a prequalification list(s) of persons, firms or products if it:

(1) Updates its prequalified list(s) at least every six months;

(2) Reviews and acts on each request for prequalification made more than 30 days before the closing date for receipt of proposals or bid opening; and

(3) Gives adequate public notice of its prequalification procedure in accordance with the public notice procedures in § 33.410 or § 33.510.

(d) A recipient may not use a prequalified list(s) of persons or firms if the procedure unnecessarily restricts competition. However, this restriction does not apply to § 33.525 "Optional selection procedure for negotiation and award of subagreements for architectural and engineering services."

EDITORIAL NOTE: For Class deviation documents affecting § 33.230, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 33.235 Profit.

(a) Recipients must assure that only fair and reasonable profits are paid to contractors awarded subagreements under EPA assistance agreements.

(b) The recipient shall negotiate profit as a separate element of price for each subagreement in which there is no price competition, or where price is based on cost analysis.

(c) Where the recipient receives two or more bids, profit included in a formally advertised, competitively bid, fixed price subagreement shall be considered reasonable.

(d) Off-the-shelf or catalog supplies are exempt from this section.

§ 33.240 Small, minority, women's, and labor surplus area businesses.

(a) It is EPA policy to award a fair share of subagreements to small, minority, and women's businesses. The recipient must take affirmative steps to assure that small, minority, and women's businesses are used when possible as sources of supplies, construction and services. Affirmative steps shall include the following:

(1) Including qualified small, minority, and women's businesses on solicitation lists;

(2) Assuring that small, minority, and women's businesses are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation of small, minority, and women's businesses;

(4) Establishing delivery schedules, where the requirements of the work permit, which will encourage participation by small, minority, and women's businesses;

(5) Using the services and assistance of the Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce, as appropriate; and

(6) If the contractor awards subagreements, requiring the contractor to take the affirmative steps in paragraphs (a) (1) through (5) of this section.

(b) [Reserved]

(c) EPA encourages recipients to procure supplies and services from labor surplus area firms.

§ 33.245 Privity of subagreement.

Neither EPA nor the United States shall be a party to any subagreement nor to any solicitation or request for proposals.

§ 33.250 Documentation.

(a) Procurement records and files for procurements in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Written justification for selection of the procurement method;

(3) Written justification for use of any specification which does not provide for maximum free and open competition;

(4) Written justification for the type of subagreement;

(5) Basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 33.290 and documentation of negotiations; and

(6) Written justification for rejecting bids.

(b) Recipients must state the reasons for rejecting any or all bids and the justification for procurements on a noncompetitively negotiated basis and make them available for public inspection.

EDITORIAL NOTE: For Class deviation documents affecting § 33.250, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 33.255 Specifications.

(a) Recipients must incorporate in their specifications a clear and accurate description of the technical requirements for the material, product or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition, unless the features are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment or to promote innovative technologies. The description shall include a statement of the qualitative nature of the material, product or service to be procured and, when necessary, shall set forth those minimum essential characteristics and standards to which it must conform if it is to satisfy its intended use.

(b) The recipient shall avoid the use of detailed product specifications if at all possible.

(c) When in the judgment of the recipient it is impractical or uneconomical to make a clear and accurate description of the technical requirements, recipients may use a "brand name or equal" description as a means to define the performance or other salient requirements of a procurement. The recipient need not establish the existence of any source other than the named brand. Recipients must clearly state in the specification the salient requirements of the named brand which must be met by offerors. (An additional specification requirement for recipients of assistance for the construction of treatment works under 40 CFR part 35, subparts E and I is contained in § 33.710.)

§ 33.260 Intergovernmental agreements.

(a) To foster greater economy and efficiency, EPA encourages recipients to enter into State and local intergovernmental agreements for common procurement or use of goods and services.

(b) Although intergovermental agreements are not subject to the requirements in this part, all procurements under intergovernmental agreements are subject to the requirements in this part except for procurements that are:

(1) Incidental to the purpose of the assistance agreement, and

(2) Made through a central public procurement unit.

§ 33.265 Bonding and insurance.

(a) These requirements apply only to recipients and contractors with subagreements for construction.

(1) For construction subagreements of $100,000 or less, the recipient shall follow its own requirements relating to bid guarantees, performance bonds and payment bonds.

(2) For those subagreements more than $100,000, the award official may accept the recipient's bonding policy and requirements provided the award

official makes a determination that the Federal Government's interest is adequately protected. If the award official does not make that determination, the minimum bonding requirements for subagreements more than $100,000 are:

(i) A "bid guarantee" from each bidder equivalent to five percent of the bid price. The "bid guarantee" shall consist of a firm commitment such as a bid bond, certified check or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as the EPA recipient may require within the time specified.

(ii) A "performance bond" for 100 percent of the subagreement price. A "performance bond" is one that the contractor executes in connection with a subagreement to secure fulfillment of all its obligations under such subagreement.

(iii) A "payment bond" for 100 percent of the subagreement price. A "payment bond" is one that the contractor executes in connection with a subagreement to assure payment as required by law, to all persons supplying labor and material in the execution of the work provided for in the subagreement.

(3) Where bonds are required in the situations described above, bidders and contractors shall obtain them from companies holding certificaties of authority as acceptable sureties (31 CFR part 223).

(b) Recipients and contractors must follow the flood hazard area requirements of the Flood Disaster Protection Act of 1973 contained in 40 CFR part 30.

§ 33.270 Code of conduct.

(a) Recipients shall maintain a written code or standards of conduct which shall govern the performance of its officers, employees, or agents engaged in the award and administration of subagreements supported by EPA funds. No employee, officer or agent of the recipient shall participate in the selection, award or administration of a subagreement supported by EPA funds if a conflict of interest, real or apparent, would be involved.

(b) Such a conflict would arise when:

(1) Any employee, officer or agent of the recipient, any member of their immediate families, or their partners have a financial or other interest in the firm selected for award, or

(2) An organization which may receive or has been awarded a subagreement employs, or is about to employ, any person under paragraph (b)(1) of this section.

(c) The recipient's officers, employees or agents shall neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors or other parties to subagreements.

(d) Recipients may set minimum rules where the financial interest is not substantial or the gift is an unsolicited item of nominal intrinsic value.

(e) To the extent permitted by State or local law or regulations, the recipient's code of conduct shall provide for penalties, sanctions or other disciplinary actions for violations of the code by the recipient's officers, employees or agents or by contractors or their agents.

§ 33.275 Federal cost principles.

The following cost principles apply to assistance agreements and subagreements:

(a) State and local governments must comply with OMB Circular A-87 to determine allowable costs.

(b) Educational institutions must comply with OMB Circular A-21 to determine allowable costs and with OMB Circular A-88 for indirect cost rates.

(c) Nonprofit institutions must comply with OMB Circular A-122 to determine allowable costs.

(d) All other recipients, contractors and subcontractors must comply with the cost principles contained in the Federal Procurement Regulations (41 CFR 1-15.2 and, if appropriate, § 1-15.4) to determine allowable costs.

§ 33.280 Payment to consultants.

(a) For all EPA assistance agreements, EPA will limit its participation in the salary rate (excluding overhead) paid to individual consultants retained by recipients or by a recipient's contractors or subcontractors to the maxi-

mum daily rate for a GS–18. (Recipients may, however, pay consultants more than this amount.) This limitation applies to consultation services of designated individuals with specialized skills who are paid at a daily or hourly rate. This rate does not include transportation and subsistence costs for travel performed; recipients will pay these in accordance with their normal travel reimbursement practices.

(b) Subagreements with firms for services which are awarded using the procurement requirements in this part are not affected by this limitation.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.285 Prohibited types of subagreements.

The cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) and the percentage-of-construction-cost types of subagreements shall not be used.

§ 33.290 Cost and price considerations.

(a) The recipient shall conduct a cost analysis of all negotiated change orders and all negotiated subagreements estimated to exceed $10,000.

(b) The recipient shall conduct a price analysis of all formally advertised procurements estimated to exceed $10,000 if there are fewer than three bidders.

(c) For negotiated procurement, contractors and subcontractors shall submit cost or pricing data in support of their proposals to the recipient.

§ 33.295 Subagreements awarded by a contractor.

A contractor must comply with the following provisions in its award of subagreements. (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) 40 CFR part 32 (Debarment and Suspension Under EPA Assistance Programs);

(b) The limitations on subagreement award in § 33.220(a) (1) through (5);

(c) The profit requirements in § 33.235;

(d) The requirements for small, minority, women's and labor surplus area businesses in § 33.240;

(e) The specification requirements of § 33.255;

(f) The requirements of subpart C of this part, if appropriate;

(g) The Federal cost principles in § 33.275;

(h) The prohibited types of subagreements in § 33.285;

(i) The cost and price considerations in § 33.290, and

(j) The applicable subagreement provisions in subpart F of this part.

Small Purchases

§ 33.305 Small purchase procurement.

If the aggregate amount involved in any one procurement transaction does not exceed $10,000, including estimated handling and freight charges, overhead and profit, the recipient may use small purchase procedures.

Editorial Note: For Class deviation documents affecting § 33.305, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 33.310 Small purchase procedures.

Small purchase procedures are relatively simple procurement methods that are sound and appropriate for a procurement of services, supplies or other property costing in the aggregate not more than $10,000.

Editorial Note: For Class deviation documents affecting § 33.310, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 33.315 Requirements for competition.

(a) Recipients shall not divide a procurement into smaller parts to avoid the dollar limitation for competitive procurement.

(b) Recipients shall obtain price or rate quotations from an adequate number of qualified sources.

Formal Advertising

§ 33.405 Formal advertising procurement method.

(a) The requirements in §§ 33.405 through 33.430 apply to all formally advertised subagreements in excess of

$10,000. Formal advertising means the public solicitation of sealed bids and the award of a subagreement based on a fixed price (lump sum, unit price, or a combination of the two) to the lowest, responsive, responsible bidder.

(b) Formal advertising requires at a minimum:

(1) A complete, adequate and realistic specification or purchase description of what is required;

(2) Two or more responsible bidders which are willing and able to compete effectively for the recipient's business;

(3) A procurement that lends itself to the award of a fixed-price subagreement; and

(4) That the selection of the successful bidder be made principally on the basis of price.

§ 33.410 Public notice and solicitation of bids.

The recipient shall give adequate public notice of the solicitation, inviting bids and stating when and how the bidding documents may be obtained or examined.

§ 33.415 Time for preparing bids.

The recipient must allow adequate time between the date the public notice is first published and the date by which bids must be submitted.

§ 33.420 Adequate bidding documents.

Recipient's bidding documents shall include:

(a) A complete statement of work to be performed including, where appropriate, design drawings and specifications and the required performance schedule;

(b) The terms and conditions of the subagreement to be awarded, including payment, delivery schedules, point of delivery and acceptance criteria;

(c) A clear explanation of the recipient's method of bidding and the method of evaluating bid prices, and its basis and method for awarding the subagreement;

(d) Any other responsibility requirements or evaluation criteria which the recipient will use in evaluating bidders;

(e) The prevailing wage determination, made under the Davis-Bacon Act, if applicable; and

(f) The deadline and place to submit bids and a copy of § 33.295, subparts P and G and, if appropriate, EPA Form 5720-4 "Labor Standard Provisions for Federally Assisted Construction Contracts."

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.425 Public opening of bids.

The recipient shall publicly open bids at the place, date and time announced in the bidding documents.

§ 33.430 Award to the lowest, responsive, responsible bidder.

(a) The recipient shall evaluate all bids in accordance with the methods and criteria in the bidding documents.

(b) The recipient shall award a fixed-price subagreement to the lowest, responsive, responsible bidder. Where specified in the bidding documents, recipients shall consider factors such as discounts, transportation costs and life cycle costs to determine the low bid. Payments discounts may be used to determine the low bid only when prior experience of the recipient indicates that it generally accepts such discounts.

(c) The recipient may reject all bids only when it has sound, documented business reasons which are in the best interest of the program for which EPA assistance is awarded (see § 33.250 "Documentation").

Competitive Negotiation

§ 33.505 Competitive negotiation procurement method.

(a) The requirements in §§ 33.505 through 33.525 apply to all competitively negotiated subagreements in excess of $10,000.

(b) Recipients may use competitive negotiation only if conditions are not appropriate for the use of the formal advertising method of procurement (see § 33.405).

§ 33.510 Public notice.

(a) The recipient must give adequate public notice for competitively negotiated procurements.

(b) The notice of a request for proposals must state how to obtain associ-

ated documents, including a copy of § 33.295, subparts F and G, the basis for subagreement award, and, if appropriate, EPA Form 5720-4 "Labor Standard Provisions for Federally Assisted Construction Contracts."

(c) Requests for proposals must be written, contain enough information to enable a prospective offeror to prepare a proposal, contain all evaluation criteria and the relative importance attached to each, and clearly state the deadline and place to submit proposals.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.515 Evaluation of proposals.

(a) Recipients must uniformly and objectively evaluate all proposals submitted in response to the request for proposals.

(b) Recipients must base their determinations of qualified offerors and acceptable proposals solely on the evaluation criteria stated in the request for proposals.

§ 33.520 Negotiation and award of subagreement.

(a) Unless the request for proposals states that award may be based on initial offers alone, the recipient must conduct meaningful negotiations with the best qualified offerors with acceptable proposals within the competitive range, and permit revisions to obtain best and final offers. The best qualified offerors must have equal opportunities to negotiate or revise their proposals. During negotiations, the recipient must not disclose the indentity of competing offerors or any information from competing proposals.

(b) The recipient must award the subagreement to the responsible offeror whose proposal is determined in writing to be the most advantageous to the recipient, taking into consideration price and other evaluation criteria set forth in the request for proposals.

(c) The recipient must promptly notify unsuccessful offerors that their proposals were rejected.

(d) The recipient must document its procurement file to indicate how proposals were evaluated, what factors were used to determine the best qualified offerors within the competitive range, and what factors were used to determine the subagreement award.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

§ 33.525 Optional selection procedure for negotiation and award of subagreements for architectural and engineering services.

(a) The recipient may evaluate and select an architect or engineer using the procedures in this section in place of the procedures in § 33.520, "Negotiation and award of subagreement."

(b) The recipient may use either a prequalified list developed in accordance with § 33.230(c) or responses to requests for statement of qualifications to determine the most technically qualified architects or engineers.

(c) After selecting and ranking the most qualified architects or engineers, the recipient will request technical proposals from those architects or engineers and inform them of the evaluation criteria the recipient will use to rank the proposals.

(d) The recipient shall then select and determine, in writing, the best technical proposal.

(e) After selecting the best proposal, the recipient shall attempt to negotiate fair and reasonable compensation with that offeror.

(f) If the recipient and the offeror of the best proposal cannot agree on the amount of compensation, the recipient shall formally terminate negotiations with that offeror. The recipient shall then negotiate with the offeror with the next best proposal. This process will continue until the recipient reaches agreement on compensation with an offeror with an acceptable proposal. Once the recipient terminates negotiations with an offeror, the recipient cannot go back and renegotiate with that offeror.

[48 FR 12926, Mar. 28, 1983; 48 FR 30364, July 1, 1983]

NONCOMPETITIVE NEGOTIATION

§ 33.605 Noncompetitive negotiation procurement method.

Recipients may use noncompetitive negotiation to award a subagreement

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if the other three procurement methods are inappropriate because:

(a) The item is available only from a single source;

(b) A public exigency or emergency exists and the urgency for the requirement will not permit a delay incident to competitive procurement;

(c) After solicitation from a number of sources, competition is inadequate; or

(d) The EPA award official authorizes noncompetitive negotiation, subject to the limitation in § 33.715(a)(2).

Subpart C—[Reserved]

Subpart D—Requirements for Institutions of Higher Education and Other Nonprofit Organizations

§ 33.805 Applicability and scope of this subpart.

Recipients who are subject to the provisions of OMB Circular A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Nonprofit Organizations" are not subject to all of the requirements in this part.

§ 33.810 Nonapplicable subagreement clauses.

The following clauses in subpart F of this part do not apply to institutions of higher education and other nonprofit organizations:

(a) Energy efficiency (§ 33.1021);

(b) Changes (§ 33.1030,3);

(c) Differing site conditions (§ 33.1030,4); and

(d) Price reduction for defective cost or pricing data (§ 33.1030,8).

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983]

§ 33.815 Nonapplicable procurement provisions.

The following procurement provisions do not apply to institutions of higher education and other nonprofit organizations:

(a) Subparts C and E;

(b) Sections 33.405 through 33.430 "Formal advertising;"

(c) Sections 33.505 through 33.525 "Competitive negotiation;"

(d) Section 33.605 "Noncompetitive negotiation" (see § 33.820(b));

(e) The requirement in § 33.270(a) "Code of conduct" to have a written code of conduct;

(f) The provisions of § 33.240 "Small, minority, women's, and labor surplus area businesses" which:

(1) Encourage the award of a fair share of contracts to women's and labor surplus area businesses;

(2) Require the specific affirmative action steps in § 33.240(a)(1) through (a)(6); however, nonprofit organizations are required to make positive efforts to use small businesses and minority owned businesses as sources of supplies and services;

(g) Subpart G "Protests."

§ 33.820 Additional procurement requirements.

(a) Recipients must exclude contractors that develop or draft specifications, requirements, statements of work, invitation for bids, or requests for proposals from competing for awards resulting from the prior effort.

(b) For all proposed sole source subagreements and where only one bid or proposal is received, the recipient must request the award official's prior approval to award the subagreement if the aggregate expenditure is expected to exceed $10,000.

Subpart E—[Reserved]

Subpart F—Subagreement Provisions

§ 33.1005 Applicability and scope of this subpart.

(a) This subpart applies to all EPA recipients and describes the minimum content of each subagreement (contract and subcontract).

(b) Nothing in this subpart prohibits a recipient from requiring more assurances, guarantees, or indemnity or other contractural requirements from any party to a subagreement.

§ 33.1010 Requirements for subagreement clauses.

Recipients shall include clauses that meet the requirements of §§ 33.1015 through 33.1021, and the appropriate

clauses in § 33.1030, in each procurement subagreement.

§ 33.1015 Subagreement provisions clause.

Each subagreement must include provisions defining a sound and complete agreement, including the:

(a) Nature, scope, and extent of work to be performed;

(b) Timeframe for performance;

(c) Total cost of the subagreement; and

(d) Payment provisions.

§ 33.1016 Labor standards provisions.

(This clause applies only when required by statute.) Recipients shall include a copy of EPA Form 5720-4 "Labor Standards Provisions for Federally Assisted Construction Contracts" in each subagreement for construction (as defined by the Secretary of Labor). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a—276a-7); the Copeland Regulations (29 CFR part 3); the Contract Work Hours and Safety Standards Act—Overtime Compensation (940 U.S.C. 327-333) and the nondiscrimination provisions in Executive Order 11246, as amended.

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983]

§ 33.1019 Patents data and copyrights clause.

Except for construction grant subagreements, all subagreements shall include notice of EPA requirements and regulations pertaining to reporting and patent rights under any subagreement involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed in the conduct of work under a subagreement. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights in data contained in 40 CFR part 30.

§ 33.1020 Violating facilities clause.

Subagreements in excess of $100,000 shall contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR part 15) which prohibit the use under nonexempt Federal contracts, grants or loans of facilities included on the EPA List of Violating Facilities.

§ 33.1021 [Reserved]

§ 33.1030 Model subagreement clauses.

Recipients must include, when appropriate, the following clauses or their equivalent in each subagreement. Recipients may substitute other terms for "recipient and" "contractor" in their subagreements.

1. SUPERSESSION

The recipient and the contractor agree that this and other appropriate clauses in 40 CFR 33.1030 apply to that work eligible for EPA assistance to be performed under this subagreement and that these clauses supersede any conflicting provisions of this subagreement.

2. PRIVITY OF SUBAGREEMENT

This subagreement is expected to be funded in part with funds from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is, or will be, a party to this subagreement or any lower tier subagreement. This subagreement is subject to regulations contained in 40 CFR part 33 in effect on the date of the assistance award for this project.

3. SUSPENSION OF WORK

The following clause applies only to construction subagreements. (a) The recipient may order the contractor in writing to suspend, delay or interrupt all or any part of the work for such period of time as the recipient may determine to be appropriate for the convenience of the recipient.

(b) If the performance of all or any part of the work is suspended, delayed or interrupted for an unreasonable period of time by an act of the recipient in administration of this subagreement, or by the recipient's failure to act within the time specified in this subagreement (or if no time is specified, within a reasonable time), the recipient shall make an adjustment for any increase in the cost of performance of this subagreement (excluding profit) necessarily caused by such unreasonable suspension, delay or interruption and modify the subagreement in writing. However, no adjustment shall be made under this clause for any suspension,

delay or interruption to the extent (1) that performance would have been so suspended, delayed or interrupted by any other cause, including the fault or negligence of the contractor, or (2) for which an equitable adjustment is provided for or excluded under any other provision of this subagreement.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the contractor notified the recipient in writing of the act, or failure to act, involved (this requirement does not apply to a claim resulting from a suspension order), and (2) unless the amount claimed is asserted in writing as soon as practicable after the termination of such suspension, delay or interruption, but not later than the date of final payment under the subagreement.

4. TERMINATION

(a) This subagreement may be terminated in whole or in part in writing by either party in the event of substantial failure by the other party to fulfill its obligations under this subagreement through no fault of the terminating party, provided that no termination may be effected unless the other party is given (1) not less than ten (10) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party prior to termination.

(b) This subagreement may be terminated in whole or in part in writing by the recipient for its convenience, provided that the contractor is given (1) not less than ten (10) calendar days' written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party prior to termination.

(c) If termination for default is effected by the recipient, an equitable adjustment in the price provided for in this subagreement shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the contractor at the time of termination may be adjusted to cover any additional costs to the recipient because of the contractor's default. If termination for default is effected by the contractor, or if termination for convenience is effected by the recipient, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the contractor for services rendered and expenses incurred prior to the termination, in addition to termination settlement costs reasonably incurred by the contractor relating to commitments which had become firm prior to the termination.

(d) Upon receipt of a termination action under paragraphs (a) or (b) above, the contractor shall (1) promptly discontinue all affected work (unless the notice directs otherwise), and (2) deliver or otherwise make available to the recipient all data, drawings, specifications, reports, estimates, summaries and such other information and materials as may have been accumulated by the contractor in performing this subagreement, whether completed or in process.

(e) Upon termination under paragraphs (a) or (b) above, the recipient may take over the work and may award another party a subagreement to complete the work under this subagreement.

(f) If, after termination for failure of the contractor to fulfill contractual obligations, it is determined that the contractor had not failed to fulfill contractual obligations, the termination shall be deemed to have been for the convenience of the recipient. In such event, adjustment of the subagreement price shall be made as provided in paragraph (c) of this clause.

5. REMEDIES

Unless otherwise provided in this subagreement, all claims, counter-claims, disputes and other matters in question between the recipient and the contractor arising out of, or relating to, this subagreement or the breach of it will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the recipient is located.

6. AUDIT; ACCESS TO RECORDS

(a) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on EPA funded work under this subagreement in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR part 30 in effect on the date of execution of this subagreement. The contractor shall also maintain the financial information and data used in the preparation or support of the cost submission required under 40 CFR 33.290 for any negotiated subagreement or change order and a copy of the cost summary submitted to the recipient. The United States Environmental Protection Agency, the Comptroller General of the United States, the United States Department of Labor, the recipient, and (the State) or any of their authorized representatives shall have access to all such books, records, documents and other evidence for the purpose of inspection, audit and copying during normal business hours. The contractor will provide proper facilities for such access and inspection.

(b) If this is a formally advertised, competitively awarded, fixed price subagreement, the contractor agrees to make paragraphs (a) through (g) of this clause appli-

cable to all negotiated change orders and subagreement amendments affecting the subagreement price. In the case of all other types of prime subagreements, the contractor agrees to make paragraphs (a) through (g) applicable to all subagreements he awards in excess of $10,000, at any tier, and to make paragraphs (a) through (g) of this clause applicable to all change orders directly related to project performance.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and with established procedures and guidelines of the reviewing or audit agency(ies).

(d) The contractor agrees to disclose all information and reports resulting from access to records under paragraphs (a) and (b) of this clause to any of the agencies referred to in paragraph (a).

(e) Records under paragraphs (a) and (b) above shall be maintained by the contractor during performance on EPA assisted work under this subagreement and for the time periods specified in 40 CFR part 30. In addition, those records which relate to any controversy arising under an EPA assistance agreement, litigation, the settlement of claims arising out of such performance or to costs or items to which an audit exception has been taken shall be maintained by the contractor for the time periods specified in 40 CFR part 30.

(f) Access to records is not limited to the required retention periods. The authorized representatives designated in paragraph (a) of this clause shall have access to records at any reasonable time for as long as the records are maintained.

(g) This right of access clause applies to financial records pertaining to all subagreements (except formally advertised, competitively awarded, fixed price subagreements) and all subagreement change orders regardless of the type of subagreement, and all subagreement amendments regardless of the type of subagreement. In addition this right of access applies to all records pertaining to all subagreements, subagreement change orders and subagreement amendments:

(1) To the extent the records pertain directly to subagreement performance;

(2) If there is any indication that fraud, gross abuse or corrupt practices may be involved; or

(3) If the subagreement is terminated for default or for convenience.

7. COVENANT AGAINST CONTINGENT FEES

The contractor assures that no person or selling agency has been employed or retained to solicit or secure this subagreement upon an agreement or understanding for a commission, percentage, brokerage or contingent fee excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this assurance, the recipient shall have the right to annul this agreement without liability or, at its discretion, to deduct from the subagreement price or consideration, or otherwise recover the full amount of such commission, percentage, brokerage or contingent fee.

8. GRATUITIES

(a) If the recipient finds after a notice and hearing that the contractor or any of the contractor's agents or representatives offered or gave gratuities (in the form of entertainment, gifts or otherwise) to any official, employee or agent of the recipient, the State or EPA in an attempt to secure a subagreement or favorable treatment in awarding, amending or making any determinations related to the performance of this subagreement, the recipient may, by written notice to the contractor, terminate this subagreement. The recipient may also pursue other rights and remedies that the law or this subagreement provides. However, the existence of the facts on which the recipient bases such findings shall be in issue and may be reviewed in proceedings under the Remedies clause of this subagreement.

(b) In the event this subagreement is terminated as provided in paragraph (a), the recipient may pursue the same remedies against the contractor as it could pursue in the event of a breach of the subagreement by the contractor, and as a penalty, in addition to any other damages to which it may be entitled by law, be entitled to exemplary damages in an amount (as determined by the recipient) which shall be not less than three nor more than ten times the costs the contractor incurs in providing any such gratuities to any such officer or employee.

9. *Responsibility of the Contractor*

(a) *The following clause applies only to subagreements for services.* (1) The contractor is responsible for the professional quality, technical accuracy, timely completion and coordination of all designs, drawings, specifications, reports and other services furnished by the contractor under this subagreement. If the subagreement involves environmental measurements or data generation, the contractor shall comply with EPA quality assurance requirements in 40 CFR 30.503. The contractor shall, without additional compensation, correct or revise any errors, omissions or other deficiencies in his designs, drawings, specifications, reports and other services.

(2) The contractor shall perform the professional services necessary to accomplish the work specified in this subagreement in accordance with this subagreement and ap-

plicable EPA requirements in effect on the date of execution of the assistance agreement for this project.

(3) The owner's or EPA's approval of drawings, designs, specifications, reports and incidental work or materials furnished hereunder shall not in any way relieve the contractor of responsibility for the technical adequacy of his work. Neither the owner's nor EPA's review, approval, acceptance or payment for any of the services shall be construed as a waiver of any rights under this agreement or of any cause for action arising out of the performance of this subagreement.

(4) The contractor shall be, and shall remain, liable in accordance with applicable law for all damages to the owner or EPA caused by the contractor's negligent performance of any of the services furnished under this subagreement, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The contractor shall not be responsible for any time delays in the project caused by circumstances beyond the contractor's control.

(5) The contractor's obligations under this clause are in addition to the contractor's other express or implied assurances under this subagreement or State law and in no way diminish any other rights that the owner may have against the contractor for faulty materials, equipment or work.

(b) *The following clause applies only to subagreements for construction.* (1) The contractor agrees to perform all work under this subagreement in accordance with this agreement's designs, drawings and specifications.

(2) The contractor guarantees for a period of at least one (1) year from the date of substantial completion of the work that the completed work is free from all defects due to faulty materials, equipment or workmanship and that he shall promptly make whatever adjustments or corrections which may be necessary to cure any defects, including repairs of any damage to other parts of the system resulting from such defects. The owner shall promptly give notice to the contractor of observed defects. In the event that the contractor fails to make adjustments, repairs, corrections or other work made necessary by such defects, the owner may do so and charge the contractor the cost incurred. The performance bond shall remain in full force and effect through the guarantee period.

(3) The contractor's obligations under this clause are in addition to the contractor's other express or implied assurances under this subagreement or State law and in no way diminish any other rights that the owner may have against the contractor for faulty materials, equipment or work.

10. FINAL PAYMENT

Upon satisfactory completion of the work performed under this subagreement, as a condition before final payment under this subagreement or as a termination settlement under this subagreement the contractor shall execute and deliver to the owner a release of all claims against the owner arising under, or by virtue of, this subagreement, except claims which are specifically exempted by the contractor to be set forth therein. Unless otherwise provided in this subagreement, by State law or otherwise expressly agreed to by the parties to this subagreement, final payment under this subagreement or settlement upon termination of this subagreement shall not constitute a waiver of the owner's claims against the contractor or his sureties under this subagreement or applicable performance and payment bonds.

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983, as amended at 53 FR 8077, Mar. 11, 1988]

Subpart G—Protests

§ 33.1105 Applicability and scope of this subpart.

This subpart sets forth EPA's administrative process for the rapid resolution of protest appeals filed with the award official.

§ 33.1110 Recipient protest procedures.

(a) Recipients must establish their own procedures for prompt consideration of initial protests concerning their solicitations or subagreement awards. A "protest" is a written complaint concerning the recipient's solicitation or award of a subagreement. It must be filed with the recipient by a party with a direct financial interest adversely affected by a recipient's procurement action (see § 33.1130 "Review of protest appeal").

(b) The recipient should review each protest received to determine whether it is appropriate to defer the protested procurement action.

(c) If the recipient does not defer the procurement action, it assumes the risk that the award official may disallow the cost of the protested procurement action if the protest appeal is upheld.

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983]

§ 33.1115 Protest appeal.

(a) A party with a financial interest which is adversely affected by the recipient's decision on the initial protest may file a "protest appeal" with the award official.

(b) A "protest appeal" is a written complaint filed with the award official regarding the recipient's determination of a protest.

§ 33.1120 Limitations on protest appeals.

(a) The award official shall not accept a protest appeal until the protester has exhausted all administrative remedies at the recipient level.

(b) A protest appeal is limited to the following:

(1) Issues arising under the procurement provisions of this part, or

(2) Alleged violations of State or local law or ordinances where the award official determines that there is an overriding Federal requirement.

(c) A recipient of a lower tier subagreement (subcontract) may only file a protest appeal for issues which relate to the award of a subagreement by a contractor (see § 33.295 "Subagreements awarded by a contractor").

§ 33.1125 Filing requirements.

(a) Protest appeals must be filed with the Assistant General Counsel for Grants for headquarters-awarded assistance agreements and with the Office of Regional Counsel for regionally awarded assistance agreements.

(b) A protest appeal must:

(1) Be written;

(2) Include a copy of the recipient's determination of the protest;

(3) State the basis for the appeal; and

(4) Request a determination under this subpart.

(c) Upon filing a protest appeal with the Regional Counsel or Assistant General Counsel for Grants, as appropriate, the party filing the protest appeal must concurrently transmit a copy of all protest documents and any attachments to all other parties with a direct financial interest which may be adversely affected by the determination of the protest appeal.

(d) The award official will only consider written protest appeals received by the appropriate Counsel's office within seven calendar days after the adversely affected party receives the recipient's determination of protest. However, the adversely affected party can meet the seven-day notice requirement by telegraphing the Counsel within the seven-calendar-day period of its intent to file a protest appeal, provided the adversely affected party submits a complete protest appeal within seven calendar days of the date it sends the telegram. If the seventh day falls on a Saturday, Sunday or holiday, the next working day shall be the last day to submit a protest appeal.

(e) Any party which submits a document to the award official during the course of a protest appeal must simultaneously furnish all other affected parties with a copy of the document.

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983]

§ 33.1130 Review of protest appeal.

(a) If the recipient does not receive the initial protest before bid opening or the closing date for receipt of proposals, the award official may dismiss as untimely any protest appeal based upon alleged improprieties in the solicitation which were clearly apparent before bid opening or before the deadline for receipt of initial proposals. In negotiated procurements, protests of alleged improprieties which were incorporated in a new solicitation must have been received by the recipient by the closing date for receipt of proposals for the new solicitation.

(b) In cases not involving improprieties in the solicitation, the award official may dismiss as untimely a protest appeal if the adversely affected party did not file the initial protest with the recipient within seven calendar days of the date the basis for the protest was known or should have been known, whichever is earlier.

§ 33.1140 Deferral of procurement action.

When the award official receives a protest appeal and the recipient has not deferred the procurement action under § 33.1110(b), the award official must promptly request that the recipient defer the protested procurement action until the award official notifies

the recipient of the formal or informal resolution of the appeal. The request shall be limited to the award of the subagreement or subitem which is the basis of the protest appeal.

§ 33.1145 Award official's review.

(a) The award official may establish rules of procedures or deadlines for the submission of materials or the arrangement of protest appeal conferences.

(b) The award official may summarily dismiss an appeal without proceedings under this subpart if:

(1) The protest appeal is not reviewable, see § 33.1130, or addresses issues other than those allowed under § 33.1120(b);

(2) The protester substantially fails to comply with the procedural requirements of this subpart; or

(3) The protester does not agree to the recipient's request for a reasonable extension of the bid and bond period.

(c) The award official may summarily deny a protest appeal without proceedings under this subpart if, after considering the facts in a light most favorable to the protester, the award official believes that the protest lacks merit.

(d) The award official will give both the recipient and the protester, as well as any other party with a financial interest which may be adversely affected by the determination of protest, an opportunity to present arguments in support of their views in writing or at a conference.

(e) After the announced date for receipt of written arguments, the record shall be closed.

(f) The award official shall review the record considered by the recipient and any other documents or arguments presented by the parties to determine whether the recipient has complied with the procurement requirements of this part and has a rational basis for its determination of protest.

(g) The award official's determination shall constitute final EPA action from which there shall be no further administrative appeal. No party may appeal an award official's determination of appeal to the EPA Board of Assistance Appeals.

(h) Nothing in this subpart precludes the award official from reviewing the recipient's procurement action. (See § 33.115.)

(i) Noncompliance with the award official's determination of protest shall be cause for an action against the recipient under 40 CFR part 30 or 32.

(j) If an appeal involves legal issues not explicitly addressed by this part, the award official shall resolve the issue by referring to other protest determinations under this section and decisions of the Comptroller General of the United States or of the Federal courts addressing Federal requirements comparable to procurement requirements of this part.

APPENDIX A—PROCEDURAL REQUIREMENTS FOR RECIPIENTS WHO DO NOT CERTIFY THEIR PROCUREMENT SYSTEMS, OR FOR RECIPIENTS WHO HAVE THEIR PROCUREMENT CERTIFICATIONS REVOKED BY EPA

(a) The following procedural requirements apply to recipients who:

(1) Do not certify to EPA that their procurement system meets the minimum procurement requirements in this part, or

(2) Have their procurement certification revoked by the award official, as stated in § 33.115(c).

(b) Those recipients must comply with the requirements in this part plus the following procedural requirements. These procedural requirements supplement the requirements in the sections cited.

(1) To comply with § 33.250, "Documentation," the recipient must submit to the award official, unless he instructs otherwise, the records required by this section.

(2) To comply with § 33.290, "Cost and price considerations," the recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700-41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700-41.

(3) To comply with § 33.415, "Time for preparing bids," the recipient must allow at least 30 days between the date when it first publishes the public notice and the date by which bids must be submitted.

(4) To comply with § 33.410, "Public notice and solicitation of bids," the recipient must publish the notice in professional journals, newspapers, or publications of general circu-

lation over a reasonable area for at least 30 days before bid opening.

(5) To comply with § 33.510, "Adequate public notice," the recipient must publish the notice in professional journals, newspapers, or publications of general circulation over a reasonable area for at least 30 days before the deadline for receipt of proposals. The recipient may use posted public notices or written notification directed to interested persons, firms or professional organizations.

[48 FR 12926, Mar. 28, 1983; 48 FR 30365, July 1, 1983]

EDITORIAL NOTE: For Class deviation documents affecting part 33, appendix A, see the List of CFR Sections Affected in the Finding Aids section of this volume.

PART 34—NEW RESTRICTIONS ON LOBBYING

Subpart A—General

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APPENDIX A TO PART 34—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 34—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319; Pub. L. 101-121 (31 U.S.C. 1352); 33 U.S.C. 1251 *et seq.*; 42 U.S.C. 7401 *et seq.*; 42 U.S.C. 6901 *et seq.*; 42 U.S.C. 300f *et seq.*; 7 U.S.C. 136 *et seq.*; 15 U.S.C. 2801 *et seq.*; 42 U.S.C. 9601 *et seq.*; 20 U.S.C. 4011 *et seq.*; 33 U.S.C. 1401 *et seq.*

SOURCE: 55 FR 6737 and 6753, Feb. 26, 1990 (interim), unless otherwise noted.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 34.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in Appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member

of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 34.105 Definitions.

For purposes of this part:

(a) *Agency,* as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Com-

mittee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 34.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting

to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either Subpart B or C.

Subpart B—Activities by Own Employees

§ 34.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95-507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

§ 34.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

§ 34.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 34.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 34.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirements in § 34.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, "professional and technical services" shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting or a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

Subpart D—Penalties and Enforcement

§ 34.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000

and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 34.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 34.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 34.500 Secretary of Defense.

(a) The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) The Department of Defense may issue supplemental regulations to implement paragraph (a) of this section.

Subpart F—Agency Reports

§ 34.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see Appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 34.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 34—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Appendix B to Part 34—Disclosure Form to Report Lobbying

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB 0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. Type of Federal Action:	2. Status of Federal Action:	3. Report Type:
☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	☐ a. bid/offer/application b. initial award c. post-award	☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter ____ date of last report _____

4. Name and Address of Reporting Entity:	5. If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:
☐ Prime ☐ Subawardee Tier ____, *if known*: **Congressional District,** *if known*:	 **Congressional District,** *if known*:
6. Federal Department/Agency:	7. Federal Program Name/Description: CFDA Number, *if applicable*: _____
8. Federal Action Number, *if known*:	9. Award Amount, *if known*: $
10. a. Name and Address of Lobbying Entity (*if individual, last name, first name, MI*):	b. Individuals Performing Services (*including address if different from No. 10a*) (*last name, first name, MI*):
(attach Continuation Sheet(s) SF-LLL-A, *if necessary*)	
11. Amount of Payment (*check all that apply*): $ _____ ☐ actual ☐ planned	13. Type of Payment (*check all that apply*): ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. Form of Payment (*check all that apply*): ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	
14. Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11: (attach Continuation Sheet(s) SF-LLL-A, *if necessary*)	
15. Continuation Sheet(s) SF-LLL-A attached: ☐ Yes ☐ No	
16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	Signature: _____ Print Name: _____ Title: _____ Telephone No.: _____ Date: _____
Federal Use Only:	Authorized for Local Reproduction Standard Form - LLL

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).

11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.

12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.

13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.

14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.

15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.

16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ Page _____ of _____

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Standard Form - LLL-A

PART 35—STATE AND LOCAL ASSISTANCE

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§ 35.001 Applicability.

This part codifies policies and procedures for financial assistance awarded by the Environmental Protection Agency to State, interstate, and local agencies for pollution abatement and control programs. These provisions supplement the EPA general assistance regulations in 40 CFR part 30.

[47 FR 44954, Oct. 12, 1982]

Subpart A—Financial Assistance for Continuing Environmental Programs

Authority: Secs. 105 and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7405 and 7601(a); Secs. 106, 205(g), 205(j), 208, 319, 501(a), and 518 of the Clean Water Act, as amended (33 U.S.C. 1256, 1285(g), 1285(j), 1288, 1361(a) and 1377); secs. 1443, 1450, and 1451 of the Safe Drinking Water Act (42 U.S.C. 300j-2, 300j-9 and 300j-11); secs. 2002(a) and 3011 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6912(a), 6931, 6947, and 6949); and secs. 4, 23, and 25(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136(b), 136(u) and 136w(a).

SOURCE: 47 FR 44954, Oct. 12, 1982, unless otherwise noted.

§ 35.100 Purpose.

This subpart establishes in §§ 35.100 through 35.199 uniform administrative requirements and procedures for financial assistance to State, interstate, and local agencies for continuing environmental programs. Sections 35.200 through 35.899 establish the assistance requirements unique to each program and cross reference regulations containing substantive program requirements.

§ 35.105 Definitions.

Allotment. An amount representing a State's share of funds requested n the President's budget or appropriated by Congress for an environmental program, as EPA determines after considering any factors indicated by this regulation. The allotment is not an entitlement but rather the objective basis for determining the range for a State's planning target.

Continuation award. Any assistance award after the first award to a State, interstate, or local agency for a continuing environmental program.

Continuing environmental programs. Those pollution control programs which will not be completed within a definable time period.

Federal Indian reservation means for purposes of Clean Water Act, all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

Indian Tribe means, within the context of the Public Water System Supervision and Underground Water Source Protection grants, any Indian Tribe having a Federally recognized governing body carrying out substantial governmental duties and powers over a defined area.

EDITORIAL NOTE: At 53 FR 37408, Sept. 26, 1988, § 35.105 was amended to add the definition for "Indian Tribe". At 54 FR 14357, Apr. 11, 1989, § 35.105 was again amended to add the following new definition for *Indian Tribe.* The duplication will be corrected by an EPA document published in the FEDERAL REGISTER at a later date.

Indian Tribe means for purposes of the Clean Water Act, any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

Output. An activity or product which the applicant agrees to complete during the budget period.

Planning target. The amount of Federal financial assistance which the Regional Administrator suggests that an applicant consider in developing its application and work program.

Program element. One of the major groupings of outputs of a continuing environmental program (e.g., administration, enforcement, monitoring).

Reserve. A portion of the State's construction grant allotment which the State proposes to set aside to use for construction or permit program management or water quality management planning activities.

Recurrent expenditures. Those expenses associated with the activities of a continuing environmental program. All expenditures, except those for equipment purchases with a unit acquisition cost of $5,000 or more, are considered recurrent unless justified by the applicant as unique and approved as such by the Regional Administrator in the assistance award.

State means within the context of Public Water Systems Supervision and Underground Water Source Protection grants or of financial assistance programs under the Clean Water Act, one

of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Trust Territories of the Pacific Islands or an Indian Tribe treated as a State.

Work program. The document which identifies how and when the applicant will use program funds to produce specific outputs.

[47 FR 44954, Oct. 12, 1982, as amended at 53 FR 37408, Sept. 26, 1988; 54 FR 14357, Apr. 11, 1989]

§ 35.110 Summary of annual process.

(a) EPA considers various factors to allot among the States the funds requested in the President's budget for each financial assistance program, except for those related to construction grants, for which Congress determines the allotments. From its construction grant allotment, the State proposes reserves for State administration and water quality management planning. The Regional Administrator issues a planning target for each program to each applicant based on the reserves and allotments.

(b) Using the planning target and guidance provided by EPA, each applicant completes a standard EPA application including a proposed work program for each environmental program for which it expects to receive EPA funding. Alternatively, an applicant prepares a consolidated work program to support several individual applications or a single consolidated application. After the applicant submits its application, the Regional Administrator reviews it and, if it meets applicable requirements, approves the application and agrees to make an award when funds are available. The Regional Administrator awards assistance from funds appropriated by Congress for that purpose.

(c) The recipient conducts its activities according to the approved application and assistance award. The Regional Administrator evaluates recipient performance to assure compliance with all conditions of the assistance award.

(d) Except for funds reserved under section 205 (g) and (j) of the Clean Water Act, the Administrator or Regional Administrator may use funds not awarded or committed to an applicant to supplement awards to other applicants for that program or to support a Federal program required in the absence of an acceptable State program.

§ 35.115 State allotments and reserves.

Allotments and reserves provide an objective basis for establishing planning targets and funding levels for work programs. Congress determines the construction grant allotment, from which the State proposes reserves for State administration and water quality management planning. EPA determines the allotments for the other financial assistance programs based on the President's budget request to Congress. The factors and limitations considered for each program are as follows:

(a) *Air pollution control allotment* (Clean Air Act, section 105): Population, the extent of actual or potential air pollution problems, and the financial need of each agency to be funded with the State's allotment. However, no State will be allotted less than one-half of one percent or more than ten percent of the total.

(b) *Water pollution control allotment including ground-water protection allotments* (Clean Water Act, section 106): The extent of the State's water pollution problem. In each fiscal year, the Administrator will reserve a percentage of the total available funds for Indian Tribes treated as States.

(c) *State administration reserve* (Clean Water Act, section 205(g)): Up to four percent of the State's authorized construction grant allotment as determined by Congress or $400,000, whichever is greater.

(d) *Water quality management planning reserve* (Clean Water Act, section 205(j)(1)): Not less than $100,000 nor more than one percent of the State's construction grant allotment as determined by Congress. However, for Guam, the Virgin Islands, American Samoa, the Trust Territories of the Pacific Islands and the Northern Marina Islands, a reasonable amount shall be reserved for this purpose.

Each fiscal year the Administrator may reserve a percentage of the sums appropriated under section 207 for water quality management planning assistance to Indian Tribes treated as States.

(e) *Public Water System Supervision Allotment* (Safe Drinking Water Act, section 1443(a)): The State's population, geographic area, numbers of community and non-community water systems, and other relevant factors. However, no State, except American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands, or the Trust Territory of the Pacific Islands may be allotted less than one percent of the total, except that for fiscal years beginning after fiscal year 1989, to the extent that fiscal year appropriations exceed the amount of fiscal year 1989 appropriations, States shall share in any excess based upon the grant formula in effect for such fiscal years.

(f) *Ground-water Quality Protection Reserve* (Clean Water Act, section 319(i)): Each fiscal year the Administrator may reserve for Indian Tribes treated as States one-third of one percent of the amount appropriated under section 319(j) for 319(h) & (i).

(g) Public Water System Supervision allotment (Safe Drinking Water Act, section 1443(a)): Population, geographic area, numbers of community and noncommunity water systems and other relevant factors. All jurisdictions except American Samoa, Guam, the Northern Mariana Islands, the Virgin Islands or an individual Indian Tribe treated as a State shall be allotted at least one percent. Up to three percent of the Public Water System Supervision funds shall be reserved each year for use on Indian lands.

(h) Underground Water Source Protection allotment (Safe Drinking Water Act, section 1443(b)): Population, geographic area, extent of underground injection practices, and other relevant factors. Up to five percent of the Underground Water Source Protection funds shall be reserved each year for use on Indian lands.

(i) *Hazardous waste management allotment* (Solid Waste Disposal Act, as amended, section 3011): The extent to which hazardous waste is generated, transported, treated, stored, and disposed of in the State and the extent of exposure of human beings and the environment to such waste.

(j) *Pesticide enforcement allotment* (Federal Insecticide, Fungicide, and Rodenticide Act, section 23): The State's population, the numbers of pesticide-producing establishments and certified private and commercial applicators, and the number of farms and their acreage.

(k) *Pesticide applicator certification and training allotment* (Federal Insecticide, Fungicide, and Rodenticide Act, section 23): The number of farms and numbers of private and commercial applicators requiring certification or recertification.

[47 FR 44954, Oct. 12, 1982, as amended at 54 FR 14357, Apr. 11, 1989; 54 FR 40368, Sept. 29, 1989]

§ 35.120 Planning targets.

The Regional Administrator develops planning targets to help each applicant develop a work program. A planning target is the State's reserve or is based on the State's allotment and the Regional Administrator's evaluation of each applicant's ability to use allotted funds effectively.

§ 35.125 Program guidance.

Program guidance helps State and local agencies establish and maintain effective environmental programs which meet their particular needs and those of the national program. National program managers in Headquarters issue guidance to Regional Administrators, and Regional Administrators issue guidance to applicants.

(a) *Headquarters guidance to Regional Administrators.* Headquarters guidance is based on the President's annual budget submission to Congress and the statutory and regulatory requirements for each environmental program. The guidance contains a statement of national objectives and priorities, an explanation of the activities required of the regions, and a list of program elements and associated outputs recommended for State and local environmental programs.

(b) *Regional guidance to applicants.* Regional guidance is based on Head-

quarters guidance and the Regional Administrator's knowledge of environmental problems in each State in his region and evaluation of each applicant's ability to carry out the program. The guidance contains EPA's objectives and priorities, the applicant's planning target, the program elements EPA uses for budget justification and management, categories of outputs which should be part of the applicant's work program, and special conditions or limitations relevant to the applicant.

§ 35.130 Work program.

The work program is part of the application for financial assistance and is the basis for the management and evaluation of performance under the assistance award. The work program must specify the work years and amount and source of funding estimated to be needed for each program element, the outputs committed to under each program element, including any outputs required under an authorization or delegation agreement, a schedule for accomplishment of outputs, and an identification of the agency responsible for each of the elements and outputs.

§ 35.135 Budget period.

An applicant may choose its budget period in consultation with and subject to the approval of the Regional Administrator.

§ 35.140 Application for assistance.

Each applicant should submit a complete application at least 60 days before the beginning of the budget period. In addition to meeting the requirements contained in part 30, a complete application must contain a discussion of performance to date under the existing award, the proposed work program, and a list of all applicable EPA-approved State strategies, program plans, and delegation or authorization agreements with a statement certifying that the proposed work program is consistent with them.

§ 35.141 EPA action on application.

The Regional Administrator will review each completed application and should approve, conditionally approve, or disapprove it within 60 days of receipt. When funds are available, the Regional Administrator will award assistance based on an approved or conditionally approved application. For a continuation award made after the beginning of the approved budget period, EPA will reimburse the applicant for allowable costs incurred from the beginning of the budget period, provided that such costs are contained in the approved application and that the application was submitted before the expiration of the prior budget period.

(a) *Approval.* The Regional Administrator will approve the application only if it satisfies the terms, conditions, and limitations of this subpart, 40 CFR part 30, and relevant statutes and program regulations; if the proposed outputs are consistent with EPA guidance or otherwise demonstrated to be necessary and appropriate; and if achievement of the proposed outputs is feasible, considering the applicant's existing problems, past performance, program authority, organization, resources, and procedures.

(b) *Conditional approval.* The Regional Administrator may conditionally approve the application, after consulting with the applicant, if only minor changes are required. The Regional Administrator will include in the award the conditions which the applicant must meet to secure final approval and the date by which those conditions must be met.

(c) *Disapproval.* If the application cannot be approved or conditionally approved, the Regional Administrator will negotiate with the applicant to change the output commitments, to reduce the assistance amount, or to make any other changes necessary for approval. If negotiation fails, the Regional Administrator will disapprove the application in writing.

§ 35.143 Assistance amount.

(a) *Determining the assistance amount.* In determining the amount of assistance to an applicant, the Regional Administrator will consider the State's planning target, the extent to which the applicant's work program is consistent with EPA guidance, and the

anticipated cost of the applicant's program relative to the proposed outputs.

(b) *Reduction of assistance amount.* If the Regional Administrator's evaluation of the applicant's work program indicates that the proposed outputs do not justify the level of funding requested, the Regional Administrator will reduce the assistance amount. If the evaluation indicates that the proposed outputs are not consistent with the priorities contained in EPA guidance, the Regional Administrator may reduce the assistance amount.

§ 35.145 Consolidated assistance.

Any applicant eligible to receive and administer funds from more than one assistance program may submit an application for consolidated assistance, following the process described in § 35.140. For consolidated assistance, the applicant prepares a single budget and work program covering all programs included in the application. The consolidated budget must identify each assistance program's funds. The consolidated work program must identify the extent to which each assistance program's funds support each program element. Insular Areas which choose to consolidate program assistance may be exempted from requirements of this subpart in accordance with Title V of Pub. L. 95-134.

§ 35.150 Evaluation of recipient performance.

The Regional Administrator will oversee each recipient's performance under an assistance agreement. In consultation with the applicant, the Regional Administrator will develop a process for evaluating the recipient's performance. The Regional Administrator will include the schedule for evaluation in the assistance agreement and will evaluate recipient performance and progress toward completing the outputs in the approved work program according to the schedule. The Regional Administrator will provide the evaluation findings to the recipient and will include them in the official assistance file. If the evaluation reveals that the recipient is not achieving one or more of the conditions of the assistance agreement, the Regional Administrator will attempt to resolve the situation through negotiation. If agreement is not reached, the Regional Administrator may impose any of the sanctions in 40 CFR part 30.

§ 35.155 Reallocation.

EPA has responsibility and authority for managing all financial assistance funds effectively. To better achieve the goals of the Clean Water Act, 205(g) reserves which have not been awarded will be returned to the State's construction grant allotment to support eligible construction activities except as provided in paragraph (c) of this section; 205(j) reserves which have not been awarded during the period of availability to the State will be reallotted to other States as construction grant funds. These funds are administered under § 35.2010 of this subchapter and are not available for reallocation under this section. For the other environmental programs, EPA will consider reallocating any unawarded funds to achieve the objectives for which Congress appropriated them.

(a) *Funds remaining after initial award.* Funds remaining in a State's allotment after an initial assistance award and commitment to that State for that year may be awarded by the Regional Administrator to any eligible applicant during the Federal fiscal year. At the end of the year, funds not awarded by the Regional Administrator will be reallocated by the Administrator to accomplish the objectives of that program.

(1) The Regional Administrator may use such funds to make supplementary awards to that State for that program.

(2) Subject to any limitations contained in appropriations acts, the Regional Administrator may use such funds to support a Federal program required by law in that State in the absence of an acceptable State program.

(3) The Regional Administrator may also use such funds to supplement awards for that program to other eligible applicants within the Region.

(b) *Funds available because of no award.* Funds remaining in a State's allotment because there is no assist-

ance award to that State in that year may be used in two ways.

(1) First, subject to any limitations contained in appropriations acts, the Regional Administrator may use such funds to support a Federal program required by law in that State in the absence of an acceptable State program.

(2) Otherwise, the Administrator will reallocate any available program funds to accomplish the objectives of that program.

(c) Public Water System Supervision and Underground Water Source Protection funds reserved for use on Indian lands which are not awarded to specific Indian Tribes by February 1 of a fiscal year, may be reallocated by the Administrator for supplementary awards to Indian Tribes treated as States or to EPA Regions for purposes of direct implementation on Indian lands.

[47 FR 44954, Oct. 12, 1982, as amended at 53 FR 37409, Sept. 26, 1988; 54 FR 14358, Apr. 11, 1989]

EDITORIAL NOTE: At 53 FR 37409, Sept 26, 1988, § 35.155(c) was added. At 54 FR 14358, Apr. 11, 1989, § 35.155(c) was again added. EPA will publish at a later date to correct the error. For the convenience of the user, the September text is carried above and the April text follows.

§ 35.155 Reallocation.

* * * * *

(c) Beginning in FY 1990, on July 1 of each fiscal year, funds reserved under sections 106, 205(j)(1), 205(j)(5), and 319 of the Clean Water Act for Indian Tribes treated as States, which have not been awarded by the Regional Administrator, shall be reallocated nationally by the Administrator for awards to other Indian Tribes treated as States. Section 319 and 205(j)(5) funds awarded to an Indian Tribe treated as a State in a fiscal year which are not obligated by the end of the fiscal year shall be available to the Administrator for reallocation to other such Tribes in the following fiscal year.

AIR POLLUTION CONTROL (SECTION 105)

§ 35.200 Purpose.

Section 105 of the Clean Air Act authorizes assistance to State, local, interstate, or intermunicipal air pollution control agencies (as defined in section 302(b) of the Act) to administer programs for the prevention and control of air pollution or implementation of national air quality standards. Associated program regulations are found in 40 CFR parts 50, 51, 52, 58, 60, 61, 62, and 81.

§ 35.205 Maximum Federal share.

(a) The Regional Administrator may provide State, local, interstate, or intermunicipal agencies up to two-thirds of the approved costs of planning, developing, establishing, or improving an air pollution control program and up to one-half of the approval costs of maintaining that program.

(b) The Regional Administrator may provide State, interstate, or intermunicipal agencies which have substantial responsibility for carrying out an applicable implementation plan under section 110 of the Clean Air Act up to three-fourths of the approved costs of planning, developing, establishing, or improving an air pollution control program and up to three-fifths of the approved costs of maintaining that program.

§ 35.210 Maintenance of effort.

(a) To receive funds under section 105, an agency must expend annually for recurrent section 105 program expenditures an amount of non-Federal funds at least equal to such expenditures during the preceding fiscal year, unless the Regional Administrator, after notice and opportunity for a public hearing, determines that the reduction is attributable to a non-selective reduction of the programs of all executive branch agencies of the applicable unit of government.

(b) The Regional Administrator will not award section 105 funds unless the applicant provides assurance that the assistance will not supplant non-Federal funds that would otherwise be available for maintaining the section 105 program.

§ 35.215 Limitations.

(a) The Regional Administrator will not award section 105 funds to an interstate or intermunicipal agency which does not provide assurance that it can develop a comprehensive plan

for the air quality control region which includes representation of appropriate State, interstate, local, and international interests.

(b) The Regional Administrator will not award section 105 funds to a local, interstate, or intermunicipal agency without consulting with the appropriate official designated by the Governor or Governors of the State or States affected.

(c) The Regional Administrator will not disapprove an application for or terminate or annul an award of section 105 funds without prior notice and opportunity for a public hearing in the affected State or in one of the affected States if several are affected.

Water Pollution Control (Section 106)

§ 35.250 Purpose.

Sections 106 and 518 of the Clean Water Act authorize assistance to State and interstate agencies (as defined in section 502 of the Act) and to Indian Tribes treated as States to administer programs for the prevention, reduction, and elimination of water pollution, including programs for the development and implementation of ground-water protection strategies. Some of these activities may be eligible for funding under section 205 (g) and (j) of that Act. (See §§ 35.300 and 35.350.) Program requirements for water quality planning and management activities are provided in 40 CFR part 35, subpart G.

[47 FR 44954, Oct. 12, 1982, as amended at 54 FR 14358, Apr. 11, 1989]

§ 35.255 Maintenance of effort.

(a) To receive funds under section 106, any State or interstate agency must expend annually for recurrent section 106 program expenditures an amount of non-Federal funds at least equal to expenditures during the fiscal year ending June 30, 1971.

(b) The maintenance of effort requirement in paragraph (a) of this section shall not apply to Indian Tribes treated as States.

[54 FR 14358, Apr. 11, 1989]

§ 35.260 Limitations.

(a) The Regional Administrator will not award Section 106 funds to any State which does not monitor and compile, analyze, and report water quality data as described in section 106(e)(1) of the Clean Water Act. The Regional Administrator may award section 106 funds to Indian Tribes treated as States even if they do not meet this requirement. However, all monitoring and analysis activities performed by a Tribe must meet the applicable quality assurance, quality control requirements as specified in 40 CFR part 31.

(b) The Regional Administrator will not award section 106 funds to any State, including any Indian Tribe treated as a State, which does not have authority comparable to that in section 504 of the Clean Water Act and adequate contingency plans to implement such authority.

(c) The Regional Administrator will not award section 106 funds if federally assumed enforcement as defined in section 309(a)(2) of the Clean Water Act is in effect with respect to the agency.

(d) The Regional Administrator will not award section 106 funds unless the work program submitted with the assistance application shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under section 205 (g) and (j) of the Clean Water Act.

[47 FR 44954, Oct. 12, 1982, as amended at 54 FR 14358, Apr. 11, 1989]

§ 35.265 Awards to Indian Tribes.

(a) The Regional Administrator will not award section 106 funds to an Indian Tribe unless EPA has determined that the Indian Tribe meets the requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15 as well as the applicable limitations in 40 CFR 35.260.

(b) The Regional Administrator will not give a continuation award to any Indian Tribe unless the Tribe shows satisfactory progress in meeting its negotiated milestones and goals.

[54 FR 14358, Apr. 11, 1989]

State Administration (Section 205(g))

§ 35.300 Purpose.

Section 205(g) of the Clean Water Act authorizes assistance to States (as defined in section 502 of the Act) for two purposes.

(a) *Construction management assistance.* The 205(g) funds may be used for administering elements of the construction grant program under sections 201, 203, 204, and 212 of the Clean Water Act and for managing waste treatment construction grants for small communities. Construction management assistance funds may also be used for administering elements of a State's construction grant program which are implemented without Federal assistance, if the Regional Administrator determines that those elements are consistent with 40 CFR part 35, subpart I. Program requirements for State construction management activities under delegation are provided in 40 CFR part 35, subparts F and I.

(b) *Permit and planning assistance.* The 205(g) funds may be used for administering permit programs under sections 402 and 404 and for administering statewide waste treatment management planning programs under section 208(b)(4) of the Clean Water Act. Some of these activities may be eligible for funding under sections 106 and 205(j) of that Act. (See §§ 35.250 and 35.350.) Program requirements for water quality management activities are provided in 40 CFR part 35, subpart G.

§ 35.305 Maintenance of effort.

To receive funds under section 205(g), a State agency must expend annually for recurrent section 106 program expenditures an amount of non-Federal funds at least equal to such expenditures during fiscal year 1977, unless the Regional Administrator determines that the reduction is attributable to a non-selective reduction of expenditures in State executive branch agencies.

§ 35.310 Limitations.

(a) The Regional Administrator will not award section 205(g) funds for construction management assistance unless there is a signed agreement delegating responsibility for administration of those activities to the State.

(b) The Regional Administrator will not award section 205(g) permit and planning assistance before awarding funds which provide for the management of a substantial portion of construction grants program. The maximum amount of permit and planning assistance a State may receive is the amount remaining in its reserve after the Regional Administrator allows for full funding of the management of the construction grant program under full delegation.

(c) The Regional Administrator will not award section 205(g) permit and planning assistance unless the work program submitted with the assistance application shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under sections 106 and 205(j) of the Clean Water Act.

Water Quality Management Planning (Section 205(j)(2))

§ 35.350 Purpose.

Sections 205(j)(2) and 518 of the Clean Water Act authorize assistance to States (as defined in section 502 of the Act) and to Indian Tribes treated as States to carry out water quality management planning activities. Some of these activities may be eligible for funding under sections 106 and 205(g) of that Act. (See §§ 35.250 and 35.300.) Program requirements for water quality management activities are provided in 40 CFR part 35, subpart G. The purpose of 205(j) funds includes, but is not limited to, the following.

(a) Identification of the most cost-effective and locally acceptable facility and nonpoint measures to meet and maintain water quality standards.

(b) Development of an implementation plan to obtain State and local financial and regulatory commitments to implement measures developed under paragraph (a) of this section.

(c) Determination of the nature, extent, and causes of water quality problems in various areas of the State and interstate region.

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(d) Determination of those publicly owned treatment works which should be constructed with Federal assistance, in which areas and in what sequence, taking into account the relative degree of effluent reduction attained, the relative contributions to water quality of other point or nonpoint sources, and the consideration of alternatives to such construction.

(e) Implementation of section 303(e) of the Clean Water Act.

[47 FR 44954, Oct. 12, 1982, as amended at 54 FR 14358, Apr. 11, 1989]

§ 35.355 Maximum Federal share.

The Regional Administrator may provide up to one hundred percent of the approved work program costs.

§ 35.360 Limitations.

(a) The Regional Administrator will not award section 205(j)(1) funds to a State agency unless the agency develops its work program jointly with local, regional, and interstate agencies and gives funding priority to such agencies and designated or undesignated public comprehensive planning organizations to carry out portions of that work program.

(b) The Regional Administrator will not award section 205(j)(1) funds to a State agency which does not report annually on the nature, extent, and causes of water quality problems in various areas of the State and interstate region.

(c) The Regional Administrator will not award section 205(j)(1) funds unless the work program submitted with the assistance application shows that the activities to be funded are coordinated, as appropriate, with activities proposed for funding under sections 106 and 205(g) of the Clean Water Act.

[47 FR 44954, Oct. 12, 1982, as amended at 54 FR 14358, Apr. 11, 1989]

§ 35.365 Awards to Indian Tribes.

(a)(1) The Regional Administrator will not award section 205(j)(1) funds to an Indian Tribe unless the Tribe meets the requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15, as well as the applicable limitations in 40 CFR 35.360.

(b) The Regional Administrator will not give a continuation award to any Indian Tribe unless the Tribe shows satisfactory progress in meeting its negotiated milestones and goals.

[54 FR 14358, Apr. 11, 1989]

Public Water System Supervision (Section 1443(a))

§ 35.400 Purpose.

Sections 1443(a) and 1451(a)(3) of the Safe Drinking Water Act authorize assistance to States and Indian Tribes treated as States for Public Water System Supervision Programs. Associated program regulations are found in 40 CFR parts 141, 142, and 143.

[53 FR 37409, Sept. 26, 1988]

§ 35.405 Maximum Federal share.

(a) The Regional Administrator may provide up to seventy-five percent of the approved work program costs.

(b) The Regional Administrator may increase the 75 percent maximum Federal share for an Indian Tribe based upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes), Tribal funds, or in-kind contributions to meet the required 25 percent Tribal match. In no case shall the Federal share be greater than 90 percent.

[47 FR 44954, Oct. 12, 1982, as amended at 53 FR 37409, Sept. 26, 1988]

§ 35.410 Limitations.

(a) The Regional Administrator will not make an initial award of section 1443(a) funds unless the applicant has a public water system supervision program or will establish one within a year of the award and will assume primary enforcement responsibility for the State's public water systems within that year.

(b) The Regional Administrator will not award section 1443(a) funds after the initial award unless the applicant has primary enforcement responsibility for the State's public water systems.

(c) The limitations in paragraphs (a) and (b), of this section do not apply to funds allotted to Indian Tribes.

[47 FR 44954, Oct. 12, 1982, as amended at 53 FR 37409, Sept. 26, 1988]

§ 35.415 Indian Tribes.

(a) The Regional Administrator will not award initial section 1443(a) funds to an Indian Tribe unless:

(1) EPA has determined that the Indian Tribe meets the requirements of 40 CFR part 142, subpart H—Treatment of Indian Tribes as States; and

(2) The applicant has a Public Water System Supervision Program or agrees to establish one within three years of the initial award and agrees to assume primary enforcement responsibility within this period. Upon agreement by the applicant, at least one year of the grant funding will be used to demonstrate program capability to implement the requirements found in § 142.10.

(b) The Regional Administrator shall not give a continuation award to any Indian Tribe unless the Tribe can demonstrate reasonable progress towards assuming primary enforcement responsibility within the three-year period.

(c) After the three-year period expires, the Regional Administrator shall not award section 1443(a) funds to an Indian Tribe unless the Tribe has assumed primary enforcement responsibility.

[53 FR 37409, Sept. 26, 1988, as amended at 54 FR 52137, Dec. 20, 1989]

Underground Water Source Protection (Section 1443(b))

§ 35.450 Purpose.

Section 1443(b) of the Safe Drinking Water Act authorizes assistance to States and Indian Tribes treated as States for Underground Water Source Protection Programs. Associated program regulations are found in 40 CFR parts 124, 144, 145, 146, and 147.

[53 FR 37409, Sept. 26, 1988]

§ 35.455 Maximum Federal share.

(a) The Regional Administrator may provide up to seventy-five percent of the approved work program costs.

(b) The Regional Administrator may increase the 75 percent maximum Federal share for an Indian Tribe based upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes), Tribal funds, or in-kind contributions to meet the required 25 percent match requirement. In no case shall the Federal share be greater than 90 percent.

[47 FR 44954, Oct. 12, 1982, as amended at 53 FR 37409, Sept. 26, 1988]

§ 35.460 Limitations.

After September 30, 1983, the Regional Administrator will not award section 1443(b) funds unless the applicant has primary enforcement responsibility for the Underground Water Source Protection program. The above limitation shall not apply to funds allotted to Indian Tribes.

[53 FR 37409, Sept. 26, 1988]

§ 35.465 Indian Tribes.

(a) The Regional Administrator will not award initial section 1443(b) funds to an Indian Tribe unless:

(1) EPA has determined that the Indian Tribe meets the requirements of 40 CFR part 145 subpart E—Treatment of Indian Tribes as States.

(2) The applicant has an Underground Water Source Protection program or agrees to establish one within four years of the initial award and agrees to assume primary enforcement responsibility within this period.

(b) The Regional Administrator shall not give a continuation award to any Indian Tribe unless the Tribe can demonstrate reasonable progress towards assuming primary enforcement responsibility within the four-year period.

(c) After the four-year period expires, the Regional Administrator shall not award section 1443(b) funds to an Indian Tribe unless the Tribe has assumed primary enforcement responsibility.

[53 FR 37409, Sept. 26, 1988]

HAZARDOUS WASTE MANAGEMENT (SECTION 3011)

§ 35.500 Purpose.

Section 3011(a) of the Solid Waste Disposal Act, as amended, authorizes assistance to States (as defined in section 1004 of the Act) for the development and implementation of authorized State hazardous waste management programs. Associated program regulations are found in 40 CFR parts 122, subparts A and B; 123, subparts A, B, and F; 124, subparts A and B; and 260–266.

§ 35.505 Maximum Federal share.

The Regional Administrator may provide up to seventy-five percent of the approved work program costs.

§ 35.510 Limitations.

The Regional Administrator will not award section 3011(a) funds in a State with interim or final hazardous waste authorization unless the applicant is the lead agency designated in the authorization agreement.

PESTICIDE ENFORCEMENT (SECTION 23(A)(1))

§ 35.550 Purpose.

Section 23(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act authorizes assistance to States (as defined in section 2 of the Act) and Indian tribes to implement pesticide enforcement programs. Associated program regulations are found in 40 CFR parts 162, 165–167, 169–170, and 172–173 and 19 CFR part 12.

§ 35.555 Maximum Federal share.

The Regional Administrator may provide up to one hundred percent of the approved work program costs.

PESTICIDE APPLICATOR CERTIFICATION AND TRAINING (SECTION 23(A)(2))

§ 35.600 Purpose.

Section 23(a)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act authorizes assistance to States (as defined in section 2 of the Act) and Indian tribes to implement programs to train and certify applicants of restricted use pesticides. Associated program regulations are found in 40 CFR parts 162 and 170–171.

§ 35.605 Maximum Federal share.

The Regional Administrator may provide up to fifty percent of the approved work program costs.

NONPROFIT SOURCE MANAGEMENT (SECTIONS 205(J)(5) AND 319(H))

§ 35.750 Purpose.

Sections 319 and 518 of the Clean Water Act authorize nonpoint source management assistance to States, including Indian Tribes treated as States. Under section 319(h), grants may be awarded for the development of nonpoint source management programs, using funds reserved under section 205(j)(5) of the Act, and for the implementation of EPA-approved management programs using funds reserved under section 205(j)(5) or funds appropriated under section 319. Under section 319(i), grants may be awarded to carry out ground-water quality protection activities that will advance the implementation of a comprehensive approved nonpoint source management program.

[54 FR 14358, Apr. 11, 1989]

§ 35.755 Awards to Indian Tribes.

(a) No grants for the development of an approved nonpoint source management program will be awarded to an Indian Tribe unless the Regional Administrator determines that the Tribe meets the requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15.

(b) No funds for the implementation of an approved nonpoint source management program will be awarded to an Indian Tribe unless:

(1) The Regional Administrator determines that the Indian Tribe meets the requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15; and

(2) The Tribe agrees to:

(i) Maintain its aggregate expenditures from all other sources for programs controlling pollution from nonpoint sources and improving the quality of navigable waters within the Tribe's jurisdiction at or above the av-

erage levels of such expenditures in the fiscal years 1985 and 1986;

(ii) Limit administrative costs for services provided and charged against activities and programs carried out with a grant under section 319(h) to no more than 10 percent of the amount of the grant in any year, except that costs of implementing enforcement and regulatory activities, education, training, technical assistance, demonstration projects, and technology transfer programs are not subject to this limitation; and

(iii) Provide a matching share in accordance with 40 CFR 35.760;

(iv) Use such funds for financial assistance to persons only to the extent that such assistance is related to the costs of demonstration projects.

(v) Report to the Administrator on an annual basis concerning (A) its progress in meeting the schedule of milestones submitted under section 319(b)(2)(C) of the Act and (B) to the extent that appropriate information is available, reductions in nonpoint source pollutant loading and improvements in water quality for those navigable waters or watersheds within the jurisdiction of the Tribe which were identified under section 319(a)(1)(A) of the Act resulting from implementation of the management program.

(c) No funds to carry out groundwater protection activities under section 319(i) of the Act will be awarded to an Indian Tribe unless:

(1) The Regional Administrator determines that the Tribe meets the requirements for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15; and

(2) The Tribe agrees to provide a matching share in accordance with 40 CFR 35.760.

(d) The Regional Administrator will not give a nonpoint source management continuation award to any Indian Tribe unless the Tribe shows satisfactory progress in meeting its negotiated milestones and goals.

[54 FR 14359, Apr. 11, 1989]

§ 35.760 Maximum Federal share.

(a) The Regional Administrator may provide up to 100 percent of approved work program costs for the development of a nonpoint source management program.

(b) Except as provided in paragraph (c) or (d) of this section, the Regional Administrator may provide to an Indian Tribe up to 60 percent of approved nonpoint source management implementation program costs, and 50 percent of approved ground-water protection program costs, on condition that the non-Federal share is provided from non-Federal sources.

(c) The Regional Administrator may increase the maximum Federal shares upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes, tribal funds or in-kind contributions) to meet the required match. In no case shall the Federal share be greater than 90 percent.

(d) In any fiscal year, the amount of assistance awarded under section 319 of the Act to any one Indian Tribe treated as a State shall not exceed 15 percent of the section 319(h) reserve for Tribes established under § 35.115(e).

(e) In any fiscal year the amount of assistance awarded to any one Indian Tribe treated as a State under section 319(i), from funds appropriated under section 319(j), shall not exceed $150,000.

[54 FR 14359, Apr. 11, 1989]

Subpart B—[Reserved]

Subpart C—Grants for Construction of Wastewater Treatment Works

AUTHORITY: Sec. 8, Federal Water Pollution Control Act, as amended (33 U.S.C. 1158).

SOURCE: 37 FR 11660, June 9, 1972, unless otherwise noted.

§ 35.800 Purpose.

This subpart supplements the EPA general grant regulations and procedures (40 CFR part 30) and establishes and codifies policies and procedures for grants for the construction of treatment works to prevent the discharge of untreated or inadequately

treated sewage or other waste into any waters.

§ 35.801 Authority.

This subpart is issued under section 8 of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1158.

§ 35.805 Definitions.

As used in this subpart, the words and terms defined in this section shall have the meaning set forth in the subsections.

§ 35.805–1 Construction.

The preliminary planning to determine the economic and engineering feasibility of treatment works, the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary to the construction of treatment works; the erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works; and the inspection and supervision of the construction of treatment works. The phrase "initiation of construction," as used in this subpart, means the issuance of a notice to proceed, or, if none is required, the execution of a construction contract.

§ 35.805–2 Intermunicipal agency.

An agency of two or more municipalities having jurisdiction over disposal of sewage, industrial wastes, or other wastes.

§ 35.805–3 Interstate agency.

An agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States having substantial powers or duties pertaining to the control of pollution of waters.

§ 35.805–4 Municipality.

A city, town, borough, county, parish, district, or other public body created by or pursuant to State law, or an Indian tribe or an authorized Indian tribal organization, with jurisdiction over disposal of sewage, industrial wastes, or other wastes.

§ 35.805–5 State.

A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

§ 35.805–6 State water pollution control agency.

The State authority charged with primary responsibility for enforcing the State laws relating to the abatement of water pollution.

§ 35.805–7 Treatment works.

The various devices used in the treatment of sewage or industrial wastes of a liquid nature, including the necessary intercepting sewers, outfall sewers pumping, power, and other equipment, and their appurtenances, and including any extensions, improvements, remodeling, additions, and alterations thereof.

§ 35.810 Applicant eligibility.

Grants may be made to any State, municipality, intermunicipal or interstate agency.

§ 35.815 Allocation of funds.

§ 35.815–1 Allotments to States.

(a) The first $100 million appropriated for any fiscal year shall be allotted by the Administrator as soon as practicable as follows:

(1) Fifty per centum of such sums in the ratio that the population of each State bears to the population of all the States, and

(2) Fifty per centum of such sums in the ratio that the quotient obtained by dividing the per capita income of the United States by the per capita income of each State bears to the sum of such quotients for all the States. Per capita income shall be determined on the basis of the average of the per capita income of the States and of the continental United States for the three most recent consecutive years for which satisfactory data are available from the Department of Commerce; except that, in the absence of such satisfactory data, the per capita income of (i) Puerto Rico, (ii) the Virgin Islands, and (iii) Guam shall be deemed to equal the per capita income of the State having the lowest per

capita income in the continental United States.

For purposes of this section, population shall be determined on the basis of the official population figures of the latest decennial census for which figures are available as certified by the Secretary of Commerce.

(b) Funds in excess of $100 million appropriated for any fiscal year, except as otherwise provided by law, shall be allotted by the Administrator as soon as practicable in the ratio that the population of each State bears to the population of all the States.

(c) Sums available for allocation to States based on eligibility for reimbursement, severe local and basinwide water pollution problems, or other factors shall be divided between such purposes in such proportions as the Administrator may determine and shall be allotted among the States in accordance with the procedures and provisions set forth for reallotment of unobligated funds (see § 35.315–2). Allocation shall be made at such time or times as may be practicable.

(d) Sums allotted to a State under paragraphs (a) and (b) of this section which are not obligated within the time period specified by law shall be reallotted in accordance with the reallotment provisions contained in § 35.815–2.

(e) At least 50 per centum of the first $100 million appropriated for each fiscal year beginning on or after July 1, 1965, shall be used for the construction of treatment works serving municipalities of 125,000 population or under.

(f) The allotment of a State, including reallotments, shall be available, in accordance with the provisions of this subpart, for payments to meet the cost of construction of treatment works in such State for which Federal grants have been approved.

§ 35.815–2 Reallotment.

(a) Reallotment of unobligated funds (see § 35.815–1(d)) will be made within 90 days following their availability for reallotment, or as soon thereafter as practicable, as follows:

(1) Except as set forth in paragraph (b) of this section, unobligated funds shall be reallotted among the States having projects eligible for reimbursement under the provisions of section 8(c) of the Federal Water Pollution Control Act based on the ratio which each State's remaining eligibility for reimbursement bears to the total remaining reimbursement eligibility for all the States: *Provided*, That each State to receive any such reallotment shall first provide such assurances as the Administrator deems appropriate to assure that such funds shall be applied on an equitable pro rata basis with respect to such work in place.

(2) If any funds remain unobligated, such funds shall be reallotted among the States based on the ratio that each State's remaining eligibility for reimbursement bears to the total remaining reimbursement eligibility for all States: *Provided*, That each State to be entitled to any such reallotment shall, within 30 days following the date on which funds become available for reallotment, or as soon thereafter as practicable, provide a statement satisfactory to the Administrator listing projects eligible for reimbursement, which statement shall also specify the manner in which any reallotted funds should be applied towards the projects so listed.

(3) Prior to making any reallotment under paragraphs (a) (1) and (2) of this section, the Administrator may determine whether any part of the unobligated funds should be applied in situations of special need to meet severe local and basinwide pollution problems in order to promote the purposes of the Federal Water Pollution Control Act most effectively. In making such determination, the administrator shall apply the following criteria:

(i) The extent of degradation of water quality; (ii) the extent of the financial need; (iii) the extent to which degradation is attributed to untreated or inadequately treated waters of municipalities; (iv) the extent to which facilities to be constructed will contribute to the enhancement of the environment; (v) such other factors as the Administrator considers relevant. The Administrator shall reallot such funds to any State in which such special needs exist on such basis as he may deem most advisable: *Provided*,

That each State to receive any such reallotment shall first provide such assurances as the Administrator may require that such funds should be applied to eligible projects selected by the Administrator to meet such needs.

(b) Whenever a State has funds subject to reallotment, prior to such reallotment, additional grants may be made for any projects in that State where the Administrator finds that the need for the projects is due in part to any Federal institution or Federal construction activity which has resulted in an influx of federally connected personnel and have added to the applicant's requirements for sewage treatment works. Such additional grants shall be limited to additional identifiable costs of construction attributable to such Federal institution or Federal construction activity. "Federal institution" shall mean any Federal institution, reservation, installation, base, project, or other similar Federal establishment used by the Federal Government primarily for the performance of functions other than the provision of services to the area in which such establishment is situated. "Federal construction acitivity" shall mean the construction of any "Federal institution" as herein defined.

(1) Applicants for additional grants must support their claims that the need for their projects is due in part to any Federal institution or Federal construction activity by showing that at least 5 percent of the population contributing wastes to the project are, as of the date of filing the application for the additional grant, in one or more of the following categories:

(i) Federal personnel and their families residing on or at a Federal institution, as well as occupants, patients, and inmates of such institutions;

(ii) Federal personnel and their families working on or at, but residing at other than, a Federal institution:

(iii) Non-Federal personnel and their families working on Federal construction projects involving a Federal institution.

(2) Necessary supporting information submitted by applicants shall be used as the basis for computing a project's additional grant entitlement as follows:

(i) For paragraph (b)(1)(i), 100 percent of the product of the per capita cost of the project and the number represented in this category;

(ii) For either paragraphs (b)(1) (ii) or (iii) of this section, 50 percent of the product of the per capita cost of the project and the number represented by such category;

(iii) Provided that in any case the additional grant entitlement with respect to any category shall be reduced by the amount of any Federal contribution by any other Federal agency toward the capital cost of the approved project made on behalf of such category. The total of the sums of the above calculations shall be the maximum entitlement of an individual project for an additional grant.

(3) If the total of all entitlements for additional grants exceeds the funds available to a State for such grants, the available funds will be prorated over all eligible applicants for such grants in the State.

(4) In any instance where a grantee community claims its need for a project is due in part to any Federal institution or Federal construction activity, but because of exceptional circumstances is not measurable by the criteria set out above, a request for special consideration may be made pursuant to the deviation procedures (40 CFR 30.1000).

(5) In no event shall any additional grant be made in an amount which, together with the amount of the basic grant and, as appropriate, other Federal and State contributions, will exceed the total eligible project cost.

[37 FR 11660, June 9, 1972, as amended at 40 FR 20083, May 8, 1975]

§ 35.820 Grant limitations.

§ 35.820-1 Exceptions.

No grant shall be made for any project in an amount exceeding 30 per centum of the estimated reasonable cost of the project, except that:

(a) The percentage limitation shall be increased to a maximum of 40 per centum if the State agrees to pay not less than 30 per centum of the cost of all projects for which Federal grants

are to be made from the same fiscal year's allocation, or

(b) The percentage limitation shall be increased to a maximum of 50 per centum if the State agrees to pay not less than 25 per centum of the cost of all projects for which Federal grants are to be made from the same fiscal year's allocation and enforceable water quality standards have been established for the waters into which the project discharges, in accordance with section 10(c) of the Federal Water Pollution Control Act in the case of interstate waters, and under State law in the case of intrastate waters.

(c) The amount of a grant may be increased by an additional 10 per centum of such grant for any project which has been certified by an official State, metropolitan, or regional planning agency empowered under State or local laws or interstate compact to perform metropolitan or regional planning for a metropolitan area within which such grant is to be used, or other agency or instrumentality designated for such purposes by the Governor (or Governors in the case of interstate planning) as being in conformity with the comprehensive plan developed or in process of development for such metropolitan area. "Metropolitan area" means either (1) a standard metropolitan statistical area as established by the Office of Management and Budget except as may be determined by the President as not being appropriate for the purposes hereof, or (2) any urban area, including those surrounding areas that form an economic and socially related region, taking into consideration such factors as present and future population trends and patterns of urban growth, location of transportation facilities and systems, and distribution of industrial, commercial, residential, governmental, institutional, and other activities, which in the opinion of the President lends itself as being appropriate for the purposes hereof.

§ 35.825 Application for grant.

§ 35.825–1 Preapplication procedures.

Preapplication assistance regarding construction grants for waste water treatment works, including the necessary application forms, should be obtained from the State water pollution control agency or the appropriate EPA regional office.

§ 35.825–2 Formal application.

An application for waste water treatment works construction grants shall be submitted to the State water pollution control agency. Upon approval of the application and certification of the project for priority, the State water pollution control agency will transmit the application to the appropriate EPA regional office.

§ 35.830 Determining the desirability of projects.

In determining the desirability of treatment works projects, the State water pollution control agency and the regional administrator shall give consideration to the following:

(a) The relation of the estimated cost of the project, including operation and maintenance, to the public interest and to the necessity for the project;

(b) The propriety of Federal aid in construction of the project, which will be determined on the basis of one or more of the following criteria:

(1) *Effective control.* Whether the project effectively contributes to the control of pollution of the waters into which the project discharges its treated water.

(2) *International treaty obligations.* Whether the project is required to control pollution in meeting international treaty obligations or agreements.

(3) *Federal impact.* Whether the project involves a pollution problem affected by (i) Federal installations contributing to the total municipal waste loadings; (ii) a water use requirement involving national defense; (iii) a federal water resource development; or (iv) an increase in population due to any Federal institution or Federal construction activity which has resulted in an influx of federally connected personnel and which have added to the applicant's requirements for sewage treatment works.

(4) *Public health necessity.* Whether the project involves treatment works required to abate a public health hazard.

(5) *Financial burden.* Whether the municipality can demonstrate that the construction of sewage treatment works involves an extraordinary and excessive financial burden in relation to the municipality's economic resources.

(6) *Enforcement recommendations.* Whether the construction of the sewage treatment plant is recommended or required by Federal or State water pollution control enforcement authorities.

(c) The public benefits to be derived by the construction of the project;

(d) The related projects requiring completion before full benefit can be derived from the project for which the application is made and the degree to which the completion of the related projects in the near future is assured;

(e) The feasibility of utilizing available facilities; and,

(f) The probability that the project will be constructed and put into operation within a reasonable time.

§ 35.835 Criteria for award.

In addition to the evaluation required pursuant to § 35.830, the Regional Administrator shall determine whether the following criteria are met, prior to the award of the grant:

§ 35.835–1 State plan and priority.

The project must be in conformity with the State water pollution control plan submitted pursuant to the provisions of section 7 of the Federal Water Pollution Control Act and must be certified by the State Water Pollution Control Agency as entitled to priority over other eligible projects on the basis of financial as well as water pollution control needs; except that in the case of additional grants as provided for in the case of impact grants (see § 35.815–2(b)) and for conformity with metropolitan plans (see § 35.820–1(c)), no additional State certification of priority shall be required for the project receiving such an additional grant.

§ 35.835–2 Basin control.

No grant may be awarded unless the Regional Administrator determines, based on information furnished to him by the appropriate State or interstate agency having jurisdictional responsibilities for the area of concern, that the project is included in an effective current basinwide plan for pollution abatement in accordance with applicable water quality standards. Such basinwide plan must be in conformity with the requirements set forth in § 35.105–1 in effect at the time of the grant award.

[37 FR 11660, June 9, 1972, as amended at 42 FR 33034, June 29, 1977]

§ 35.835–3 Regional and metropolitan plan.

No grant may be awarded unless the Regional Administrator determines that the project is included in an effective metropolitan or regional plan developed or in the process of development, and certified by the Governor or his designee as being the official pollution abatement plan developed or in the process of development for the metropolitan area or region within which the project is proposed to be constructed. In the case of an interstate metropolitan or regional area, the plan shall be certified by the respective Governors or their designees. Such plan must meet the requirements set forth in § 35.105–2 in effect at the time of grant award.

[37 FR 11660, June 9, 1972, as amended at 42 FR 33034, June 29, 1977]

§ 35.835–4 Adequacy of treatment.

No grant may be awarded unless the applicant provides assurance satisfactory to the Regional Administrator that the proposed project is designed to result in an operable treatment works, or part thereof, which will adequately treat sewage or industrial wastes of a liquid nature in order to abate, control, or prevent water pollution. Such assurance must certify that the treatment works or part thereof, if constructed, operated, and maintained in accordance with plans, designs, and specifications will result in:

(a) Substantially complete removal of all floatable and settleable materials; (b) removal of not less than 85 percent of 5-day biochemical oxygen demand of equivalent; (c) substantially complete reduction of pathogenic micro-organisms on a continuous basis; and (d) such additional treatment as may be necessary to meet applicable water quality standards, recommendations of the Administrator, or order of a court pursuant to section 10 of the Federal Water Pollution Control Act: *Provided,* That in the case of a project which will discharge wastes into open ocean waters through an ocean outfall, the Administrator may waive the requirements of paragraph (b) of this section if he determines that such discharges will not adversely affect the open ocean environment and adjoining shores: *Provided further,* That in the case of a project designed solely to treat or control wet weather combined sewer overflows, the Administrator may waive the requirements of subparagraphs (b) and (c) of this section if he finds such project to be consistent with river basin and regional or metropolitan plans to meet approved water quality standards.

§ 35.835–5 Industrial waste treatment.

(a) Where a project will treat industrial wastes, a grant may be awarded at the discretion of the Regional Administrator: *Provided,* That such project is included in a waste treatment system treating the wastes of the entire community, metropolitan area, or region concerned. For the purposes of this section, "waste treatment system" means one or more treatment works which provide integrated, but not necessarily interconnected, waste disposal for a community, metropolitan area or region.

(b) Where industrial wastes are to be treated by the proposed project, no grant may be awarded unless the applicant provides assurance satisfactory to the Regional Administrator that such applicant will require pretreatment of any industrial waste which would otherwise be detrimental to the treatment works of its proper and efficient operation and maintenance, or will otherwise prevent the entry of such waste into the treatment plant.

(c) Where industrial wastes are to be treated by the proposed project, no grant may be awarded unless the applicant provides assurance satisfactory to the Regional Administrator that the applicant has, or will have in effect when the project will be operated, an equitable system of cost recovery. Such system of cost recovery may include user charges, connection fees, or such other techniques as may be available under State and local law. Such system shall provide for an equitable assessment of costs whereby such assessments upon dischargers of industrial wastes correspond to the cost of the waste treatment, taking into account the volume and strength of the industrial, domestic, commercial wastes, and all other waste discharges treated, and techniques of treatment required. Such cost recovery system shall produce revenues, in proportion to the percentage of industrial wastes, proportionately, relative to the total waste load to be treated by the project, for the operation and maintenance of the treatment works, for the amortization of the applicant's indebtedness for the cost of such treatment works, and for such additional costs as may be necessary to assure adequate waste treatment on a continuing basis. For purposes of this section "industrial waste" shall mean the waste discharges (other than domestic sewage) of industries identified in the "Standard Industrial Classification Manual," Bureau of the Budget, 1967, as amended and supplemented, under the category "Division D—Manufacturing," and such other wastes as the Regional Administrator deems appropriate for purposes of this section.

§ 35.835–6 Design.

No grant may be awarded unless the Regional Administrator determines that the proposed treatment works is designed so as to achieve economy, efficiency, and effectiveness in the prevention or abatement of pollution or enhancement of the quality of the water into which such treatment works effluent will discharge and meet such requirements as the Administrator may publish from time to time concerning treatment works design.

§ 35.835–7 Operation and maintenance.

No grant may be awarded unless the applicant has made provision satisfactory to the Regional Administrator that the treatment works will be maintained and operated in accordance with such requirements as the Administrator may publish from time to time concerning methods, techniques and practices for economic, and efficient, effective operation and maintenance of treatment works. Such provision shall include, but not be limited to, (a) an operation and maintenance manual, including emergency readiness plan, (b) properly trained personnel, and (c) operational reports.

§ 35.835–8 Operation during construction.

Where an existing waste treatment facility is to be modified or enlarged, no grant may be awarded unless the applicant provides assurance satisfactory to the Regional Administrator that the treatment works will be operated during construction to obtain optimum treatment of sewage.

§ 35.835–9 Postconstruction inspection.

No grant may be awarded unless the State Water Pollution Control Agency provides assurance satisfactory to the Regional Administrator that the State will inspect the treatment works not less frequently than annually for the 3 years after such treatment works is constructed and periodically thereafter to determine whether such treatment works is operated and maintained in an efficient, economic, and effective manner.

§ 35.840 Supplemental grant conditions.

In addition to the EPA general grant conditions (Appendix A to this subchapter), each wastewater treatment works construction grant shall be subject to the following conditions:

(a) All measures required to minimize water pollution to affected waters shall be undertaken in the planning and construction processes of the treatment plant to be financed in part by the Federal grant. To achieve this end, regard shall be given to the selection of a plantsite compatible with the protection of the natural environment and the watershed natural cover, engineering and work measures to assure minimal siltation and bank erosion from the construction process, and other measures which reduce water pollution to a minimum.

(b) Construction work will be performed by the lump sum (fixed) price or unit price contract method; adequate methods of advertising for and obtaining sealed competitive bids will be employed prior to award of the construction contract; and the award of the contract will be made to the responsible bidder submitting the lowest responsive bid, which shall be determined without regard to State or local law whereby preference is given on factors other than the amount of the bid.

(c) The project will not be advertised or placed on the market for bidding until the final plans and specifications have been approved by the Regional Administrator, and the appropriate State water pollution control agency and the applicant has been so notified.

(d) On construction contracts exceeding $100,000, the contractor must furnish performance and payment bonds, each of which shall be in an amount not less than 100 per centum of the contract price. Construction contracts less than $100,000 shall follow the State or local requirements relating to bid guarantees, performance bonds, and payment bonds. In all cases, the contractor must maintain during the construction phase of the contract adequate fire and extended coverage, workmen's compensation, public liability and property damage insurance. Proceeds of the performance and payment bonds and fire and extended coverage insurance shall, in the discretion of the Regional Administrator, be applied to meet the cost of construction of the project.

(e) The construction of the project, including the letting of contracts in connection therewith, shall conform to the applicable requirements of State, territorial, and local laws and ordinances except as provided in § 35.840 (b) and (d).

(f) Any construction contract must provide that representatives of the Environmental Protection Agency and the State will have access to the work whenever it is in preparation or progress and that the contractor will

provide proper facilities for such access and inspection. The contract must also provide that the Grants Officer, the Comptroller General of the United States, or any authorized representative shall have access to any books, documents, papers, and records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, and transcriptions thereof.

(g) The grantee will provide and maintain competent and adequate engineering supervision and inspection for the project to insure that the construction conforms with the approved plans and specifications.

(h) The applicant will demonstrate to the satisfaction of the Regional Administrator that he has or will have a fee simple or such other estate or interest in the site of the project, and rights of access, as the Regional Administrator finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project; and in the case of projects serving more than one municipality, that the participating communities have such interests or rights as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project for the estimated life of the project.

(i) The grantee agrees to construct the project or cause it to be constructed in accordance with the application and plans and specifications approved by the Regional Administrator.

(j) In addition to the notification of project changes pursuant to 40 CFR 30.900, a copy of any construction contract, or modifications thereof, and of revisions to plans and specifications must be submitted to the Regional Administrator through the State water pollution control agency.

(k) In addition to the notification of project changes required pursuant to 40 CFR 30.900, prior approval by the Regional Administrator and the State water pollution control agency is required for project changes which (1) substantially alter the design and scope of the project, (2) alter the type of treatment to be provided, (3) substantially alter the location, size, capacity, or quality of any major items of equipment; or (4) increase the amount of Federal funds needed to complete the project: *Provided,* That prior EPA approval is not required for changes to correct errors, minor changes, or emergency changes. No approval or disapproval of a project change pursuant to 40 CFR 30.900 or this section shall commit or obligate the United States to any increase in the amount of the grant or payments thereunder, but shall not preclude submission or consideration of a request for a grant amendment pursuant to 40 CFR 30.900-1.

[37 FR 11660, June 9, 1972, as amended at 40 FR 20083, May 8, 1975]

§ 35.845 Payments.

Installment payments of the Federal grant shall be made upon request of the applicant and shall be based on the cost of the work performed, materials and equipment furnished, and services rendered in connection with an approved project. Payments will generally be made in four installments, except as the Regional Administrator may otherwise direct. Final payment will be made only after a final inspection by an EPA representative upon completion of the project.

Subpart D—Reimbursement Grants

AUTHORITY: Sec. 206, Federal Water Pollution Control Act Amendments of 1972, as amended by Pub. L. 93-207 and sec. 29 of Pub. L. 95-217.

SOURCE: 43 FR 7426, Feb. 23, 1978, unless otherwise noted.

§ 35.850 Purpose.

(a) This subpart governs funding under section 206(a) of the Federal Water Pollution Control Act, as amended, for publicly owned sewage treatment works on which construction was initiated after June 30, 1972, but before July 1, 1973, which was authorized by Pub. L. 95-217, December 27, 1977.

(b) Funding under section 206 for publicly owned sewage treatment works on which construction was initiated after June 30, 1956 but before July 1, 1972, and for which applications were due January 31, 1974, is

governed by the applicable provisions of the previously promulgated subpart D regulations (39 FR 3678, Jan. 29, 1974 and 39 FR 49855, Nov. 21, 1974).

§ 35.855 Project eligibility.

Grants may be made for reimbursement of State or local funds used for public sewage treatment works projects on which construction was initiated after June 30, 1972, but before July 1, 1973, and for which a grant was awarded under section 8 of Pub. L. 84-660.

§ 35.860 Eligible and ineligible costs.

(a) Eligible costs of construction include costs of preliminary planning to determine the economic and engineering feasibility of treatment works; the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary to the construction of treatment works; the erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works; and the inspection and supervision of the construction of treatment works.

(b) Ineligible costs include collector sewer lines and land acquisition.

§ 35.865 Applications.

(a) An application for a grant must be received by the appropriate Regional Administrator on or before March 27, 1978.

(b) An application for reimbursement shall be made in writing (if mailed, a return receipt should be requested) and shall contain the following information:

(1) Brief description of project.

(2) Total actual or estimated eligible cost of project as of March 27, 1978.

(3) Total amount of Pub. L. 84-660 funds and any other Federal assistance received to date.

(4) Amount of additional Federal financial assistance requested under section 206 of the Act.

(5) The dates (actual or estimated) of initiation and completion of construction.

(6) Evidence of approval by State agency.

(c) The applicant must furnish such other information as may be required for determination of eligibility for and amount of reimbursement under this subpart.

§ 35.870 Grant amount.

(a) For a project described in § 35.855, the grant amount shall not exceed a total amount equal to the difference between the amount of Federal financial assistance, if any, received under Pub. L. 84-660 (as amended) for the project, and 50 percent of the allowable costs of the project (or 55 percent of the costs where the Administrator determines that project construction was undertaken in conformity with a comprehensive metropolitan treatment plan). However, reimbursement for project costs from all Federal grant sources may not exceed 80 percent of the costs of the project.

(b) A reimbursement grant will be rounded to the nearest hundred dollars. Reimbursement grants will not be awarded to projects entitled to reimbursement of less than $1,000.

§ 35.875 Initiation of construction.

The phrase "initiation of construction," as used in this subpart, means the issuance to a construction contractor of a notice to proceed, or, if no such notice is required, the execution of a construction contract.

§ 35.880 Disputes.

Determinations by the Regional Administrator concerning applicant eligibility, the amount to which an applicant is entitled, or allowability of costs shall be final and conclusive unless appealed within 30 days in accordance with the "Disputes" article (Article 8) of the EPA General Grant Conditions (Appendix A to part 30 of this subchapter). (See also subpart J to part 30 of this subchapter.)

Subpart E—Grants for Construction of Treatment Works—Clean Water Act

AUTHORITY: Secs. 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 217, 304(d)(3), 313, 501, 502, 511, and 516(b)

of the Clean Water Act, as amended, 33 U.S.C. 1251 et seq.

SOURCE: 43 FR 44049, Sept. 27, 1978, unless otherwise noted.

§ 35.900 Purpose.

(a) This subpart supplements the EPA general grant regulations and procedures (part 30 of this chapter) and establishes policies and procedures for grants to assist in the construction of waste treatment works in compliance with the Clean Water Act.

(b) A number of provisions of this subpart which contained transition dates preceding October 1, 1978, have been modified to delete those dates. However, the earlier requirements remain applicable to grants awarded when those provisions were in effect. The transition provisions in former §§ 35.905–4, 35.917, and 35.925–18 remain applicable to certain grants awarded through March 31, 1981.

(c) Technical and guidance publications (MCD series) concerning this program which are issued by EPA may be ordered from: General Services Administration (8FFS), Centralized Mailing List Services, Building 41, Denver Federal Center, Denver, Colo. 80225. In order to expedite processing of requests, persons desiring to obtain these publications should request a copy of EPA form 7500–21 (the order form listing all available publications), from EPA Headquarters, Municipal Construction Division (WH–547) or from any regional office of EPA.

§ 35.901 Program policy.

The primary purpose of Federal grant assistance available under this subpart is to assist municipalities in meeting enforceable requirements of the Act, particularly, applicable national pollution discharge elimination system (NPDES) permit requirements. The Regional Administrator and States are authorized and encouraged to administer this grant program in a manner which will most effectively achieve the enforceable requirements of the Act.

§ 35.903 Summary of construction grant program.

(a) The construction of federally financed waste treatment works is generally accomplished in three steps: Step 1, facilities plans and related elements; step 2, preparation of construction drawings and specifications; and step 3, building of a treatment works.

(b) The Regional Administrator may award grant assistance for a step 1, step 2, or step 3 project, or, as authorized by § 35.909, for a project involving a combination of step 2 and step 3 (step 2+3 grant). For a step 1, step 2, or step 3 grant award, a "project" may consist of an entire step or any "treatment works segment" (see § 35.905) of construction within a step. In the case of step 2+3 grant awards, a project must consist of all associated step 2 and step 3 work; segmenting is not permitted.

(c) Grants are awarded from State allocations (see § 35.910 et seq.) under the Act. No grant assistance may be awarded unless priority for a project has been determined in accordance with an approved State priority system under § 35.915. The State is responsible for determining the amount and timing of Federal assistance to each municipality for which treatment works funding is needed.

(d) An applicant will initially define the scope of a project. The State may revise this initial project scope when priority for the project is established. The Regional Administrator will make the final determination of project scope when grant assistance is awarded (see § 35.930–4).

(e) For each proposed grant, an applicant must first submit his application to the State agency. The basic grant application must meet the requirements for the project in § 35.920–3. If grant assistance for subsequent related projects is necessary, the grantee shall make submissions in the form of amendments to the basic application. The State agency will forward to the appropriate EPA Regional Administrator complete project applications or amendments to them for which the State agency has determined priority. The grant will consist of the grant agreement resulting from the basic application and grant amendments awarded for subsequent related projects.

(f) Generally, grant assistance for projects involving step 2 or 3 will not

be awarded unless the Regional Administrator first determines that the facilities planning requirements of §§ 35.917 to 35.917-9 of this subpart have been met. Facilities planning may not be initiated prior to approval of a step 1 grant or written approval of a "plan of study" accompanied by a reservation of funds (see § 35.925-18 and definition of "construction" in § 35.905).

(g) If initiation of step 1, 2, or 3 construction (see definition of "construction" in § 35.905) occurs before grant award, costs incurred before the approved date of initiation of construction will not be paid and award will not be made except under the circumstances in § 35.925-18.

(h) The Regional Administrator may not award grant assistance unless the application meets the requirements of § 35.920-3 and he has made the determinations required by § 35.925 et seq.

(i) A grant or grant amendment awarded for a project under this subpart shall constitute a contractual obligation of the United States to pay the Federal share of allowable project costs up to the amount approved in the grant agreement (including amendments) in accordance with § 35.930-6. However, this obligation is subject to the grantee's compliance with the conditions of the grant (see § 35.935 et seq.) and other applicable requirements of this subpart.

(j) Sections 35.937-10, 35.938-6 and 35.945 authorize prompt payment for project costs which have been incurred. The initial request for payment may cover the Federal share of allowable costs incurred before the award except as otherwise provided in § 35.925-18. Before the award of such assistance, the applicant must claim in the application for grant assistance for that project all allowable costs incurred before initiation of project construction. An applicant may make no subsequent claim for payment for such costs. The estimated amount of any grant or grant amendment, including any prior costs, must be established in conjunction with determination of priority for the project. The Regional Administrator must determine that the project costs are allowable under § 35.940 et seq.

(k) Under section 204(b) of the Act, the grantee must comply with applicable user charge and industrial cost recovery requirements; see §§ 35.925-11, 35.928 et seq., 35.929 et seq., 35.935-13, 35.935-15, and Appendix B to this subpart.

(l) The costs of sewage collection systems for new communities, new subdivisions, or newly developed urban areas should be included as part of the development costs of the new construction in these areas. Under section 211 of the Act, such costs will not be allowed under the construction grant program; see § 35.925-13.

(m) The approval of a plan of study for step 1, a facilities plan, or award of grant assistance for step 1, step 2, or step 3, or any segment thereof, will not constitute a Federal commitment for grant assistance for any subequent project.

(n) Where justified, a deviation from any substatutory requirement of this subpart may be granted under § 30.1000 of this chapter.

(o) The Act requires EPA and the States to provide for, encourage and assist public participation in the Construction Grants Program. This requirement for public participation applies to the development of the State water pollution control strategy, the State project priority system, and the State project priority list, under § 35.915; to the development of user charge and industrial cost recovery systems, under §§ 35.925.11, 35.928, and 35.929; and to the delegation of administrative responsibilities for the Construction Grants Program under subpart F of this chapter.

(p) Requirements regarding the award and administration of subagreements are set forth in §§ 35.935 through 35.939.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.905 Definitions.

As used in this subpart, the following words and terms mean:

Act. The Clean Water Act (33 U.S.C. 1251 et seq., as amended).

Ad valorem tax. A tax based upon the value of real property.

Combined sewer. A sewer intended to serve as a sanitary sewer and a storm sewer, or as an industrial sewer and a storm sewer.

Complete waste treatment system. A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involved in: (a) The transport of waste waters from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished; (b) the treatment of the wastewaters to remove pollutants; and (c) the ultimate disposal, including recycling or reuse, of the treated wastewaters and residues which result from the treatment process. One complete waste treatment system would, normally, include one treatment plant or facility, but also includes two or more connected or integrated treatment plants or facilities.

Construction. Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, or other necessary actions, erection, building, acquisition, alteration, remodeling, improvement, or extension of treatment works, or the inspection or supervision of any of the foregoing items. The phrase *initiation of construction*, as used in this subpart means with reference to a project for:

(a) *Step 1:* The approval of a plan of study (see §§ 35.920-3(a)(1) and 35.925-18(a));

(b) *Step 2:* The award of a step 2 grant;

(c) *Step 3:* Issuance of a notice to proceed under a construction contract for any segment of step 3 project work or, if notice to proceed is not required, execution of the construction contract.

Enforceable requirements of the Act. Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary to meet applicable criteria for best practicable waste treatment technology (BPWTT).

Excessive infiltration/inflow. The quantities of infiltration/inflow which can be economically eliminated from a sewerage system by rehabilitation, as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow, subject to the provisions in § 35.927.

Industrial cost recovery. (a) The grantee's recovery from the industrial users of a treatment works of the grant amount allocable to the treatment of waste from such users under section 204(b) of the Act and this subpart.

(b) The grantee's recovery from the commercial users of an individual system of the grant amount allocable to the treatment of waste from such users under section 201(h) of the Act and this subpart.

Industrial cost recovery period. That period during which the grant amount allocable to the treatment of wastes from industrial users is recovered from the industrial users of such works.

Industrial user. (a) Any nongovernmental, nonresidential user of a publicly owned treatment works which discharges more than the equivalent of 25,000 gallons per day (gpd) of sanitary wastes and which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing.
Division B. Mining.
Division D. Manufacturing.
Division E. Transportation, Communications, Electric, Gas, and Sanitary Services.
Division I. Services.

(1) In determining the amount of a user's discharge for purposes of industrial cost recovery, the grantee may

exclude domestic wastes or discharges from sanitary conveniences.

(2) After applying the sanitary waste exclusion in paragraph (b)(1) of this section (if the grantee chooses to do so), dischargers in the above divisions that have a volume exceeding 25,000 gpd or the weight of biochemical oxygen demand (BOD) or suspended solids (SS) equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users. Sanitary wastes, for purposes of this calculation of equivalency, are the wastes discharged from residential users. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, BOD and SS per volume of flow.

(b) Any nongovernmental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(c) All commercial users of an individual system constructed with grant assistance under section 201(h) of the Act and this subpart. (See § 35.918(a)(3).)

Infiltration. Water other than wastewater that enters a sewerage system (including sewer service connections) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

Infiltration/inflow. The total quantity of water from both infiltration and inflow without distinguishing the source.

Inflow. Water other than wastewater that enters a sewerage system (including sewer service connections) from sources such as roof leaders, cellar drains, yard drains, area drains, foundation drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

Interceptor sewer. A sewer whose primary purpose is to transport wastewaters from collector sewers to a treatment facility.

Interstate agency. An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

Municipality. A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

(a) This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district, or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of liquid wastes of the general public in a particular geographic area.

(b) This definition excludes the following:

(1) Any revenue producing entity which has as its principal responsibility an activity other than providing wastewater treatment services to the general public, such as an airport, turnpike, port facility, or other municipal utility.

(2) Any special district (such as school district or a park district) which has the responsibility to provide wastewater treatment services in support of its principal activity at specific facilities, unless the special district

has the responsibility under State law to provide waste water treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

Operable treatment works. An operable treatment works is a treatment works that:

(a) Upon completion of construction will treat waste water, transport waste water to or from treatment, or transport and dispose of waste water in a manner which will significantly improve an objectionable water quality situation or health hazard, and

(b) Is a component part of a complete waste treatment system which, upon completion of construction for the complete waste treatment system (or completion of construction of other treatment works in the system in accordance with a schedule approved by the Regional Administrator) will comply with all applicable statutory and regulatory requirements.

Project. The scope of work for which a grant or grant amendment is awarded under this subpart. The scope of work is defined as step 1, step 2, or step 3 of treatment works construction or segments (see definition of *treatment works segment* and § 35.930–4).

Replacement. Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary during the useful life of the treatment works to maintain the capacity and performance for which such works were designed and constructed. The term *operation and maintenance* includes replacement.

Sanitary sewer. A sewer intended to carry only sanitary or sanitary and industrial waste waters from residences, commercial buildings, industrial plants, and institutions.

Sewage collection system. For the purpose of § 35.925–13, each, and all, of the common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive waste waters directly from facilities which convey waste water from individual structures or from private property, and which include service connection "Y" fittings designed for connection with those facilities. The facilities which convey waste water from individual structures, from private property to the public lateral sewer, or its equivalent, are specifically excluded from the definition, with the exception of pumping units, and pressurized lines, for individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

State. A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas.

State agency. The State water pollution control agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

Storm sewer. A sewer intended to carry only storm waters, surface runoff, street wash waters, and drainage.

Treatment works. Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the useful life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including site acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost, and land used for the storage of treated wastewater in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in com-

bined storm water and sanitary sewer systems.

Treatment works segment. A treatment works segment may be any portion of an operable treatment works described in an approved facilities plan, under § 35.917, which can be identified as a contract or discrete subitem or subcontract for step 1, 2, or 3 work. Completion of construction of a treatment works segment may, but need not, result in an operable treatment works.

Useful life. Estimated period during which a treatment works will be operated.

User charge. A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

Value engineering (VE). A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

§ 35.907 Municipal pretreatment program.

(a) The Regional Administrator is authorized to provide grant assistance for the development of an approvable municipal pretreatment program as required by part 403 of this chapter in conjunction with a step 1, step 2, or step 3 project.

(b) The grantee is required to develop a pretreatment program if the Regional Administrator determines that:

(1) The municipal treatment works:

(i) Serves industries subject to proposed or promulgated pretreatment standards under section 307(b) of the Act, or

(ii) Expects to serve industries connecting into the works in accordance with section 301(i)(2), where these industries are subject to the section 307 (b) or (c) standards: and

(2) A work plan under a section 208 planning grant has not provided for the development of a program approvable under part 403 of this chapter.

(c) A pretreatment program may be required for municipal treatment works which receive other nondomestic wastes covered by guidance issued under section 304(g) of the Act.

(d) Development of an approvable municipal pretreatment program under part 403 of this chapter shall include:

(1) An industrial survey as required by § 403.8 of this chapter including identification of system users, the character and volume of pollutants discharged, type of industry, location (see paragraph (f) of this section);

(2) An evaluation of legal authority, including adequacy of enabling legislation, and selection of mechanisms to be used for control and enforcement (e.g., ordinance, joint powers agreement, contract);

(3) An evaluation of financial programs and revenue sources to insure adequate funding to carry out the pretreatment program;

(4) A determination of technical information necessary to support development of an industrial waste ordinance or other means of enforcing pretreatment standards;

(5) Design of a monitoring enforcement program;

(6) A determination of pollutant removals in existing treatment works;

(7) A determination of the treatment works tolerance to pollutants which interfere with its operation, sludge use, or disposal;

(8) A determination of required monitoring equipment for the municipal treatment works;

(9) A determination of municipal facilities to be constructed for monitoring or analysis of industrial waste.

(e) Items (d) (6) and (7) of this section are grant eligible if necessary for the proper design or operation of the municipal treatment works but are not grant eligible when performed solely for the purpose of seeking an allowance for removal of pollutants under § 403.7 of this chapter.

(f) Information concerning the character and volume of pollutants discharged by industry to a municipal treatment works is to be provided to the municipality by the industrial discharger under paragraph (d)(1) of this section. However, the costs of a limited amount of end-of-pipe sampling and associated analysis of industrial dis-

charges to a municipal treatment works properly allocable to the municipality are allowable if the grantee obtains the prior written approval of the Regional Administrator; see § 35.940-3(f).

(g) The pretreatment program developed under paragraph (b) of this section is subject to the Regional Administrator's approval under § 35.935-19 and must be implemented in accordance with part 403 of this chapter.

§ 35.908 Innovative and alternative technologies.

(a) *Policy.* EPA's policy is to encourage and, where possible, to assist in the development of innovative and alternative technologies for the construction of waste water treatment works. Such technologies may be used in the construction of waste water treatment works under this subpart as § 35.915-1, § 35.930-5, Appendix E, and this section provide. New technology or processes may also be developed or demonstrated with the assistance of EPA research or demonstration grants awarded under Title I of the Act (see part 40 of this subchapter).

(b) *Funding for innovative and alterative technologies.* (1) Projects or portions of projects which the Regional Administrator determines meet criteria for innovative or alternative technologies in Appendix E may receive 85-percent grants (see § 35.930-5).

(i) Only funds from the reserve in § 35.915-1(b) shall be used to increase these grants from 75 to 85 percent.

(ii) Funds for the grant increase shall be distributed according to the chronological approval of grants, unless the State and the Regional Administrator agree otherwise.

(iii) The project must be on the fundable portion of the State project priority list.

(iv) If the project is an alternative to conventional treatment works for a small community (a municipality with a population of 3,500 or less or a highly dispersed section of a larger municipality, as defined by the Regional Administrator), funds from the reserve in § 35.915(e) may be used for the 75 percent portion of the Federal grant.

(v) Only if sewer related costs qualify as alternatives to conventional treatment works for small communities are they entitled to the grant increase from 75 to 85 percent, either as part of the entire treatment works or as components.

(2) A project or portions of a project may be designated innovative or alternative on the basis of a facilities plan or on the basis of plans and specifications. A project that has been designated innovative on the basis of the facilities plan may lose that designation if plans and specifications indicate that it does not meet the appropriate criteria stated in section 6 of Appendix E.

(3) Projects or portions of projects that receive step 2, step 3, or step 2+3 grant awards after December 27, 1977, from funds allotted or reallotted in fiscal year 1978 may also receive the grant increase from funds allotted for fiscal year 1979 for eligible portions that meet the criteria for alternative technologies in Appendix E, if funds are available for such purposes under § 35.915-1(b).

(c) *Modification or replacement of innovative and alternative projects.* The Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with 85-percent grant assistance if:

(1) He determines that:

(i) The facilities have not met design performance specifications (unless such failure is due to any person's negligence);

(ii) Correction of the failure requires significantly increased capital or operating and maintenance expenditures; and

(iii) Such failure has occurred within the 2-year period following final inspection; and

(2) The replacement or modification project is on the fundable portion of the State's priority list.

(d) *Sole source procurement.* A determination by the Regional Administrator under this section that innovative criteria have been met will serve as the basis for sole source procurement (see § 35.936-13(b)) for step 3, if appropri-

ate, to achieve the objective of demonstrating innovative technology.

§ 35.909 Step 2+3 grants.

(a) *Authority.* The Regional Administrator may award grant assistance for a step 2+3 project for the combination of design (step 2) and construction (step 3) of a wastewater treatment works.

(b) *Limitations.* The Regional Administrator may award step 2+3 grant assistance only if he determines that:

(1) The population is 25,000 or less for the applicant municipality (according to most recent U.S. Census information or disaggregations thereof);

(2) The treatment works has an estimated total step 3 construction cost of $2 million or less, as determined by the Regional Administrator. For any State that the Assistant Administrator for Water and Waste Management finds to have unusually high costs of construction, the Regional Administrator may make step 2+3 awards where the estimated total step 3 construction costs of such treatment works does not exceed $3,million. The project must consist of all associated step 2 and step 3 work; segmenting is not permitted; and

(3) The fundable range of the approved project priority list includes the step 2 and step 3 work.

(c) *Application requirements.* Step 2+3 projects are subject to all requirements of this subpart that apply to separate step 2 and step 3 projects except compliance with § 35.920-3(c) is not required before grant award. An applicant should only submit a single application.

(d) *Cross references.* See §§ 35.920-3(d) (contents of application), 35.930-1(a)(4) (types of projects) and 35.935-4 (grant conditions).

EDITORIAL NOTE: For Class deviation documents affecting § 35.909, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.910 Allocation of funds.

§ 35.910-1 Allotments.

Allotments are made on a formula or other basis which Congress specifies for each fiscal year. Except where Congress indicates the exact amount of funds which each State should receive, computation of a State's ratio will be carried out to the nearest ten-thousandth percent (0.0001 percent). Unless regulations for allotments for a specific fiscal year otherwise specify, alloted amounts will be rounded to the nearest thousand dollars.

§ 35.910-2 Period of availability; reallotment.

(a) All sums allotted under § 35.910-5 shall remain available for obligation within that State until September 30, 1978. Such funds which remain unobligated on October 1, 1978, will be immediately reallotted in the same manner as sums under paragraph (b) of this section.

(b) All other sums allotted to a State under section 207 of the Act shall remain available for obligation until the end of 1 year after the close of the fiscal year for which the sums were authorized. Sums not obligated at the end of that period shall be immediately reallotted on the basis of the same ratio as applicable to sums allotted for the then-current fiscal year, but none of the funds reallotted shall be made available to any State which failed to obligate any of the funds being reallotted. Any sum made available to a State by reallotment under this section shall be in addition to any funds otherwise allotted to such State for grants under this subpart during any fiscal year.

(c) Sums which are deobligated after the reallotment date for those funds shall be treated in the same manner as the most recent allotment before the deobligation.

§§ 35.910-3—35.910-4 [Reserved]

§ 35.910-5 Additional allotments of previously withheld sums.

(a) A total sum of $9 billion is allotted from sums authorized, but initially unallotted, for fiscal years 1973, 1974, and 1975. This additional allotment shall be available for obligation through September 30, 1977, before reallotment of unobligated sums under § 35.910-2.

(b) Two-thirds of the sum hereby allotted ($6 billion) represents the initially unallotted portion of the

amounts authorized for fiscal years 1973 and 1974. Therefore, the portion of the additional allotments derived from this sum were computed by applying the percentages formerly set forth in § 35.910–3(b) to the total sums authorized for fiscal years 1973 and 1974 ($11 billion) and subtracting the previously allotted sums, formerly set forth in § 35.910–3(c).

(c) One-third of the sum hereby allotted ($3 billion) represents the initially unallotted portion of the amounts authorized for fiscal year 1975. Therefore, the portion of the additional allotments derived from this sum were computed in a three-step process: First, by applying the percentages set forth in § 35.910–4(b) to the total sums authorized for fiscal year 1975 ($7 billion); then, by making adjustments necessary to assure that no State's allotment of such sums fell below its fiscal year 1972 allotment, under Pub. L. 93–243; and, finally, by subtracting the previously allotted sums set forth in § 35.910–4(c).

(d) Based upon the computations set forth in paragraphs (b) and (c) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$43,975,950
Alaska	25,250,500
Arizona	18,833,450
Arkansas	39,822,700
California	945,776,800
Colorado	43,113,300
Connecticut	155,091,800
Delaware	56,394,900
District of Columbia	72,492,000
Florida	345,870,100
Georgia	117,772,800
Hawaii	51,903,300
Idaho	19,219,100
Illinois	571,698,400
Indiana	251,631,800
Iowa	100,044,900
Kansas	53,794,200
Kentucky	90,430,800
Louisiana	71,712,250
Maine	78,495,200
Maryland	297,705,300
Massachusetts	295,809,100
Michigan	625,991,900
Minnesota	172,024,500
Mississippi	38,735,200
Missouri	157,471,200
Montana	12,378,200
Nebraska	38,539,500
Nevada	31,839,800
New Hampshire	77,199,350
New Jersey	660,830,500
New Mexico	15,054,900
New York	1,046,103,500
North Carolina	110,345,000
North Dakota	2,802,000
Ohio	497,227,400
Oklahoma	64,298,700
Oregon	77,582,900
Pennsylvania	498,984,900
Rhode Island	45,599,600
South Carolina	82,341,900
South Dakota	5,688,000
Tennessee	107,351,400
Texas	174,969,850
Utah	21,376,500
Vermont	22,506,600
Virginia	251,809,000
Washington	103,915,600
West Virginia	59,419,900
Wisconsin	145,327,400
Wyoming	2,930,650
Guam	6,399,200
Puerto Rico	84,910,500
Virgin Islands	7,794,800
American Samoa	738,200
Trust Territory of Pacific	2,672,800
Total	9,000,000,000

§ 35.910–6 Fiscal year 1977 public works allotments.

(a) The $480 million appropriated by Pub. L. 94–447, 90 Stat. 1498, is available for obligation under the authority of title III of the Public Works Employment Act of 1976 (Pub. L. 94–369, 90 Stat. 999), as provided by section 301 of Pub. L. 94–369, to carry out title II of the Clean Water Act (other than sections 206, 208, and 209). Allotments of these funds shall remain available until expended. Amounts allotted are in addition to the State's last allotment under the Clean Water Act and are to be used for the same purpose.

(b) The sum of $480 million has been allotted to States identified in column 1 of the Table IV of the House Public Works and Transportation Committee print numbered 94–25 based on percentages shown in column 5 of that table.

(c) The percentages referred to in paragraph (b) of this section and used in computing the State allotments set forth in paragraph (d) of this section are as follows:

State	Percent
Alabama	4.90
Alaska	.91
Arizona	4.69
Arkansas	3.74
California	0
Colorado	3.04
Connecticut	0
Delaware	0
District of Columbia	0
Florida	2.97
Georgia	5.70
Hawaii	.60
Idaho	1.06
Illinois	0
Indiana	0
Iowa	.37
Kansas	2.90
Kentucky	2.70
Louisiana	3.51
Maine	0
Maryland	1.51
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	2.65
Missouri	1.47
Montana	.63
Nebraska	.77
Nevada	.13
New Hampshire	0
New Jersey	0
New Mexico	1.13
New York	0
North Carolina	6.65
North Dakota	1.06
Ohio	0
Oklahoma	3.64
Oregon	.28
Pennsylvania	0
Rhode Island	0
South Carolina	2.92
South Dakota	.89
Tennessee	3.01
Texas	18.46
Utah	1.86
Vermont	0
Virginia	0
Washington	2.49
West Virginia	7.14
Wisconsin	2.65
Wyoming	.91
Guam	.30
Puerto Rico	1.22
Virgin Islands	0
American Samoa	.16
Trust Territory of Pacific	.98
Total	100.00

(d) Based on these percentages, the total additional sums hereby allotted to the States are as follows:

State	Allotments from funds appropriated under Pub. L. 94–447
Alabama	$23,520,000
Alaska	4,368,000
Arizona	22,512,000
Arkansas	17,952,000
California	0
Colorado	14,592,000
Connecticut	0
Delaware	0
District of Columbia	0
Florida	14,256,000
Georgia	27,360,000
Hawaii	2,880,000
Idaho	5,088,000
Illinois	0
Indiana	0
Iowa	1,776,000
Kansas	13,920,000
Kentucky	12,960,000
Louisiana	16,848,000
Maine	0
Maryland	7,248,000
Massachusetts	0
Michigan	0
Minnesota	0
Mississippi	12,720,000
Missouri	7,056,000
Montana	3,024,000
Nebraska	3,696,000
Nevada	624,000
New Hampshire	0
New Jersey	0
New Mexico	5,424,000
New York	0
North Carolina	31,920,000
North Dakota	5,088,000
Ohio	0
Oklahoma	17,472,000
Oregon	1,344,000
Pennsylvania	0
Rhode Island	0
South Carolina	14,016,000
South Dakota	4,272,000
Tennessee	14,448,000
Texas	88,608,000
Utah	8,928,000
Vermont	0
Virginia	0
Washington	11,952,000
West Virginia	34,272,000
Wisconsin	12,720,000
Wyoming	4,368,000
Guam	1,440,000
Puerto Rico	5,856,000
Virgin Islands	0
American Samoa	768,000
Trust Territory of Pacific	4,704,000
Total	480,000,000

§ 35.910–7 Fiscal Year 1977 Supplemental Appropriations Act allotments.

(a) Under Title I, Chapter V of Pub. L. 95–26, $1 billion is available for obligation. The allotments are to be used to carry out Title II of the Act, excluding sections 206, 208, and 209. These allotments are available until expend-

ed but must be obligated by May 3, 1980. After that date, unobligated balances will be subject to reallotment under section 205 (b) of the Act (see § 35.910–2 (b)).

(b) The allotments, computed by proportionally adjusting the table on page 16 of Senate Report No. 95–38, are based on the following four factors:

(1) 25 percent on the States estimated 1975 census population;

(2) 50 percent on each State's partial needs, i.e., on the cost of needed facilities in categories I, II, and IVB (secondary treatment, more stringent treatment required to meet water quality standards, and interceptor sewers and pumping stations), as shown in table IV of the May 6, 1975, EPA report, "cost Estimates for Construction of Publicly Owned Waste Water Treatment Facilities—1974 Needs Survey";

(3) 25 percent on each State's full needs, i.e., on the cost of needed facilities in categories I, II, IIIA, IIIB, IVA, IVB, and V (secondary treatment, more stringent treatment required to meet water quality standards, infiltration and inflow correction, major sewer system rehabilitation, collector sewers, interceptor sewers, and pumping stations, and treatment of combined sewer overflows), as shown in table V of the EPA report noted in paragraph (b) (2) of this section; and

(4) An allotment adjustment to insure that no State receives less than the one-third of 1 percent of the total amount allocated.

(c) Based on paragraph (b) of this section, the total additional sums hereby allotted to the States are as follows:

State	Allotment
Alabama	$10,906,000
Alaska	4,759,000
Arizona	6,345,000
Arkansas	10,807,000
California	82,391,000
Colorado	8,031,000
Connecticut	12,195,000
Delaware	3,966,000
District of Columbia	3,966,000
Florida	35,792,000
Georgia	19,929,000
Hawaii	6,940,000
Idaho	4,065,000
Illinois	52,151,000
Indiana	21,713,000
Iowa	11,005,000
Kansas	12,195,000
Kentucky	14,971,000
Louisiana	12,493,000
Maine	5,453,000
Maryland	37,874,000
Massachusetts	27,662,000
Michigan	46,897,000
Minnesota	15,070,000
Mississippi	7,535,000
Missouri	19,830,000
Montana	3,272,000
Nebraska	6,147,000
Nevada	3,272,000
New Hampshire	6,742,000
New Jersey	47,591,000
New Mexico	3,272,000
New York	105,294,000
North Carolina	20,722,000
North Dakota	3,272,000
Ohio	55,522,000
Oklahoma	13,484,000
Oregon	8,326,000
Pennsylvania	46,698,000
Rhode Island	3,966,000
South Carolina	13,088,000
South Dakota	3,272,000
Tennessee	14,872,000
Texas	43,030,000
Utah	5,057,000
Vermont	3,272,000
Virginia	22,011,000
Washington	15,368,000
West Virginia	21,614,000
Wisconsin	19,929,000
Wyoming	3,272,000
Guam	992,000
Puerto Rico	8,923,000
Virgin Islands	496,000
American Samoa	298,000
Trust Territory of Pacific	1,983,000
Total	1,000,000,000

§ 35.910–8 Allotments for fiscal years 1978–1981.

(a) Unless later legislation requires otherwise, for each of the fiscal years 1978–1981, all funds appropriated under authorizations in section 207 of the Act will be distributed among the States based on the following percentages drawn from table 3 of Committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alabama	1.2842
Alaska	.4235
Arizona	.7757
Arkansas	.7513

State	Percentage
California	7.9512
Colorado	.9187
Connecticut	1.1072
Delaware	.3996
District of Columbia	.3193
Florida	3.8366
Georgia	1.9418
Hawaii	.7928
Idaho	.4952
Illinois	5.1943
Indiana	2.7678
Iowa	1.2953
Kansas	.8803
Kentucky	1.4618
Louisiana	1.2625
Maine	.7495
Maryland	2.7777
Massachusetts	2.9542
Michigan	4.1306
Minnesota	1.8691
Mississippi	.9660
Missouri	2.4957
Montana	.3472
Nebraska	.5505
Nevada	.4138
New Hampshire	.8810
New Jersey	3.5715
New Mexico	.3819
New York	10.6209
North Carolina	1.9808
North Dakota	.3107
Ohio	6.4655
Oklahoma	.9279
Oregon	1.2974
Pennsylvania	4.3616
Rhode Island	.5252
South Carolina	1.1766
South Dakota	.3733
Tennessee	1.5486
Texas	4.3634
Utah	.4457
Vermont	.3845
Virginia	1.9802
Washington	1.7688
West Virginia	1.7903
Wisconsin	1.9503
Wyoming	.3003
Guam	.0744
Puerto Rico	1.1734
Virgin Islands	.0378
American Samoa	.0616
Trust Territory of Pacific	.1530
Total	100.00

(b) Based on paragraph (a) of this section, and table 4 of the committee print, the following authorizations are allotted among the States subject to the limitations of paragraph (c) of this section:

State	For fiscal year 1978	For each of the fiscal years 1979, 1980, 1981
Alabama	$57,789,000	$64,210,000
Alaska	19,057,500	21,175,000
Arizona	34,906,500	38,785,000
Arkansas	33,808,500	37,565,000
California	357,804,000	397,560,000
Colorado	41,341,500	45,935,000
Connecticut	49,824,000	55,360,000
Delaware	17,982,000	19,980,000
District of Columbia	14,368,500	15,965,000
Florida	172,647,000	191,830,000
Georgia	87,381,000	97,090,000
Hawaii	35,676,000	39,640,000
Idaho	22,284,000	24,760,000
Illinois	233,743,500	259,715,000
Indiana	124,551,000	138,390,000
Iowa	58,288,500	64,765,000
Kansas	39,613,500	44,015,000
Kentucky	65,781,000	73,090,000
Louisiana	56,812,500	63,125,000
Maine	33,727,500	37,475,000
Maryland	124,996,500	138,885,000
Massachusetts	132,939,000	147,710,000
Michigan	185,877,000	206,530,000
Minnesota	84,109,500	93,455,000
Mississippi	43,470,000	48,300,000
Missouri	112,306,500	124,785,000
Montana	15,624,000	17,360,000
Nebraska	24,772,500	27,525,000
Nevada	18,621,000	20,690,000
New Hampshire	39,645,000	44,050,000
New Jersey	160,717,500	178,575,000
New Mexico	17,185,500	19,095,000
New York	477,940,500	531,045,000
North Carolina	89,136,000	99,040,000
North Dakota	13,981,500	15,535,000
Ohio	290,947,500	323,275,000
Oklahoma	41,755,500	46,395,000
Oregon	58,383,000	64,870,000
Pennsylvania	196,272,000	218,080,000
Rhode Island	23,634,000	26,260,000
South Carolina	52,947,000	58,830,000
South Dakota	16,798,500	18,665,000
Tennessee	69,687,000	77,430,000
Texas	196,353,000	218,170,000
Utah	20,056,500	22,285,000
Vermont	17,302,500	19,225,000
Virginia	88,209,000	98,010,000
Washington	79,596,000	88,440,000
West Virginia	80,563,500	89,515,000
Wisconsin	87,763,500	97,515,000
Wyoming	13,513,500	15,015,000
Guam	3,348,000	3,720,000
Puerto Rico	52,803,000	58,670,000
Virgin Islands	1,701,000	1,890,000
American Samoa	2,772,000	3,080,000
Trust Territory of the Pacific Islands	6,885,000	7,650,000
Total	4,500,000,000	5,000,000,000

(c) The authorizations in paragraph (b) of this section depend on appropriation. Therefore, the Regional Administrator may not obligate any portion of any authorization for a fiscal year until a law is enacted appropriating part or all of the sums authorized

for that fiscal year. If sums appropriated are less than the sums authorized for a fiscal year, EPA will apply the percentages in paragraph (a) of this section to distribute all appropriated sums among the States, and promptly will notify each State of its share. The Regional Administrator may not obligate more than the State's share of appropriated sums.

(d) If supplementary funds are appropriated in any fiscal year under section 205(e) of the Act to carry out the purposes of this paragraph, no State shall receive less than one-half of 1 percent of the total allotment among all States for that fiscal year, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territories not more than thirty-three one-hundredths of 1 percent of the total allotment shall be allotted to all four of those jurisdictions. If for any fiscal year the amount appropriated to carry out this paragraph is less than the full amount needed, the following States will share in any funds appropriated for the purposes of this paragraph in the following percentages, drawn from the note to table 3 of committee print numbered 95–30 of the Committee on Public Works and Transportation of the House of Representatives:

State	Percentage
Alaska	5.4449
Delaware	7.1459
District of Columbia	12.8612
Idaho	.3416
Montana	10.8755
Nevada	6.1352
New Mexico	8.4057
North Dakota	13.4733
South Dakota	9.0178
Utah	3.8648
Vermont	8.2206
Wyoming	14.2135
Total	100.0000

§ 35.910–9 Allotment of Fiscal Year 1978 appropriation.

(a) Pub. L. 95–240 appropriated $4.5 billion. These allotments are available until expended but must be obligated by September 30, 1979. After that date unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) These sums were allotted to the States as shown in § 35.910–8(b).

[43 FR 56200, Nov. 30, 1978]

§ 35.910–10 Allotment of Fiscal Year 1979 appropriation.

(a) Title II of Pub. L. 95–392 appropriated $4.2 billion. These allotments are available until expended but must be obligated by September 30, 1980. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8(a) and (b) to the funds appropriated for FY 1979 and rounding to the nearest hundred dollars.

(c) The $4.2 billion are allotted as follows:

State	Allotments from funds appropriated under Pub. L. 95–392
Alabama	$53,189,100
Alaska	20,709,000
Arizona	32,128,000
Arkansas	31,117,400
California	329,323,400
Colorado	38,050,800
Connecticut	45,858,100
Delaware	20,709,000
District of Columbia	20,709,000
Florida	158,904,600
Georgia	80,425,600
Hawaii	32,836,300
Idaho	20,709,000
Illinois	215,137,900
Indiana	114,637,000
Iowa	53,648,800
Kansas	36,460,300
Kentucky	60,545,000
Louisiana	52,290,300
Maine	31,042,900
Maryland	115,047,000
Massachusetts	122,357,300
Michigan	171,081,500
Minnesota	77,414,600
Mississippi	40,009,900
Missouri	103,367,100
Montana	20,709,000
Nebraska	22,800,700
Nevada	20,709,000
New Hampshire	36,489,300
New Jersey	147,924,700
New Mexico	20,709,000
New York	439,897,200
North Carolina	82,040,900
North Dakota	20,709,000
Ohio	267,788,600
Oklahoma	38,431,900
Oregon	53,735,800
Pennsylvania	180,649,100

State	Allotments from funds appropriated under Pub. L. 95–392
Rhode Island	21,752,800
South Carolina	48,732,500
South Dakota	20,709,000
Tennessee	64,140,000
Texas	180,723,600
Utah	20,709,000
Vermont	20,709,000
Virginia	81,187,700
Washington	73,260,300
West Virginia	74,150,800
Wisconsin	80,777,700
Wyoming	20,709,000
American Samoa	2,551,400
Guam	3,081,500
Northern Mariana Islands	570,300
Puerto Rico	48,600,000
Trust Territory of Pacific	5,766,700
Virgin Islands	1,565,600
Total	4,200,000,000

[43 FR 56201, Nov. 30, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.910–10, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.910–11 Allotment of Fiscal Year 1980 appropriation.

(a) Title II of Pub. L. 96–103 appropriated $3.4 billion. These allotments are available until expended but must be obligated by September 30, 1981. After that date, unobligated balances will be reallotted under section 205(b) of the Act (see § 35.910–2(b)).

(b) The allotments were computed by applying the percentages in § 35.910–8 (a) and (d) to the funds appropriated for FY 1980 and rounding to the nearest hundred dollars.

(c) The $3.4 billion are alloted as follows:

State	Allotments from funds appropriated under Pub. L. 95–372
Alabama	$43,057,800
Alaska	16,764,500
Arizona	26,008,400
Arkansas	25,190,300
California	266,595,100
Colorado	30,803,000
Connecticut	37,123,200
Delaware	16,764,500
District of Columbia	16,764,500
Florida	128,637,000
Georgia	65,106,400
Hawaii	26,581,700
Idaho	16,764,500
Illinois	174,159,300
Indiana	92,801,300
Iowa	43,430,000
Kansas	29,515,500
Kentucky	49,012,600
Louisiana	42,330,300
Maine	25,129,900
Maryland	93,133,300
Massachusetts	99,051,100
Michigan	138,494,500
Minnesota	62,668,900
Mississippi	32,388,900
Missouri	83,678,100
Montana	16,764,500
Nebraska	18,457,700
Nevada	16,764,500
New Hampshire	29,539,000
New Jersey	119,748,500
New Mexico	16,764,500
New York	356,107,300
North Carolina	66,414,100
North Dakota	16,764,500
Ohio	216,781,200
Oklahoma	31,111,500
Oregon	43,500,400
Pennsylvania	146,239,700
Rhode Island	17,609,400
South Carolina	39,450,100
South Dakota	16,764,500
Tennessee	51,922,900
Texas	146,300,100
Utah	16,764,500
Vermont	16,764,500
Virginia	65,723,400
Washington	59,305,900
West Virginia	60,026,800
Wisconsin	65,391,400
Wyoming	16,764,500
American Samoa	2,065,400
Guam	2,494,500
Puerto Rico	39,342,800
Trust Terr	4,667,200
Virgin Islands	1,267,400
Northern Marianas	462,700
Total	3,400,000,000

[45 FR 16486, Mar. 14, 1980]

§ 35.910–12 Reallotment of deobligated funds of fiscal year 1978.

(a) Of the 4.5 billion appropriated by Pub. L. 95–240 for fiscal year 1978, $23,902,130 remained unobligated as of September 30, 1979 and thereby became subject to reallotment.

(b) The reallotment was computed by applying the percentages in § 35.910–8(a), adjusted to account for the absence of Ohio and readjusted to

comply with the requirements of § 35.910(d) establishing a minimum allotment of .5 percent.

(c) These funds are added to the fiscal year 1980 allotments and will remain available through September 30, 1981 (see §§ 35.910–2(b) and 35.910–8).

(d) The $23,902,130 is allotted as follows:

State	Amount
Alabama	$324,543
Alaska	118,190
Arizona	196,050
Arkansas	189,880
California	2,009,389
Colorado	232,191
Connecticut	279,813
Delaware	118,190
District of Columbia	118,190
Florida	969,582
Georgia	490,736
Hawaii	200,367
Idaho	125,148
Illinois	1,312,681
Indiana	699,465
Iowa	327,345
Kansas	222,494
Kentucky	369,430
Louisiana	319,073
Maine	189,428
Maryland	701,974
Massachusetts	746,591
Michigan	1,043,875
Minnesota	472,360
Mississippi	244,147
Missouri	630,710
Montana	118,190
Nebraska	139,138
Nevada	118,190
New Hampshire	222,653
New Jersey	902,590
New Mexico	118,190
New York	2,684,060
North Carolina	500,590
North Dakota	118,190
Oklahoma	234,496
Oregon	327,888
Pennsylvania	1,102,234
Rhode Island	132,719
South Carolina	297,352
South Dakota	118,190
Tennessee	391,354
Texas	1,102,708
Utah	118,190
Vermont	118,190
Virginia	495,392
Washington	447,046
West Virginia	452,493
Wisconsin	492,883
Wyoming	118,190
Guam	18,805
Puerto Rico	296,561
Virgin Islands	9,561
American Samoa	15,573
Tr. Terr. of Pac. Islds	35,192
N. Mariana Islds	3,480
Total	23,902,130

[45 FR 83497, Dec. 19, 1980. Correctly designated at 46 FR 9947, Jan. 30, 1981]

§ 35.912 Delegation to State agencies.

EPA's policy is to maximize the use of staff capabilities of State agencies. Therefore, in the implementation of the construction grant program, optimum use will be made of available State and Federal resources. This will eliminate unnecessary duplicative reviews of documents required in the processing of construction grant awards. Accordingly, the Regional Administrator may enter into a written agreement, where appropriate, with a State agency to authorize the State agency's certification of the technical or administrative adequacy of specifically required documents. The agreement may provide for the review and certification of elements of: (a) Facilities plans (step 1), (b) plans and specifications (step 2), (c) operation and maintenance manuals, and (d) such other elements as the Regional Administrator determines may be appropriately delegated as the program permits and State competence allows. The agreement will define requirements which the State will be expected to fulfill as part of its general responsibilities for the conduct of an effective preaward applicant assistance program; compensation for this program is the responsibility of the State. The agreement will also define specific duties regarding the review of identified documents prerequisite to the receipt of grant awards. A certification agreement must provide that an applicant or grantee may request review by the Regional Administrator of an adverse recommendation by a State agency. Delegation activities are compensable by EPA only under section 106 of the Act or Subpart F of this part.

§ 35.915 State priority system and project priorty list.

Construction grants will be awarded from allotments according to the State priority list, based on the approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act.

(a) *State priority system.* The State priority system describes the methodology used to rate and rank projects that are considered eligible for assistance. It also sets forth the administrative, management, and public participation procedures required to develop and revise the State project priority list. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide water quality management (WQM) plans. The State shall hold a public hearing before submission of the priority system (or revision thereto). Before the hearing, a fact sheet describing the proposed systen (including rating and ranking criteria) shall be distributed to the public. A summary of State responses to public comment and to any public hearing testimony shall be prepared and included in the priority system submission. The Regional Administrator shall review and approve the State priority system for procedural completeness, insuring that it is designed to obtain compliance with the enforceable requirements of the Act as defined in § 35.905. The Regional Administrator may exempt grants for training facilities under section 109(b)(1) of the Act and § 35.930-1(b) from these requirements.

(1) *Project rating criteria.* (i) The State priority system shall be based on the following criteria:

(A) The severity of the pollution problem;

(B) The existing population affected;

(C) The need for preservation of high quality waters; and,

(D) At the State's option, the specific category of need that is addressed.

(ii) The State will have sole authority to determine the priority for each category of need. These categories comprise mutually exclusive classes of facilities and include:

(A) Category I—Secondary treatment;

(B) Category II—More stringent treatment;

(C) Category IIIA—Infiltration/inflow correction;

(D) Category IIIB—Sewer system replacement or major rehabilitation;

(E) Category IVA—New collectors and appurtenances;

(F) Category IVB—New interceptors and appurtenances; and

(G) Category V—Correction of combined sewer overflows.

(iii) Step 2, step 3 and step 2+3 projects utilizing processes and techniques meeting the innovative and alternative guidelines in Appendix E of this part may receive higher priority. Also 100 percent grants for projects that modify or replace malfunctioning treatment works constructed with an 85 percent grant may receive a higher priority.

(iv) Other criteria, consistent with these, may be considered (including the special needs of small and rural communities). The State shall not consider: The project area's development needs not related to pollution abatement; the geographical region within the State; or future population growth projections.

(2) *Criteria assessment.* The State shall have authority to determine the relative influence of the rating criteria used for assigning project priority. The criteria must be clearly delineated in the approved State priority system and applied consistently to all projects. A project on the priority list shall generally retain its priority rating until an award is made.

(b) *State needs inventory.* The State shall maintain a listing, including costs by category, of all needed treatment works. The most recent needs inventory, prepared in accordance with section 516(b)(1)(B) of the Act, should be used for this purpose. This State listing should be the same as the needs inventory and fulfills similar requirements in the State WQM planning process. The State project priority list shall be consistent with the needs inventory.

(c) *State project priority list.* The State shall prepare and submit annually a ranked priority listing of projects for which Federal assistance is expected during the 5-year planning period starting at the beginning of the next fiscal year. The list's fundable portion shall include those projects planned for award during the first year of the 5-year period (hereinafter called the funding year). The fundable

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portion shall not exceed the total funds expected to be available during the year less all applicable reserves provided in § 35.915–1 (a) through (d). The list's planning portion shall include all projects outside the fundable portion that may, under anticipated allotment levels, receive funding during the 5-year period. The Administrator shall provide annual guidance to the States outlining the funding assumptions and other criteria useful in developing the 5-year priority list.

(1) *Project priority list development.* The development of the project priority list shall be consistent with the rating criteria established in the approved priority system, in accordance with the criteria in paragraph (a)(1) of this section. In ranking projects, States must also consider the treatment works and step sequence; the allotment deadline; total funds available; and other management criteria in the approved State priority system. In developing its annual priority list, the State must consider the construction grant needs and priorities set forth in certified and approved State and areawide WQM plans. The Regional Administrator may request that a State provide justification for the rating or ranking established for specific project(s).

(2) *Project priority list information.* The project priority list shall include the information for each project that is set out below for projects on the fundable portion of the list. The Administrator shall issue specific guidance on these information requirements for the planning portion of the list, including phase-in procedures for the fiscal year 1979 priority planning process.

(i) State assigned EPA project number;

(ii) Legal name and address of applicant;

(iii) Short project name or description;

(iv) Priority rating and rank of each project, based on the approved priority system;

(v) Project step number (step 1, 2, 3, or 2+3);

(vi) Relevant needs authority/facility number(s);

(vii) NPDES number (as appropriate);

(viii) Parent project number (i.e., EPA project number for predecessor project);

(ix) For step 2, 3, or 2+3 projects, indication of alternative system for small community;

(x) For step 2, 3, or 2+3 projects, that portion (if any) of eligible cost to apply to alternative techniques;

(xi) For step 2, 3, or 2+3 projects, that portion (if any) of eligible cost to apply to innovative processes;

(xii) For step 3 or 2+3 projects, the eligible costs in categories IIIB, IV, and V (see § 35.915(a)(1)(ii));

(xiii) Total eligible cost;

(xiv) Date project is expected to be certified by State to EPA for funding;

(xv) Estimated EPA assistance (not including potential grant increase from the reserve in § 35.915–1(b)); and

(xvi) Indication that the project does or does not satisfy the enforceable requirements provision, including (as appropriate) funding estimates for those portions which do not meet the enforceable requirements of the Act.

(d) *Public participation.* Before the State submits its annual project priority list to the Regional Administrator, the State shall insure that adequate public participation (including a public hearing) has taken place as required by Subpart G of this part. Before the public hearing, the State shall circulate information about the priority list including a description of each proposed project and a statement concerning whether or not it is necessary to meet the enforceable requirements of the Act. The information on the proposed priority list under paragraph (c)(2) of this section may be used to fulfill these requirements. This public hearing may be conducted jointly with any regular public meeting of the State agency. The public must receive adequate and timely statewide notice of the meeting (including publication of the proposed priority list) and attendees at the meeting must receive adequate opportunity to express their views concerning the list. Any revision of the State priority list (including project bypass and the deletion or addition of projects) requires circulation for public comment and a public hear-

ing unless the State agency and the Regional Administrator determine that the revision is not significant. The approved State priority system shall describe the public participation policy and procedures applicable to any proposed revision to the priority list.

(e) *Submission and review of project priority list.* The State shall submit the priority list as part of the annual State program plan under Subpart G of this part. A summary of State agency response to public comment and hearing testimony shall be prepared and submitted with the priority list. The Regional Administrator will not consider a priority list to be final until the public participation requirements are met and all information required for each project has been received. The Regional Administrator will review the final priority list within 30 days to insure compliance with the approved State priority system. No project may be funded until this review is complete.

(f) *Revision of the project priority list.* The State may modify the project priority list at any time during the program planning cycle in accordance with the public participation requirements and the procedures established in the approved State priority system. Any modification (other than clerical) to the priority list must be clearly documented and promptly reported to the Regional Administrator. As a minimum, each State's priority list management procedure must provide for the following conditions:

(1) *Project bypass.* A State may bypass a project on the fundable portion of the list after it gives written notice to the municipality and the NPDES authority that the State has determined that the project to be bypassed will not be ready to proceed during the funding year. Bypassed projects shall retain their relative priority rating for consideration in the future year allotments. The highest ranked projects on the planning portion of the list will replace bypassed projects. Projects considered for funding in accordance with this provision must comply with paragraph (g) of this section.

(2) *Additional allotments.* If a State receives any additional allotment(s), it may fund projects on the planning portion of the priority list without further public participation if:

(i) The projects on the planning portion have met all administrative and public participation requirements outlined in the approved State priority system; and

(ii) The projects included within the fundable range are the highest priority projects on the planning portion.

If sufficient projects that meet these conditions are not available on the planning portion of the list, the State shall follow the procedures outlined in paragraph (e) of this section to add projects to the fundable portion of the priority list.

(3) *Project removal.* A State may remove a project from the priority list only if:

(i) The project has been fully funded;

(ii) The project is no longer entitled to funding under the approved priority system;

(iii) The Regional Administrator has determined that the project is not needed to comply with the enforceable requirements of the Act; or

(iv) The project is otherwise ineligible.

(g) *Regional Administrator review for compliance with the enforceable requirements of the Act.* (1) Unless otherwise provided in paragraph (g)(2) of this section, the Regional Administrator may propose the removal of a specific project or portion thereof from the State project priority list during or after the initial review where there is reason to believe that it will not result in compliance with the enforceable requirements of the Act. Before making a final determination, the Regional Administrator will initiate a public hearing on this issue. Questioned projects shall not be funded during this administrative process. Consideration of grant award will continue for those projects not at issue in accordance with all other requirements of this section.

(i) The Regional Administrator shall establish the procedures for the public notice and conduct of any such hear-

ing, or, as appropriate, the procedures may be adapted from existing agency procedures such as § 6.400 or §§ 123.32 and 123.34 of this chapter. The procedures used must conform to minimum Agency guidelines for public hearings under part 25 of this chapter.

(ii) Within 30 days after the date of the hearing, the Regional Administrator shall transmit to the appropriate State agency a written determination about the questioned projects. If the Regional Administrator determines that the project will not result in compliance with the enforceable requirements of the Act, the State shall remove the project from the priority list and modify the priority list to reflect this action. The Regional Administrator's determination will constitute the final agency action, unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

(2) The State may use 25 percent of its funds during each fiscal year for projects or portions of projects in categories IIIB, IVA, IVB, and V (see § 35.915(a)(1)(ii)). These projects must be eligible for Federal funding to be included on the priority list. EPA will generally not review these projects under paragraph (g)(1) of this section to determine if they will result in compliance with the enforceable requirements of the Act. The Regional Administrator will, however, review all projects or portions thereof which would use funds beyond the 25-percent level according to the criteria in paragraph (g)(1) of this section.

(h) *Regional Administrator review for eligibility.* If the Regional Administrator determines that a project on the priority list is not eligible for assistance under this subpart, the State and municipality will be promptly advised and the State will be required to modify its priority list accordingly. Elimination of any project from the priority list shall be final and conclusive unless the State or municipality files a notice of appeal under part 30, subpart J of this subchapter.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.915, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.915-1 Reserves related to the project priority list.

In developing the fundable portion of the priority list, the State shall provide for the establishment of the several reserves required or allowed under this section. The State shall submit a statement specifying the amount to be set aside for each reserve with the final project priority list.

(a) *Reserve for State management assistance grants.* The State may (but need not) propose that the Regional Administrator set aside from each allotment a reserve not to exceed 2 percent or $400,000, whichever is greater, for State management assistance grants under subpart F of this part. Grants may be made from these funds to cover the reasonable costs of administering activities delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for innovative and alternative technology project grant increase.* Each State shall set aside from its annual allotment a specific percentage to increase the Federal share of grant awards from 75 percent to 85 percent of the eligible cost of construction (under § 35.908(b)(1)) for construction projects which use innovative or alternative waste water treatment processes and techniques. The set-aside amount shall be 2 percent of the State's allotment for each of fiscal years 1979 and 1980, and 3 percent for fiscal year 1981. Of this amount not less than one-half of 1 percent of the State's allotment shall be set aside to increase the Federal grant share for projects utilizing innovative processes and techniques. Funds reserved under this section may be expended on projects for which facilities plans were initiated before fiscal year 1979. These funds shall be reallotted if not used for this purpose during the allotment period.

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(c) *Reserve for grant increases.* The State shall set aside not less than 5 percent of the total funds available during the priority list year for grant increases (including any funds necessary for development of municipal pretreatment programs) for projects awarded assistance under § 35.935-11. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, if they are not needed for grant increases they should be released for funding additional projects before the reallotment deadline.

(d) *Reserve for step 1 and step 2 projects.* The State may (but need not) set aside up to 10 percent of the total funds available in order to provide grant assistance to step 1 and step 2 projects that may be selected for funding after the final submission of the project priority list. The funds reserved for this purpose shall be reallotted if not obligated. Therefore, they should be released for funding additional projects before the reallotment deadline.

(e) *Reserve for alternative systems for small communities.* Each State with a rural population of 25 percent or more (as determined by population estimates of the Bureau of Census) shall set aside an amount equal to 4 percent of the State's annual allotment, beginning with the fiscal year 1979 allotment. The set-aside amount shall be used for funding alternatives to conventional treatment works for small communities. The Regional Administrator may authorize, at the request of the Governor of any nonrural State, a reserve of up to 4 percent of that State's allotment for alternatives to conventional treatment works for small communities. For the purposes of this paragraph, the definition of a small community is any municipality with a population of 3,500 or less, or highly dispersed sections of larger municipalities, as determined by the Regional Administrator. In States where the reserve is mandatory, these funds shall be reallotted if not obligated during the allotment period. In States where the reserve is optional, these funds should be released for funding projects before the reallotment deadline.

EDITORIAL NOTE: For Class deviation documents affecting § 35.915-1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.917 Facilities planning (step 1).

(a) Sections 35.917 through 35.917-9 establish the requirements for facilities plans.

(b) Facilities planning consists of those necessary plans and studies which directly relate to the construction of treatment works necessary to comply with sections 301 and 302 of the Act. Facilities planning will demonstrate the need for the proposed facilities. Through a systematic evaluation of feasible alternatives, it will also demonstrate that the selected alternative is cost-effective, i.e., is the most economical means of meeting established effluent and water quality goals while recognizing environmental and social considerations. (See Appendix A to this subpart.)

(c) EPA requires full compliance with the facilities planning provisions of this subpart before award of step 2 or step 3 grant assistance. (Facilities planning initiated before May 1, 1974, may be accepted under regulations published on February 11, 1974, if the step 2 or step 3 grant assistance is awarded before April 1, 1980.)

(d) Grant assistance for step 2 or step 3 may be awarded before approval of a facilities plan for the entire geographic area to be served by the complete waste treatment system of which the proposed treatment works will be an integral part if:

(1) The Regional Administrator determines that applicable statutory requirements have been met (see §§ 35.925-7 and 35.925-8); that the facilities planning related to the proposed step 2 or step 3 project has been substantially completed; and that the step 2 or step 3 project for which grant assistance is made will not be significantly affected by the completion of the facilities plan and will be a component part of the complete system; and

(2) The applicant agrees to complete the facilities plan on a schedule the State accepts (subject to the Regional Administrator's approval); the sched-

ule shall be inserted as a special condition in the grant agreement.

(e) Facilities planning may not be initiated before award of a step 1 grant or written approval of a plan of study (see § 35.920-3(a)(1)) accompanied by reservation of funds for a step 1 grant (see §§ 35.925-18 and 35.905). Facility planning must be based on load allocations, delineation of facility planning areas and population projection totals and disaggregations in approved water quality management (WQM) plans. (See paragraph 8a(3) of Appendix A.) After October 1, 1979, the Regional Administrator shall not approve grant assistance for any project under this subpart if such facility-related information is not available in an approved WQM plan, unless the Regional Administrator determines, in writing, based on information submitted by the State or the grantee, that the facility-related information was not within the scope of the WQM work program, or that award of the grant is necessary to achieve water quality goals of the Act.

(f) If the information required as part of a facilities plan has been developed separately, the facilities plan should incorporate it by reference. Planning which has been previously or collaterally accomplished under local, State, or Federal programs will be utilized (not duplicated).

§ 35.917-1 Content of facilities plan.

Facilities planning must address each of the following to the extent considered appropriate by the Regional Administrator:

(a) A description of the treatment works for which construction drawings and specifications are to be prepared. This description shall include preliminary engineering data, cost estimates for design and construction of the treatment works, and a schedule for completion of design and construction. The preliminary engineering data may include, to the extent appropriate, information such as a schematic flow diagram, unit processes, design data regarding detention times, flow rates, sizing of units, etc.

(b) A description of the selected complete waste treatment system(s) of which the proposed treatment works is a part. The description shall cover all elements of the system, from the service area and collection sewers, through treatment, to the ultimate discharge of treated wastewaters and management and disposal of sludge. Planning area maps must include major components of existing and proposed treatment works. For individual systems, planning area maps must include those individual systems which are proposed for funding under § 35.918.

(c) Infiltration/inflow documentation in accordance with § 35.927 et seq.

(d) A cost-effectiveness analysis of alternatives for the treatment works and for the complete waste treatment system(s) of which the treatment works is a part. The selection of the system(s) and the choice of the treatment works for which construction drawings and specifications are to be prepared shall be based on the results of the cost-effectiveness analysis. (See Appendix A to this subpart.) This analysis shall include:

(1) The relationship of the size and capacity of alternative works to the needs to be served, including reserve capacity;

(2) An evaluation of alternative flow and waste reduction measures, including nonstructural methods;

(3) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an alternative or supplement to construction of new facilities;

(4) An evaluation of the capability of each alternative to meet applicable effluent limitations. (All step 2, step 3, or step 2+3 projects shall be based on application of best practicable waste treatment technology (BPWTT), as a minimum. Where application of BPWTT would not meet water quality standards, the facilities plan shall provide for attaining such standards. Such provision shall consider the alternative of treating combined sewer overflows.);

(5) An identification of, and provision for, applying BPWTT as defined by the Administrator, based on an evaluation of technologies included under each of the following waste treatment management techniques:

(i) Biological or physical-chemical treatment and discharge to receiving waters;

(ii) Systems employing the reuse of wastewater and recycling of pollutants;

(iii) Land application techniques;

(iv) Systems including revenue generating applications; and

(v) Onsite and nonconventional systems;

(6) An evaluation of the alternative methods for the ultimate disposal of treated wastewater and sludge materials resulting from the treatment process, and a justification for the method(s) chosen;

(7) An adequate assessment of the expected environmental impact of alternatives (including sites) under part 6 of this chapter. This assessment shall be revised as necessary to include information developed during subsequent project steps;

(8) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of innovative and alternative treatment processes and techniques that reclaim and reuse water, productively recycle wastewater constituents, eliminate the discharge of pollutants, recover energy or otherwise achieve the benefits described in Appendix E. The provisions of this paragraph are encouraged in all cases. They are required in facilities planning for new treatment works and for treatment works which are being acquired, altered, modified, improved, or extended either to handle a significant increase in the volume of treated waste or to reduce significantly the pollutant discharges from the system. Where certain categories of alternative technologies may not be generally applicable because of prevailing climatic or geological conditions, a detailed analysis of these categories of alternative technologies is not required. However, the reason for such a rejection must be fully substantiated in the facilities plan;

(9) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, an analysis of the primary energy requirements (operational energy inputs) for each system considered. The alternative selected shall propose adoption of measures to reduce energy consumption or to increase recovery as long as such measures are cost-effective. Where processes or techniques are claimed to be innovative technology on the basis of energy reduction criterion contained in paragraph 6e(2) of Appendix E to this subpart, a detailed energy analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

(e) An identification of effluent discharge limitations or, where a permit has been issued, the NPDES permit number, and a brief description of how the proposed project(s) will result in compliance with the enforceable requirements of the Act.

(f) Required comments or approvals of relevant State, interstate, regional, and local agencies (see § 30.305–8).

(g) A final responsiveness summary, consistent with 40 CFR 25.8 and § 35.917–5.

(h) A brief statement demonstrating that the authorities who will be implementing the plan have the necessary legal, financial, institutional, and managerial resources available to insure the construction, operation, and maintenance of the proposed treatment works.

(i) A statement specifying that the requirements of the Civil Rights Act of 1964 and of part 7 of this chapter have been met.

(j) For facilities planning begun after September 30, 1978, whether or not prepared under a step 1 grant, a description of potential opportunities for recreation, open space, and access to bodies of water analyzed in planning the proposed treatment works and the recommended actions. The facilities plan shall also describe measures taken to coordinate with Federal, State, and local recreational programs and with recreational elements of applicable approved areawide WQM plans.

(k) A municipal pretreatment program in accordance with § 35.907.

(l) An estimate of total project costs and charges to customers, in accordance with guidance issued by the Administrator.

(m) A statement concerning the availability and estimated cost of proposed sites.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10302, Feb. 16, 1979]

§ 35.917-2 State responsibilities.

(a) *Facilities planning areas.* Facilities planning should focus upon the geographic area to be served by the waste treatment system(s) of which the proposed treatment works will be an integral part. The facilities plan should include the area necessary to prepare an environmental assessment and to assure that the most cost-effective means of achieving the established water quality goals can be implemented. To assure that facilities planning will include the appropriate geographic areas, the State shall:

(1) Delineate, as a preliminary basis for planning, the boundaries of the planning areas. In the determination of each area, appropriate attention should be given to including the entire area where cost savings, other management advantages, or environmental gains may result from interconnection of individual waste treatment systems or collective management of such systems;

(2) Include maps, which shall be updated annually, showing the identified areas and boundary determinations, as part of the State submission under section 106 of the act;

(3) Consult with local officials in making the area and boundary determinations; and

(4) Where individual systems are likely to be cost-effective, delineate a planning area large enough to take advantage of economies of scale and efficiencies in planning and management.

(b) *Facilities planning priorities.* The State shall establish funding priorities for facilities planning in accordance with §§ 35.915 and 35.915-1.

§ 35.917-3 Federal assistance.

(a) *Eligibility.* Only an applicant which is eligible to receive grant assistance for subsequent phases of construction (steps 2 and 3) and which has the legal authority to subsequently construct and manage the facility may apply for grant assistance for step 1. If the area to be covered by the facilities plan includes more than one political jurisdiction, a grant may be awarded for a step 1 project, as appropriate, to:

(1) The joint authority representing such jurisdictions, if eligible; (2) one qualified (lead agency) applicant; or (3) two or more eligible jurisdictions. After a waste treatment management agency for an area has been designated in accordance with section 208(c) of the Act (see subpart G of this part) the Regional Administrator shall not make any grant for construction of treatment works within the area except to the designated agency.

(b) *Reports.* Where a grant has been awarded for facilities planning which is expected to require more than 1 year to complete, the grantee must submit a brief progress report to the Regional Administrator at 3-month intervals. The progress report shall contain a minimum of narrative description, and shall describe progress in completing the approved schedule of specific tasks for the project.

§ 35.917-4 Planning scope and detail.

(a) Initially, the geographic scope of step 1 grant assistance shall be based on the area delineated by the State under § 35.917-2, subject to the Regional Administrator's review. The Regional Administrator may make the preliminary delineation of the boundaries of the planning area, if the State has not done so, or may revise boundaries selected by the locality or State agency, after appropriate consultation with State and local officials.

(b) Facilities planning shall be conducted only to the extent that the Regional Administrator finds necessary in order to insure that facilities for which grants are awarded will be cost-effective and environmentally sound and to permit reasonable evaluation of grant applications and subsequent preparation of designs, construction drawings, and specifications.

§ 35.917-5 Public participation.

(a) *General.* Consistent with section 101(e) of the Clean Water Act and 40 CFR part 25, EPA, the States, and grantees shall provide for, encourage, and assist public participation in the

facilities planning process and shall provide citizens with information about and opportunities to become involved in the following:

(1) The assessment of local water quality problems and needs;

(2) The identification and evaluation of locations for wastewater treatment facilities and of alternative treatment technologies and systems including those which recycle and reuse wastewater (including sludge), use land treatment, reduce wastewater volume, and encourage multiple use of facilities;

(3) The evaluation of social, economic, fiscal, and environmental impacts; and

(4) The resolution of other significant facilities planning issues and decisions.

(b) *Basic Public Participation Program.* Since wastewater treatment facilities vary in complexity and impact upon the community, these public participation requirements institute a two-tier public participation program for facilities planning consisting of a Basic Public Participation Program, suitable for less complex projects with only moderate community impacts, and a Full-Scale Public Participation Program, for more complex projects with potentially significant community impacts. All facilities planning projects, except those that qualify for the Full-Scale Public Participation Program under paragraph (c) of this section and those exempt under paragraph (d) of this section, require the Basic Public Participation Program. In conducting the Basic Public Participation Program, the grantee shall at a minimum:

(1) Institute, and maintain throughout the facilities planning process, a public information program (including the development and use of a mailing list of interested and affected members of the public), in accordance with 40 CFR 25.4 and § 35.917-5(a).

(2) Notify and consult with the public, during the preparation of the plan of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer.

(3) Include in the plan of study, submitted with the Step 1 grant application, a brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, the types of consultation and informational mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement.

(4) Submit to EPA, within 45 days after the date of acceptance of the Step 1 grant award, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method of coordination between the appropriate Water Quality Management public participation program under subpart G of this part and the grantee's public participation program as required by 40 CFR 35.917-5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting charges to each affected household.

(5) Consult with the public, in accordance with 40 CFR 25.4, early in the facilities planning process when assessing the existing and future situations and identifying and screening alternatives, but before selecting alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). After consultating with the public, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(6) Hold a meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected and then prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8.

(7) Hold a public hearing before final adoption of the facilities plan, in accordance with 40 CFR 25.5.

(8) Include in the final facilities plan a final responsiveness summary, in accordance with 40 CFR 25.8.

(c) *Full-Scale Public Participation Program.* (1) The Regional Administrator shall require a Full-Scale Public Participation Program for all Step 1 facilities planning projects that fulfill one or more of the following three conditions:

(i) Where EPA prepares or requires the preparation of an Environmental Impact Statement during facilities planning under 40 CFR part 6; or

(ii) Where advanced wastewater treatment (AWT) levels, as defined in EPA guidance, may be required; or

(iii) Where the Regional Administrator determines that more active public participation in decision-making is needed because of the possibility of particularly significant effects on matters of citizen concern, as indicated by one or more of the following:

(A) Significant change in land use or impact on environmentally sensitive areas;

(B) Significant increase in the capacity of treatment facilities or interceptors, significant increase in sewered area, or construction of wholly new treatment and conveyance systems;

(C) Substantial total cost to the community or substantial increased cost to users (i.e., cost not reimbursed under the grant);

(D) Significant public controversy;

(E) Significant impact on local population growth or economic growth;

(F) Substantial opportunity for implementation of innovative or alternative wastewater treatment technologies or systems.

(2) The grantee shall initiate a Full-Scale Public Participation Program as soon as the determination in paragraph (c)(1) of this section is made. Generally, the determination should be made before or at the time of award of the Step 1 grant. However, if the Regional Administrator's determination under paragraph (c)(1) of this section to require a Full-Scale Public Participation Program occurs after initiation of facilities planning because of newly discovered circumstances, the grantee shall initiate and expanded public participation program at that point. The Regional Administrator shall assure that the expanded program is at least as inclusive as a normal Full-Scale Public Participation Program, except for constraints imposed by facilities planning activities that have already been completed. If the project is segmented, the Regional Administrator shall look at the project as a whole when considering whether to require a Full-Scale Public Participation Program.

(3) In conducting the Full-Scale Public Participation Program, the grantee shall at a minimum:

(i) Institute and maintain, throughout the facilities planning process, a public information program, in accordance with 40 CFR 25.4 and § 35.917-5(a);

(ii) Notify and consult with the public, during the development of the plan of study, about the nature and scope of the proposed facilities planning project. EPA encourages the grantee to consult with the public in the selection of the professional consulting engineer;

(iii) Include, in the plan of study submitted with the Step 1 grant application, brief outline of the public participation program, noting the projected staff and budget resources which will be devoted to public participation, a proposed schedule for public participation activities, types of information and consultation mechanisms that will be used, and the segments of the public that the grantee has targeted for involvement;

(iv) Designate or hire a public participation coordinator and establish an advisory group, in accordance with 40 CFR 25.7, immediately upon acceptance of the Step 1 grant award.

(v) Submit to EPA, within 45 days after the date of acceptance of the step 1 grant award and after consultation with the advisory group, a brief Public Participation Work Plan. In addition to meeting the requirements of 40 CFR 25.11, the Work Plan shall describe the method for coordination between the appropriate Water Quality Management agency public participation program under subpart G of this part, and the grantee's public partici-

pation program as required by 40 CFR 35.917–5(e). The grantee shall distribute the Work Plan, accompanied by a fact sheet on the project, to groups and individuals who may be interested in or affected by the project. The fact sheet shall describe the nature, scope and location of the project; identify the consulting engineer and grantee staff contact; and include a preliminary estimate of the total costs of the project, including debt service and operation and maintenance, and of the resulting costs to each affected household;

(vi) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, early in the facilities planning process when assessing the existing and future situations, and identifying and screening alternatives, but before selection of alternatives for evaluation according to the Cost-Effectiveness Analysis Guidelines (see Appendix A, Cost-Effectiveness Analysis Guidelines, paragraph 5). Following the public meeting, the grantee shall prepare and distribute a responsiveness summary, in accordance with 40 CFR 25.8;

(vii) Hold a public meeting to consult with the public, in accordance with 40 CFR 25.6, when alternatives are largely developed but before an alternative or plan has been selected, and then prepare and circulate a responsiveness summary, in accordance with 40 CFR 25.8;

(viii) Hold a public hearing prior to final adoption of the facilities plan, in accordance with 40 CFR 25.5. This public hearing may be held in conjunction with the public hearing on the draft Environmental Impact Statement under 40 CFR part 6.

(ix) Include, in the final facilities plan, a final responsiveness summary, in accordance with 40 CFR 25.8.

(d) *Exemptions from public participation requirements.* (1) Upon written request of the grantee, the Regional Administrator may exempt projects in which only minor upgrading of treatment works or minor sewer rehabilitation is anticipated according to the State Project Priority List from the requirements of the Basic and Full-Scale Public Participation Programs under paragraphs (b) and (c) of this section, except for the public hearing and public disclosure of costs. Before granting any exemption, the Regional Administrator shall issue a public notice of intent to waive the above requirements containing the facts of the situation and shall allow 30 days for response. If responses indicate that serious local issues exist, then the Regional Administrator shall deny the exemption request.

(2) During the facilities planning process, if the Regional Administrator determines that the project no longer meets the exemption criteria stated above, the grantee, in consultation with the Regional Administrator, shall undertake public participation activities commensurate with the appropriate public participation program but adjusted for constraints imposed by facilities planning activities that have already been completed.

(3) If a project is segmented, the Regional Administrator shall look at the project as a whole when considering any petition for exemption.

(e) *Relationship between facilities planning and other environmental protection programs.* Where possible, the grantee shall further the integration of facilities planning and related environmental protection programs by coordinating the facilities planning public participation program with public participation activities carried out under other programs. At a minimum, the grantee shall provide for a formal liaison between the facilities planning advisory group (or the grantee, where there is no advisory group) and any areawide advisory group established under Subpart G of this part. The Regional Administrator may request review of the facilities plan by any appropriate State or areawide advisory group in association with the facilities plan review required by 40 CFR 35.1522.

(f) *Mid-project evaluation.* In accordance with 40 CFR 25.12(a)(2), EPA shall, in conjunction with other regular oversight responsibilities, conduct a mid-project review of compliance with public participation requirements.

[44 FR 10302, Feb. 16, 1979]

§ 35.917-6 Acceptance by implementing governmental units.

A facilities plan submitted for approval shall include adopted resolutions or, where applicable, executed agreements of the implementing governmental units, including Federal facilities, or management agencies which provide for acceptance of the plan, or assurances that it will be carried out, and statements of legal authority necessary for plan implementation. The Regional Administrator may approve any departures from these requirements before the plan is submitted.

§ 35.917-7 State review and certification of facilities plan.

Each facilities plan must be submitted to the State agency for review. The State must certify that:

(a) The plan conforms with requirements set forth in this subpart;

(b) The plan conforms with any existing final basin plans approved under section 303(e) of the Act;

(c) Any concerned 208 planning agency has been given the opportunity to comment on the plan; and

(d) The plan conforms with any waste treatment management plan approved under section 208(b) of the act.

§ 35.917-8 Submission and approval of facilities plan.

The State agency must submit the completed facilities plan for the Regional Administrator's approval. Where deficiencies in a facilities plan are discovered, the Regional Administrator shall promptly notify the State and the grantee or applicant in writing of the nature of such deficiencies and of the recommended course of action to correct such deficiencies. Approval of a plan of study or a facilities plan will not constitute an obligation of the United States for any step 2, step 3, or step 2+3 project.

§ 35.917-9 Revision or amendment of facilities plan.

A facilities plan may provide the basis for several subsequent step 2, step 3, or step 2+3 projects. A facilities plan which has served as the basis for the award of a grant for a step 2, step 3, or step 2+3 project shall be reviewed before the award of any grant for a subsequent project involving step 2 or step 3 to determine if substantial changes have occurred. If the Regional Administrator decides substantial changes have occurred which warrant revision or amendment, the plan shall be revised or amended and submitted for review in the same manner specified in this subpart.

§ 35.918 Individual systems.

(a) For references to individual systems, the following definitions apply:

(1) *Individual systems.* Privately owned alternative wastewater treatment works (including dual waterless/gray water systems) serving one or more principal residences or small commercial establishments which are neither connected into nor a part of any conventional treatment works. Normally, these are on-site systems with localized treatment and disposal of wastewater with minimal or no conveyance of untreated waste water. Limited conveyance of treated or partially treated effluents to further treatment or disposal sites can be a function of individual systems where cost-effective.

(2) *Principal residence.* Normally the voting residence, the habitation of the family or household which occupies the space for at least 51 percent of the time annually. Second homes, vacation, or recreation residences are not included in this definition. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flows) is included.

(3) *Small commercial establishments.* Private establishments normally found in small communities such as restaurants, hotels, stores, filling stations, or recreational facilities with dry weather wastewater flows less than 25,000 gallons per day. Private, nonprofit entities such as churches, schools, hospitals, or charitable organizations are considered small commercial establishments. A commercial establishment with waste water flow equal to or smaller than one user equivalent (generally 300 gallons per day dry weather flow) shall be treated as a residence.

(4) *Conventional system.* A collection and treatment system consisting of minimum size (6 or 8 inch) gravity collector sewers normally with manholes, force mains, pumping and lift stations, and interceptors leading to a central treatment plant.

(5) *Alternative waste water treatment works.* A waste water conveyance and/or treatment system other than a conventional system. This includes small diameter pressure and vacuum sewers and small diameter gravity sewers carrying partially or fully treated waste water.

(b) A public body otherwise eligible for a grant under § 35.920–1 is eligible for a grant to construct privately owned treatment works serving one or more principal residences or small commercial establishments if the requirements of §§ 35.918–1, 35.918–2, and 35.918–3 are met.

(c) All individual systems qualify as alternative systems under § 35.908 and are eligible for the 4-percent set-aside (§ 35.915–1(e)) where cost-effective.

§ 35.918–1 Additional limitations on awards for individual systems.

In addition to those limitations set forth in § 35.925, the grant applicant shall:

(a) Certify that the principal residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date;

(b) Demonstrate in the facility plan that the solution chosen is cost-effective and selected in accordance with the cost-effectiveness guidelines for the construction grants program (see Appendix A to this subpart);

(c) Apply on behalf of a number of individual units located in the facility planning area;

(d) Certify that public ownership of such works is not feasible and list the reasons in support of such certification;

(e) Certify that such treatment works will be properly installed, operated, and maintained and that the public body will be responsible for such actions;

(f) Certify before the step 2 grant award that the project will be constructed and an operation and maintenance program established to meet local, State, and Federal requirements including those protecting present or potential underground potable water sources;

(g) Establish a system of user charges and industrial cost recovery in accordance with §§ 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15;

(h) Obtain assurance (such as an easement or covenant running with the land), before the step 2 grant award, of unlimited access to each individual system at all reasonable times for such purposes as inspection, monitoring, construction, maintenance, operation, rehabilitation, and replacement. An option will satisfy this requirement if it can be exercised no later than the initiation of construction;

(i) Establish a comprehensive program for regulation and inspection of individual systems before EPA approval of the plans and specifications. Planning for this comprehensive program shall be completed as part of the facility plan. The program shall include as a minimum, periodic testing of water from existing potable water wells in the area. Where a substantial number of onsite systems exist, appropriate additional monitoring of the aquifer(s) shall be provided;

(j) Comply with all other applicable limitations and conditions which treatment works projects funded under this subpart must meet.

§ 35.918–2 Eligible and ineligible costs.

(a) Only the treatment and treatment residue disposal portions of toilets with composting tanks, oil-flush mechanisms or similar in-house systems are grant eligible.

(b) Acquisition of land in which the individual system treatment works are located is not grant eligible.

(c) Commodes, sinks, tubs, drains, and other wastewater generating fixtures and associated plumbing are not grant eligible. Modifications to homes or commercial establishments are also excluded from grant eligibility.

(d) Only reasonable costs of construction site restoration to preconstruction conditions are eligible. Costs of improvement or decoration associat-

ed with the installation of individual systems are not eligible.

(e) Conveyance pipes from wastewater generating fixtures to the treatment unit connection flange or joint are not eligible where the conveyance pipes are located on private property.

§ 35.918–3 Requirements for discharge of effluents.

Best practicable waste treatment criteria published by EPA under section 304(d)(2) of the Act shall be met for disposal of effluent on or into the soil from individual systems. Discharges to surface waters shall meet effluent discharge limitations for publicly owned treatment works.

§ 35.920 Grant application.

Grant applications will be submitted and evaluated in accordance with part 30, subpart B of this chapter.

§ 35.920–1 Eligibility.

Municipalities (see § 35.905), intermunicipal agencies, States, or interstate agencies are eligible for grant assistance.

§ 35.920–2 Procedure.

(a) Preapplication assistance, including, where appropriate, a preapplication conference, should be requested from the State agency or the appropriate EPA Regional Office for each project for which State priority has been determined. The State agency must receive an application for each proposed treatment works. The basic application shall meet the project requirements in § 35.920–3. Submissions required for subsequent related projects shall be in the form of amendments to the basic application. The grantee shall submit each application through the State agency. It must be complete (see § 35.920–3), and must relate to a project for which priority has been determined under § 35.915. If any information required by § 35.920–3 has been furnished with an earlier application, the applicant need only incorporate it by reference and, if necessary, revise such information using the previously approved application.

(b) Grant applications (and, for subsequent related projects, amendments to them) are considered received by EPA only when complete and upon official receipt of the State priority certification document (EPA form 5700–28) in the appropriate EPA Regional Office. In a State which has been delegated Federal application processing functions under § 35.912 or under Subpart F of this part, applications are considered received by EPA on the date of State certification. Preliminary or partial submittals may be made; EPA may conduct preliminary processing of these submittals.

§ 35.920–3 Contents of application.

(a) *Step 1: Facilities plan and related step 1 elements.* An application for a grant for step 1 shall include:

(1) A plan of study presenting—

(i) The proposed planning area;

(ii) An identification of the entity or entities that will be conducting the planning;

(iii) The nature and scope of the proposed Step 1 project and public participation program, including a schedule for the completion of specific tasks;

(iv) An itemized description of the estimated costs for the project; and

(v) Any significant public comments received.

(2) Proposed subagreements, or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work:

(3) Required comments or approvals of relevant State, local and Federal agencies, including clearinghouse requirements of Office of Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter).

(b) *Step 2: Preparation of construction drawings and specifications.* Before the award of a grant or grant amendment for a step 2 project, the applicant must furnish the following:

(1) A facilities plan (including the environmental assessment portion in accordance with part 6 of this chapter) in accordance with §§ 35.917 through 35.917–9;

(2) Adequate information regarding availability of proposed site(s), if relevant;

(3) Proposed subagreements or an explanation of the intended method of awarding subagreements for performance of any substantial portion of the project work;

(4) Required comments or approvals of relevant State, local, and Federal agencies, including clearinghouse requirements of Office and Management and Budget Circular A–95, as revised (see § 30.305 of this subchapter);

(5) A value engineering (VE) commitment in compliance with § 35.926(a) for all step 2 grant applications for projects with a projected total step 3 grant eligible construction cost of $10 million or more excluding the cost for interceptor and collector sewers. For those projects requiring VE, the grantee may propose, subject to the Regional Administrator's approval, to exclude interceptor and collector sewers from the scope of the VE analysis;

(6) Proposed or executed (as determined appropriate by the Regional Administrator) intermunicipal agreements necessary for the construction and operation of the proposed treatment works, for any treatment works serving two or more municipalities;

(7) A schedule for initiation and completion of the project work (see § 35.935–9), including milestones; and

(8) Satisfactory evidence of compliance with:

(i) Sections 35.925–11, 35.929 *et seq.* and 35.935–13 regarding user charges;

(ii) Sections 35.925–11, 35.928 *et seq.* and 35.935–15, regarding industrial cost recovery, if applicable;

(iii) Section 35.925–16, regarding costs allocable to Federal facilities, if applicable;

(iv) Section 35.927–4 regarding a sewer use ordinance;

(v) Section 30.405–2 and part 4 of this chapter, regarding compliance with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, if applicable; and,

(vi) Other applicable Federal statutory and regulatory requirements (see subpart C of part 30 of this chapter).

(9) After June 30, 1980, for grantees subject to pretreatment requirements under § 35.907(b), the items required by § 35.907(d)(1), (2), and (4).

(10) A public participation work plan, in accordance with § 35.917–5(g), if the grantee, after consultation with the public and its advisory group (if one exists), determines that additional public participation activities are necessary.

(c) *Step 3. Building and erection of a treatment works.* Prior to the award of a grant or grant amendment for a step 3 project, the applicant must furnish the following:

(1) Each of the items specified in paragraph (b) of this section (in compliance with paragraph (b)(6) of this section, the final intermunicipal agreements must be furnished);

(2) Construction drawings and specifications suitable for bidding purposes (in the case of an application for step 3 assistance solely for acquisition of eligible land, the grantee must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property);

(3) A schedule for or evidence of compliance with §§ 35.925–10 and 35.935–12 concerning an operation and maintenance program, including a preliminary plan of operation; and

(4) After December 31, 1980, the items required by § 35.907(d)(1) through (d)(9), as applicable, for grantees subject to pretreatment requirements under § 35.907(b).

(5) A public participation work plan, in accordance with § 35.917–5(g), if the grantee determines, after consultation with the public, that additional public participation activities are necessary.

(d) *Step 2+3.* Combination design and construction of a treatment works. Before the award of a grant or grant amendment for a step 2+3 project, the grantee must furnish:

(1) Each of the items specified in paragraph (b) of this section, and (2) a schedule for timely submission of plans and specifications, operation and maintenance manual, user charge and industrial cost recovery systems, sewer use ordinance, and a preliminary plan of operation.

(e) *Training facility project.* An application for grant assistance for construction and support of a training fa-

cility, facilities or training programs under section 109(b) of the Act shall include:

(1) A statement concerning the suitability of the treatment works facility, facilities or training programs for training operations and maintenance personnel for treatment works throughout one or more States;

(2) A written commitment from the State agency or agencies to carry out at such facility a program of training approved by the Regional Administrator;

(3) An engineering report (required only if a facility is to be constructed) including facility design data and cost estimates for design and construction;

(4) A detailed outline of the training programs, including (for 1-, 3-, and 5-year projections):

(i) An assessment of need for training,

(ii) How the need was determined,

(iii) Who would be trained,

(iv) What curriculum and materials would be used,

(v) What type of delivery system will be used to conduct training, (i.e., State vocational education system, State environmental agency, universities or private organizations),

(vi) What resources are available for the program,

(vii) A budget breakdown on the cost of the program, and

(viii) The relationship of the facility or programs to other training programs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 37595, June 27, 1979; 44 FR 39339, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.920-3, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.925 Limitations on award.

Before awarding initial grant assistance for any project for a treatment works through a grant or grant amendment, the Regional Administrator shall determine that all of the applicable requirements of § 35.920-3 have been met. He shall also determine the following:

§ 35.925-1 Facilities planning.

That, if the award is for step 2, step 3, or step 2+3 grant assistance, the facilities planning requirements in § 35.917 *et seq.* have been met.

§ 35.925-2 Water quality management plans and agencies.

That the project is consistent with any applicable water quality management (WQM) plan approved under section 208 or section 303(e) of the Act; and that the applicant is the wastewater management agency designated in any WQM plan certified by the Governor and approved by the Regional Administrator.

§ 35.925-3 Priority determination.

That such works are entitled to priority in accordance with § 35.915, and that the award of grant assistance for the proposed project will not jeopardize the funding of any treatment works of higher priority.

§ 35.925-4 State allocation.

That the award of grant assistance for a particular project will not cause the total of all grant assistance which applicants within a State received, including grant increases, to exceed the total of all allotments and reallotments available to the State under § 35.910.

§ 35.925-5 Funding and other capabilities.

That the applicant has:

(a) Agreed to pay the non-Federal project costs, and

(b) The legal, institutional, managerial, and financial capability to insure adequate construction, operation, and maintenance of the treatment works throughout the applicant's jurisdiction. (Also see § 30.340-3 of this subchapter.)

§ 35.925-6 Permits.

That the applicant has, or has applied for, the permit or permits as required by the national pollutant discharge elimination system (NPDES) with respect to existing discharges affected by the proposed project.

§ 35.925–7 Design.

That the treatment works design will be (in the case of projects involving step 2) or has been (in the case of projects for step 3) based upon:

(a) Appendix A to this subpart, so that the design, size, and capacity of such works are cost-effective and relate directly to the needs they serve, including adequate reserve capacity;

(b) Subject to the limitations set forth in § 35.930–4, achievement of applicable effluent limitations established under the Act, or BPWTT (see § 35.917–1(d)(5)), including consideration, as appropriate, for the application of technology which will provide for the reclaiming or recycling of water or otherwise eliminate the discharge of pollutants;

(c) The sewer system evaluation and rehabilitation requirements of § 35.927; and

(d) The value engineering requirements of § 35.926 (b) and (c).

§ 35.925–8 Environmental review.

(a) That, if the award is for step 2, step 3, or step 2+3, the requirements of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) applicable to the project step have been met. The grantee or grant applicant must prepare an adequate assessment of expected environmental impacts, consistent with the requirements of part 6 of this chapter, as part of facilities planning, in accordance with § 35.917–1(d)(7). The Regional Administrator must insure that an environmental impact statement or a negative declaration is prepared in accordance with part 6 of this chapter (particularly §§ 6.108, 6.200, 6.212, and 6.504) in conjunction with EPA review of a facility plan and issued before any award of step 2 or step 3 grant assistance.

(b) The Regional Administrator may not award step 2 or step 3 grant assistance if the grantee has not made, or agreed to make, pertinent changes in the project, in accordance with determinations made in a negative declaration or environmental impact statement. He may condition a grant to ensure that the grantee will comply, or seek to obtain compliance, with such environmental review determinations. The conditions may address secondary impacts to the extent deemed appropriate by the Regional Administrator.

§ 35.925–9 Civil rights.

That if the award of grant assistance is for a project involving step 2 or step 3, the applicable requirements of the Civil Rights Act of 1964 and part 7 of this chapter have been met.

§ 35.925–10 Operation and maintenance program.

If the award of grant assistance is for a step 3 project, that the applicant has made satisfactory provision to assure proper and efficient operation and maintenance of the treatment works (including the sewer system), in accordance with § 35.935–12, and that the State will have an effective operation and maintenance monitoring program to assure that treatment works assisted under this subpart comply with applicable permit and grant conditions.

§ 35.925–11 User charges and industrial cost recovery.

That, in the case of grant assistance for a project involving step 2 or step 3, the grantee has complied or will comply with the requirements for user charge and industrial cost recovery systems. (See §§ 35.928 *et seq.*, 35.929 *et seq.*, 35.935–13, and 35.935–15.)

(a) *Grants awarded before July 1, 1979.* Grantees must submit a schedule of implementation to show that their user charge and industrial cost recovery systems will be approved in accordance with the requirements of §§ 35.935–13 and 35.935–15.

(b) *Grants awarded after June 30, 1979.* The grantee's user charge and industrial cost recovery systems must be approved before the award of step 3 grant assistance.

(c) *Letters of intent.* In the case of any grant assistance for a project involving step 2 or step 3, the applicant must have received signed letters of intent from each significant industrial user stating that it will pay that portion of the grant amount allocable to the treatment of its wastes. Each such letter shall also include a statement of

the industrial user's intended period of use of the treatment works. A significant industrial user is one that will contribute greater than 10 percent of the design flow or design pollutant loading of the treatment works. In addition, the applicant must agree to require all industrial users to pay that portion of the grant amount allocable to the treatment of wastes from such users.

EDITORIAL NOTE: For a class deviation document affecting § 35.925–11, see 45 FR 81567, Dec. 11, 1980.

§ 35.925–12 Property.

That the applicant has demonstrated to the satisfaction of the Regional Administrator that it has met or will met the property requirements of § 35.935–3.

§ 35.925–13 Sewage collection system.

That, if the project involves sewage collection system work, such work (a) is for the replacement or major rehabilitation of an existing sewer system under § 35.927–3(a) and is necessary to the total integrity and performance of the waste treatment works serving the community, or (b) is for a new sewer system in a community in existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected sewage. Replacement or major rehabilitation of an existing sewer system may be approved only if cost-effective; the result must be a sewer system design capacity equivalent to that of the existing system plus a reasonable amount for future growth. For purposes of this section, a community would include any area with substantial human habitation on October 18, 1972, as determined by an evaluation of each tract (city blocks or parcels of 5 acres or less where city blocks do not exist). No award may be made for a new sewer system in a community in existence on October 18, 1972, unless the Regional Administrator further determines that:

(a) The bulk (generally two-thirds) of the expected flow (flow from existing plus projected future habitations) from the collection system will be for waste waters originating from the community (habitations) in existence on October 18, 1972;

(b) The collection system is cost-effective;

(c) The population density of the area to be served has been considered in determining the cost-effectiveness of the proposed project:

(d) The collection system conforms with any approved WQM plan, other environmental laws in accordance with § 35.925–14, Executive Orders on Wetlands and Floodplains and Agency policy on wetlands and agricultural lands; and

(e) The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g., restricting sewer hook-up) should be used where necessary to protect these resources from new development.

§ 35.925–14 Compliance with environmental laws.

That the treatment works will comply with all pertinent requirements of applicable Federal, State and local environmental laws and regulations. (See § 30.101 and subpart C of part 30 of this chapter and the Clean Air Act.)

§ 35.925–15 Treatment of industrial wastes.

That the allowable project costs do not include (a) costs of interceptor or collector lines constructed exclusively, or almost exclusively, to serve industrial sources or (b) costs allocable to the treatment for control or removal of pollutants in wastewater introduced into the treatment works by industrial sources, unless the applicant is required to remove such pollutants introduced from nonindustrial sources. The project must be included in a complete waste treatment system, a principal purpose of which project (as defined by the Regional Administrator; see §§ 35.903 (d) and 35.905) and system is the treatment of domestic wastes of the entire community, area, region or the district concerned. See

the pretreatment regulations in part 403 of this chapter and § 35.907.

[44 FR 39340, July 5, 1979]

§ 35.925–16 Federal activities.

That the allowable step 2 or step 3 project costs do not include the proportional costs allocable to the treatment of wastes from major activities of the Federal Government. A "major activity" includes any Federal facility which contributes either (a) 250,000 gallons or more per day or (b) 5 percent or more of the total design flow of waste treatment works, whichever is less.

§ 35.925–17 Retained amounts for reconstruction and expansion.

That the allowable project costs have been reduced by an amount equal to the unexpended balance of the amounts the applicant retains for future reconstruction and expansion under § 35.928–2(a)(2)(ii), together with interest earned.

§ 35.925–18 Limitation upon project costs incurred prior to award.

That project construction has not been initiated before the approved date of initiation of construction (as defined in § 35.905), unless otherwise provided in this section.

(a) *Step 1 or Step 2:* No grant assistance is authorized for step 1 or step 2 project work performed before award of a step 1 or step 2 grant. However, payment is authorized, in conjunction with the first award of grant assistance, for all preaward allowable project costs in the following cases:

(1) Step 1 work begun after the date of approval by the Regional Administrator of a plan of study, if the State requests and the Regional Administrator has reserved funds for the step 1 grant. However, the step 1 grant must be applied for and awarded within the allotment period of the reserved funds.

(2) Step 1 or step 2 work begun after October 31, 1974, but before June 30, 1975, in accordance with an approved plan of study or an approved facilities plan, as appropriate, but only if a grant is awarded before April 1, 1981.

(3) Step 1 or step 2 work begun before November 1, 1974, but only if a grant is awarded before April 1, 1980.

(b) *Step 3:* Except as otherwise provided in this paragraph, no grant assistance for a step 3 project may be awarded unless the award precedes initiation of the step 3 construction. Preliminary step 3 work, such as advance acquisition of major equipment items requiring long lead times, acquisition of eligible land or of an option for the purchase of eligible land, or advance construction of minor portions of treatment works, including associated engineering costs, in emergencies or instances where delay could result in significant cost increases, may be approved by the Regional Administrator after completion of environmental review, but only if (1) the applicant submits a written and adequately substantiated request for approval and (2) written approval by the Regional Administrator is obtained before initiation of the advance acquisition or advance construction. (In the case of authorization for acquisition of eligible land, the applicant must submit a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the property.)

(c) The approval of a plan of study, a facilities plan, or advance acquisition of equipment or advance construction will not constitute a commitment for approval of grant assistance for a subsequent treatment works project, but will allow payment for the previously approved costs as allowable project costs upon subsequent award of grant assistance, if requested before grant award (see § 35.945(a)). In instances where such approval is obtained, the applicant proceeds at its own risk, since payment for such costs cannot be made unless grant assistance for the project is awarded.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.925-19 [Reserved]

§ 35.925-20 Procurement.

That the applicant has complied or will comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement actions taken before the award of step 1, 2, or 3 grant assistance, such as submission of the information required under § 35.937-6.

§ 35.925-21 Storm sewers.

That, under section 211(c) of the Act, the allowable project costs do not include costs of treatment works for control of pollutant discharges from a separate storm sewer system (as defined in § 35.905).

§ 35.926 Value engineering (VE).

(a) *Value engineering proposal.* All step 2 grant applications for projects having a projected total step 3 grant eligible cost of $10 million or more, excluding the cost for interceptor and collector sewers, will contain a VE commitment. The VE proposal submitted during step 2 must contain enough information to determine the adequacy of the VE effort and the justification of the proposed VE fee. Essential information shall include:

(1) Scope of VE analysis;

(2) VE team and VE coordinator (names and background);

(3) Level of VE effort;

(4) VE cost estimate;

(5) VE schedule in relation to project schedule (including completion of VE analysis and submittal of VE summary reports).

(b) *Value engineering analysis.* For projects subject to the VE requirements of paragraph (a) of this section, a VE analysis of the project design shall be performed. When the VE analysis is completed, a preliminary report summarizing the VE findings and a final report describing implementation of the VE recommendations must be submitted to the project officer on a schedule approved by him.

(c) *Implementation.* For those projects for which a VE analysis has been performed in accordance with paragraph (b) of this section, VE recommendations shall be implemented to the maximum extent feasible, as determined by the grantee, subject to the approval of the EPA project officer. Rejection of any recommendation shall be on the basis of cost-effectiveness, reliability, extent of project delays, and other factors that may be critical to the treatment processes and the environmental impact of the project.

§ 35.927 Sewer system evaluation and rehabilitation.

(a) All applicants for step 2 or step 3 grant assistance must demonstrate to the Regional Administrator's satisfaction that each sewer system discharging into the treatment works project for which grant application is made is not or will not be subject to excessive infiltration/inflow. A determination of whether excessive infiltration/inflow exists may take into account, in addition to flow and related data, other significant factors such as cost-effectiveness (including the cost of substantial treatment works construction delay, see Appendix A to this subpart), public health emergencies, the effects of plant bypassing or overloading, or relevant economic or environmental factors.

(b) A sewer system evaluation will generally be used to determine whether or not excessive infiltration/inflow exists. It will consist of:

(1) Certification by the State agency, as appropriate; and, when necessary,

(2) An infiltration/inflow analysis; and, if appropriate,

(3) A sewer system evaluation survey and, if appropriate, a program, including an estimate of costs, for rehabilitation of the sewer system to eliminate excessive infiltration/inflow identified in the sewer system evaluation. Information submitted to the Regional Administrator for such determination should be the minimum necessary to enable him to make a judgment.

(c) Guidelines on sewer system evaluation published by the Administrator provide further advisory information (see § 35.900(c)). Also see §§ 35.925-7(c) and 35.935-16.

§ 35.927–1 Infiltration/inflow analysis.

(a) The infiltration/inflow analysis shall demonstrate the nonexistence or possible existence of excessive infiltration/inflow in the sewer system. The analysis should identify the presence, flow rate, and type of infiltration/inflow conditions which exist in the sewer system.

(b) For determination of the possible existence of excessive infiltration/inflow, the analysis shall include an estimate of the cost of eliminating the infiltration/inflow conditions. These costs shall be compared with estimated total costs for transportation and treatment of the infiltration/inflow. Cost-effectiveness analysis guidelines (Appendix A to this subpart) should be consulted with respect to this determination.

(c) If the infiltration/inflow analysis demonstrates the existence or possible existence of excessive infiltration/inflow a detailed plan for a sewer system evaluation survey shall be included in the analysis. The plan shall outline the tasks to be performed in the survey and their estimated costs.

§ 35.927–2 Sewer system evaluation survey.

(a) The sewer system evaluation survey shall identify the location, estimated flow rate, method of rehabilitation and cost of rehabilitation versus cost of transportation and treatment for each defined source of infiltration/inflow.

(b) A report shall summarize the results of the sewer system evaluation survey. In addition, the report shall include:

(1) A justification for each sewer section cleaned and internally inspected.

(2) A proposed rehabilitation program for the sewer system to eliminate all defined excessive infiltration/inflow.

§ 35.927–3 Rehabilitation.

(a) Subject to State concurrence, the Regional Administrator may authorize the grantee to perform minor rehabilitation concurrently with the sewer system evaluation survey in any step under a grant if sufficient funding can be made available and there is no adverse environmental impact. However, minor rehabilitation work in excess of $10,000 which is not accomplished with force account labor (see § 35.936–14(a)(2)), must be procured through formal advertising in compliance with the applicable requirements of §§ 35.938 *et seq.* and 35.939, the statutory requirements referenced in §§ 30.415 through 30.415–4 of this subchapter, and other applicable provisions of part 30.

(b) Grant assistance for a step 3 project segment consisting of major rehabilitation work may be awarded concurrently with step 2 work for the design of the new treatment works.

(c) The scope of each treatment works project defined within the facilities plan as being required for implementation of the plan, and for which Federal assistance will be requested, shall define (1) any necessary new treatment works construction and (2) any rehabilitation work (including replacement) determined by the sewer system evaluation to be necessary for the elimination of excessive infiltration/inflow. However, rehabilitation which should be a part of the applicant's normal operation and maintenance responsibilities shall not be included within the scope of a step 3 treatment works project.

(d) Only rehabilitation of the grantee's sewage collection system is eligible for grant assistance. However, the grantee's costs of rehabilitation beyond "Y" fittings (see definition of "sewage collection system" in § 35.905) may be treated on an incremental cost basis.

§ 35.927–4 Sewer use ordinance.

Each applicant for grant assistance for a step 2 or step 3 project shall demonstrate to the satisfaction of the Regional Administrator that a sewer use ordinance or other legally binding requirement will be enacted and enforced in each jurisdiction served by the treatment works project before the completion of construction. The ordinance shall prohibit any new connections from inflow sources into the sanitary sewer portions of the sewer system and shall insure that new sewers and connections to the sewer

system are properly designed and constructed.

§ 35.927–5 Project procedures.

(a) *State certification.* The State agency may (but need not) certify that excessive infiltration/inflow does or does not exist. The Regional Administrator will determine that excessive infiltration/inflow does not exist on the basis of State certification, if he finds that the State had adequately established the basis for its certification through submission of only the minimum information necessary to enable a judgment to be made. Such information could include a preliminary review by the applicant or State, for example, of such parameters as per capita design flow, ratio of flow to design flow, flow records or flow estimates, bypasses or overflows, or summary analysis of hydrological, geographical, and geological conditions, but this review would not usually be equivalent to a complete infiltration/inflow analysis. State certification must be on a project-by-project basis. If, on the basis of State certification, the Regional Administrator determines that the treatment works is or may be subject to excessive infiltration/inflow, no step 2 or step 3 grant assistance may be awarded except as paragraph (c) of this section provides.

(b) *Pre-award sewer system evaluation.* Generally, except as otherwise provided in paragraph (c) of this section, an adequate sewer system evaluation, consisting of a sewer system analysis and, if required, an evaluation survey, is an essential element of step 1 facilities planning. It is a prerequisite to the award of step 2 or 3 grant assistance. If the Regional Administrator determines through State Certification or an infiltration/inflow analysis that excessive infiltration/inflow does not exist, step 2 or 3 grant assistance may be awarded. If on the basis of State certification or the infiltration/inflow analysis, the Regional Administrator determines that possible excessive infiltration/inflow exists, an adequate sewer system evaluation survey and, if required, a rehabilitation program must be furnished, except as set forth in paragraph (c) of this section before grant assistance for step 2 or 3 can be awarded. A step 1 grant may be awarded for the completion of this segment of step 1 work, and, upon completion of step 1, grant assistance for a step 2 or 3 project (for which priority has been determined under § 35.915) may be awarded.

(c) *Exception.* If the Regional Administrator determines that the treatment works would be regarded (in the absence of an acceptable program of correction) as being subject to excessive infiltration/inflow, grant assistance may be awarded if the applicant establishes to the Regional Administrator's satisfaction that the treatment works project for which grant application is made will not be significantly changed by any subsequent rehabilitation program or will be a component part of any rehabilitated system. The applicant must agree to complete the sewer system evaluation and any resulting rehabilitation on an implementation schedule the State accepts (subject to approval by the Regional Administrator), which shall be inserted as a special condition in the grant agreement.

(d) *Regional Administrator review.* Municipalities may submit through the State agency the infiltration/inflow analysis and, when appropriate, the sewer system evaluation survey to the Regional Administrator for his review at any time before application for a treatment works grant. Based on such a review, the Regional Administrator shall provide the municipality with a written response indicating either his concurrence or nonconcurrence. In order for the survey to be an allowable cost, the Regional Administrator must concur with the sewer system evaluation survey plan before the work is performed.

§ 35.928 Requirements for an industrial cost recovery system.

(a) The Regional Administrator shall approve the grantee's industrial cost recovery system and the grantee shall implement and maintain it in accordance with § 35.935–15 and the requirements in §§ 35.928–1 through 35.928–4. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

(b) Grantees awarded step 3 grants under regulations promulgated on February 11, 1974, or grantees who obtained approval of their industrial cost recovery systems before April 25, 1978, may amend their systems to correspond to the definition of industrial users in § 35.905 or to provide for systemwide industrial cost recovery under § 35.928–1(g).

EDITORIAL NOTE: For a class deviation document affecting § 35.928, see 45 FR 81567, Dec. 11, 1980.

§ 35.928–1 Approval of the industrial cost recovery system.

The Regional Administrator may approve an industrial cost recovery system if it meets the following requirements:

(a) *General.* Each industrial user of the treatment works shall pay an annual amount equal to its share of the total amount of the step 1, 2, and 3 grants and any grant amendments awarded under this subpart, divided by the number of years in the recovery period. An industrial user's share shall be based on factors which significantly influence the cost of the treatment works. Volume of flow shall be a factor in determining an industrial user's share in all industrial cost recovery systems; other factors shall include strength, volume, and delivery flow rate characteristics, if necessary, to insure that all industrial users of the treatment works pay a proportionate distribution of the grant assistance allocable to industrial use.

(b) *Industrial cost recovery period.* The industrial cost recovery period shall be equal to 30 years or to the useful life of the treatment works, whichever is less.

(c) *Frequency of payment.* Except as provided in § 35.928–3, each industrial user shall pay not less often than annually. The first payment by an industrial user shall be made not later than 1 year after the user begins use of the treatment works.

(d) *Reserve capacity.* If an industrial user enters into an agreement with the grantee to reserve a certain capacity in the treatment works, the user's industrial cost recovery payments shall be based on the total reserved capacity in relation to the design capacity of the treatment works. If the discharge of an industrial user exceeds the reserved capacity in volume, strength or delivery flow rate characteristics, the user's industrial cost recovery payment shall be increased to reflect the actual use. If there is no reserve capacity agreement between the industrial user and the grantee, and a substantial change in the strength, volume, or delivery flow rate characteristics of an industrial user's discharge share occurs, the user's share shall be adjusted proportionately.

(e) *Upgrading and expansion.* (1) If the treatment works are upgraded, each existing industrial user's share shall be adjusted proportionately.

(2) If the treatment works are expanded, each industrial user's share shall be adjusted proportionately, except that a user with reserved capacity under paragraph (d) of this section shall incur no additional industrial cost recovery charges unless the user's actual use exceeded its reserved capacity.

(f) [Reserved]

(g) *Collection of industrial cost recovery payments.* Industrial cost recovery payments may be collected on a systemwide or on a project-by-project basis. The total amount collected from all industrial users on a systemwide basis shall equal the sum of the amounts which would be collected on a project-by-project basis.

(h) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the industrial cost recovery system. If the project is a regional treatment works accepting wastewaters from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt industrial cost recovery systems in accordance with section 204(b)(1)(B) of the Act with §§ 35.928 through 35.928–4. These industrial cost recovery systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be consulted prior to adoption of the industrial cost recovery system, in accordance with 40 CFR part 25.

(i) *Inconsistent agreements.* The grantee may have pre-existing agreements which address (1) the reservation of capacity in the grantee's treatment works or (2) the charges to be collected by the grantee in providing waste water treatment services or reserving capacity. The industrial cost recovery system shall take precedence over any terms or conditions of agreements or contracts between the grantee and industrial users which are inconsistent with the requirements of section 204(b)(1)(B) of the Act and these industrial cost recovery regulations.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979; 44 FR 39340, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.928–1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.928–2 Use of industrial cost recovery payments.

(a) The grantee shall use industrial cost recovery payments received from industrial users as follows:

(1) The grantee shall return 50 percent of the amounts received from industrial users, together with any interest earned, to the U.S. Treasury annually.

(2) The grantee shall retain 50 percent of the amount recovered from industrial users.

(i) A portion of the amounts which the grantee retains may be used to pay the incremental costs of administration of the industrial cost recovery system. The incremental costs of administration are those costs remaining after deducting all costs reasonably attributable to the administration of the user charge system. The incremental costs shall be segregated from all other administrative costs of the grantee.

(ii) A minimum of 80 percent of the amounts the grantee retains after paying the incremental costs of administration, together with any interest earned, shall be used for the allowable costs (see § 35.940) of any expansion, upgrading or reconstruction of treatment works necessary to meet the requirements of the Act. The grantee shall obtain the written approval of the Regional Administrator before the commitment of the amounts retained for expansion, upgrading, or reconstruction.

(iii) The remainder of the amounts retained by the grantee may be used as the grantee sees fit, except that they may not be used for construction of industrial pretreatment facilities or rebates to industrial users for costs incurred in complying with user charge or industrial cost recovery requirements.

(b) Pending the use of industrial cost recovery payments, as described in paragraph (a) of this section, the grantee shall:

(1) Invest the amounts received in obligations of the U.S. Government or in obligations guaranteed as to principal and interest by the U.S. Government or any agency thereof; or

(2) Deposit the amounts received in accounts fully collateralized by obligations of the U.S. Government or any agency thereof.

EDITORIAL NOTE: For Class deviation documents affecting § 35.928–2, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.928–3 Implementation of the industrial cost recovery system.

(a) When a grantee's industrial cost recovery system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain all records that are necessary to document compliance with these regulations.

EDITORIAL NOTE: For Class deviation documents affecting § 35.928–3, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.928–4 Moratorium on industrial cost recovery payments.

(a) EPA does not require that industrial users defined in paragraphs (a) and (b) of the definition in § 35.905 pay industrial cost recovery for charges incurred during the period after December 31, 1977, and before July 1, 1979. Any industrial cost recovery charges incurred for accounting periods or portions of periods ending before January 1, 1978, shall be paid

by industrial users. These funds are to be used as described in § 35.928–2.

(b) Grantees may either defer industrial cost recovery payments, or require industrial users as defined in paragraphs (a) and (b) of the definition in § 35.905 to pay industrial cost recovery payments for the period after December 31, 1977, and before July 1, 1979. If grantees require payment, the amount held by the municipality for eventual return to the U.S. Treasury under § 35.928–2(a)(1) shall be invested as required under § 35.928–2(b) until EPA advises how such sums shall be distributed. Grantees shall implement or continue operating approved industrial cost recovery systems and maintain their activities of monitoring flows, calculating payments due, and submitting bills to industrial users informing them of their current or deferred obligation.

(c) Industrial users as defined in paragraphs (a) and (b) of the definition in § 35.905 who are served by grantees who defer payment during the 18-month period ending June 30, 1979, shall make industrial cost recovery payments for that period in a lump sum by June 30, 1980, or in equal annual installments prorated from July 1, 1979, over the remaining industrial cost recovery period.

EDITORIAL NOTE: For Class deviation documents affecting § 35.928–4, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.929 Requirements for user charge system.

The Regional Administrator shall approve the grantee's user charge system and the grantee shall implement and maintain it in accordance with § 35.935–13 and the requirements in §§ 35.929–1 through 35.929–3. The grantee shall be subject to the noncompliance provisions of § 35.965 for failure to comply.

§ 35.929–1 Approval of the user charge system.

The Regional Administrator may approve a user charge system based on either actual use under paragraph (a) of this section or ad valorem taxes under paragraph (b) of this section. The general requirements in §§ 35.929–2 and 35.929–3 must also be satisfied.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of waste water treatment services may be approved if each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total waste water loading from all users (or user classes). To insure a proportional distribution of operation and maintenance costs to each user (or user class), the user's contribution shall be based on factors such as strength, volume, and delivery flow rate characteristics.

(b) *User charges based on ad valorem taxes.* A grantee's user charge system (or the user charge system of a subscriber, i.e., a constituent community receiving waste treatment services from the grantee) which is based on ad valorem taxes may be approved if it meets the requirements of paragraphs (b)(1) through (b)(7) of this section. If the Regional Administrator determines that the grantee did not have a dedicated ad valorem tax system on December 27, 1977, meeting the requirements of paragraphs (b)(1) through (b)(3) of this section, the grantee shall develop a user charge system based on actual use under § 35.929–1(a).

(1) The grantee (or subscriber) had in existence on December 27, 1977, a system of ad valorem taxes which collected revenues to pay the cost of operation and maintenance of waste water treatment works within the grantee's service area and has continued to use that system.

(2) The grantee (or subscriber) has not previously obtained approval of a user charge system on actual use.

(3) The system of ad valorem taxes in existence on December 27, 1977, was dedicated ad valorem tax system.

(i) A grantee's system will be considered to be dedicated if the Regional Administrator determines that the system meets all of the following criteria:

(A) The ad valorem tax system provided for a separate tax rate or for the allocation of a portion of the taxes collected for payment of the grantee's costs of waste water treatment services;

(B) The grantee's budgeting and accounting procedures assured that a specified portion of the tax funds would be used for the payment of the costs of operation and maintenance;

(C) The ad valorem tax system collected tax funds for the costs of waste water treatment services which could not be or historically were not used for other purposes; and

(D) The authority responsible for the operation and maintenance of the treatment works established the budget for the costs of operation and maintenance and used those specified amounts solely to pay the costs of operation and maintenance.

(ii) A subscriber's system based on ad valorem taxes will be considered to be dedicated if a contractual agreement or a charter established under State law existed on December 27, 1977, which required the subscriber to pay its share of the cost of waste water treatment services.

(4) A user charge system funded by dedicated ad valorem taxes shall establish, as a minimum, the classes of users listed below:

(i) Residential users, including single-family and multifamily dwellings, and small nonresidential users, including nonresidential commercial and industrial users which introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works:

(ii) Industrial and commercial users;

(A) Any nongovernmental user of publicly owned treatment works which discharges more than 25,000 gallons per day (gpd) of sanitary waste; or a volume of process waste, or combined process and sanitary waste, equivalent to 25,000 gpd of sanitary waste. The grantee, with the Regional Administrator's approval, shall define the strength of the residential discharges in terms of parameters including, as a minimum, biochemical oxygen demand (BOD) and suspended solids (SS) per volume of flow. Dischargers with a volume exceeding 25,000 gpd or the weight of BOD or SS equivalent to that weight found in 25,000 gpd of sanitary waste are considered industrial users.

(B) Any nongovernmental user of a publicly owned treatment works which discharges wastewater to the treatment works which contains toxic pollutants or poisonous solids, liquids, or gases in sufficient quantity either singly or by interaction with other wastes, to contaminate the sludge of any municipal systems, or to injure or to interfere with any sewage treatment process, or which constitutes a hazard to humans or animals, creates a public nuisance, or creates any hazard in or has an adverse effect on the waters receiving any discharge from the treatment works.

(iii) Users which pay no ad valorem taxes or receive substantial credits in paying such taxes, such as tax exempt institutions or governmental users, but excluding publicly owned facilities performing local governmental functions (e.g., city office building, police station, school) which discharge solely domestic wastes.

(5) The grantee must be prepared to demonstrate for the Regional Administrator's approval that its system of evaluating the volume, strength, and characteristics of the discharges from users or categories of users classified within the subclass of small nonresidential users is sufficient to assure that such users or the average users in such categories do not discharge either toxic pollutants or more than the equivalent of 25,000 gallons per day of domestic wastewater.

(6) The ad valorem user charge system shall distribute the operation and maintenance costs for all treatment works in the grantee's jurisdiction to the residential and small nonresidential user class, in proportion to the use of the treatment works by this class. The proportional allocation of costs for this user class shall take into account the total waste water loading of the treatment works, the constituent elements of the wastes from this user class and other appropriate factors. The grantee may assess one ad valorem tax rate to this entire class of users or, if permitted under State law, the grantee may assess different ad va-

lorem tax rates for the subclass of residential users and the subclass of small nonresidential users provided the operation and maintenance costs are distributed proportionately between these subclasses.

(7) Each member of the industrial and commercial user class described under paragraph (b)(4)(ii) of this section and of the user class which pays no ad valorem taxes or receives substantial credits in paying such taxes described under paragraph (b)(4)(iii) of this section shall pay its share of the costs of operation and maintenance of the treatment works based upon charges for actual use (in accordance with § 35.929–1(a)). The grantee may use its ad valorem tax system to collect, in whole or in part, those charges from members of the industrial and large commercial class where the following conditions are met:

(i) A portion or all of the ad valorem tax rate assessed to members of this class has been specifically designated to pay the costs of operation and maintenance of the treatment works, and that designated rate is uniformly applied to all members of this class:

(ii) A system of surcharges and rebates is employed to adjust the revenues from the ad valorem taxes collected from each user of this class in accordance with the rate designated under paragraph (b)(7)(i) of this section, such that each member of the class pays a total charge for its share of the costs of operation and maintenance based upon actual use.

§ 35.929–2 General requirements for all user charge systems.

User charge systems based on actual use under § 35.929–1(a) or ad valorem taxes under § 35.929–1(b) shall also meet the following requirements:

(a) *Initial basis for operation and maintenance charges.* For the first year of operation, operation and maintenance charges shall be based upon past experience for existing treatment works or some other method that can be demonstrated to be appropriate to the level and type of services provided.

(b) *Biennial review of operation and maintenance charges.* The grantee shall review not less often than every 2 years the waste water contribution of users and user classes, the total costs of operation and maintenance of the treatment works, and its approved user charge system. The grantee shall revise the charges for users or user classes to accomplish the following:

(1) Maintain the proportionate distribution of operation and maintenance costs among users and user classes as required herein;

(2) Generate sufficient revenue to pay the total operation and maintenance costs necessary to the proper operation and maintenance (including replacement) of the treatment works; and

(3) Apply excess revenues collected from a class of users to the costs of operation and maintenance attributable to that class for the next year and adjust the rate accordingly.

(c) *Toxic pollutants.* The user charge system shall provide that each user which discharges any toxic pollutants which cause an increase in the cost of managing the effluent or the sludge of the grantee's treatment works shall pay for such increased costs.

(d) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users of the grantee's treatment works system based upon either of the following:

(1) In the same manner that it distributes the costs of operation and maintenance among users (or user classes) for their actual use, or

(2) Under a system which uses one of any combination of the following factors on a reasonable basis:

(i) Flow volume of the users;

(ii) Land area of the users;

(iii) Number of hookups or discharges to the users;

(iv) Property valuation of the users, if the grantee has a user charge system based on ad valorem taxes approved under § 35.929–1(b).

(e) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project is a regional treatment system accepting wastewaters from other municipalities, the subscribers

receiving waste treatment services from the grantee shall adopt user charge systems in accordance with section 204(b)(1)(A) of the Act and §§ 35.929 through 35.929–3. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works. The public shall be informed of the financial impact of the user charge system on them and shall be consulted prior to adoption of the system, in accordance with 40 CFR part 25.

(f) *Notification.* Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill, of the rate and that portion of the user charges or ad valorem taxes which are attributable to waste water treatment services.

(g) *Inconsistent agreements.* The grantee may have preexisting agreements which address: (1) The reservation of capacity in the grantee's treatment works, or (2) the charges to be collected by the grantee in providing wastewater treatment services or reserving capacity. The user charge system shall take precedence over any terms or conditions of agreements or contracts between the grantee and users (including industrial users, special districts, other municipalities, or Federal agencies or installations) which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and these regulations.

(h) *Costs of pretreatment program.* A user charge system submitted by a municipality with an approved pretreatment program shall provide that the costs necessary to carry out the program and to comply with any applicable requirements of section 405 of the Act and related regulations are included within the costs of operation and maintenance of the system and paid through user charges, or are paid in whole or in part by other identified sources of funds.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§ 35.929–3 Implementation of the user charge system.

(a) When a grantee's user charge system is approved, implementation of the approved system shall become a condition of the grant.

(b) The grantee shall maintain such records as are necessary to document compliance with these regulations.

(c) Appendix B to this subpart contains guidelines with illustrative examples of acceptable user charge systems.

(d) The Regional Administrator may review, no more often than annually, a grantee's user charge system to assure that it continues to meet the requirements of §§ 35.929–1 through 35.929–3.

§ 35.930 Award of grant assistance.

The Regional Administrator's approval of an application or amendments to it through execution of a grant agreement (including a grant amendment), in accordance with § 30.345 of this subchapter, shall constitute a contractual obligation of the United States for the payment of the Federal share of the allowable project costs, as determined by the Regional Administrator. Information about the approved project furnished in accordance with § 35.920–3 shall be considered incorporated in the grant agreement.

§ 35.930–1 Types of projects.

(a) The Regional Administrator is authorized to award grant assistance for the following types of projects:

(1) *Step 1.* A facilities plan and related step 1 elements (see § 35.920–3(b)), if he determines that the applicant has submitted the items required under § 35.920–3(a); (In the case of grant assistance awarded solely for the acquisition of eligible land, the following provisions are deferred until the award of the ensuing step 3 assistance for the construction of facilities: Sections 35.925–10, 35.925–11(b), 35.935–12 (c) and (d), 35.935–13(c), 35.935–15(c), 35.935–16 (b) and (c));

(2) *Step 2.* Construction drawings and specifications, if he determines that the applicant has submitted the items required under § 35.920–3(b);

(3) *Step 3.* Building and erection of a treatment works, if he determines that the applicant has submitted the items required under § 35.920–3(c); or

(4) *Steps 2 and 3.* A combination of design (step 2) and construction (step

3) for a treatment works (see § 35.909) if he determines that the applicant has submitted the items required under § 35.920–3(d).

(b) The Regional Administrator may award Federal assistance by a grant or grant amendment from any allotment or reallotment available to a State under § 35.910 et seq. for payment of 100 percent of the cost of construction of treatment works required to train and upgrade waste treatment works operations and maintenance personnel and for the costs of other operator training programs. Costs of other operator training programs are limited to mobile training units, classroom rental, specialized instructors, and instructional material, under section 109(b) of the Act.

(1) Where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each State. The Federal funds awarded under section 109(b) to any State for all training facilities or programs shall not exceed $500,000.

(2) Any grantee who received a grant under section 109(b) before December 27, 1977, is eligible to have the grant increased by funds made available under the Act, not to exceed 100 percent of eligible costs.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.930–1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.930–2 Grant amount.

The grant agreement shall set forth the amount of grant assistance. The grant amount may not exceed the amount of funds available from the State allotments and reallotments under § 35.910 et seq. Grant payments will be limited to the Federal share of allowable project costs incurred within the grant amount or any increases effected through grant amendments (see § 35.955).

§ 35.930–3 Grant term.

The grant agreement shall establish the period within which the project must be completed, in accordance with § 30.345–1 of this chapter. This time period is subject to extension for excusable delay, at the discretion of the Regional Administrator.

§ 35.930–4 Project scope.

The grant agreement must define the scope of the project for which Federal assistance is awarded under the grant. The project scope must include a step or an identified segment. Grant assistance may be awarded for a segment of step 3 treatment works construction, when that segment is and of itself does not provide for achievement of applicable effluent discharge limitations, if:

(a) The segment is to be a component of an operable treatment works which will achieve the applicable effluent discharge limitations; and

(b) A commitment for completion of the entire treatment works is submitted to the Regional Administrator and that commitment is reflected in a special condition in the grant agreement.

§ 35.930–5 Federal share.

(a) *General.* The grant shall be 75 percent of the estimated total cost of construction that the Regional Administrator approves in the grant agreement, except as otherwise provided in paragraphs (b) and (c) of this section and in §§ 35.925–15, 35.925–16, 35.925–17, 35.930–1(b), and paragraph 10 of Appendix A.

(b) *Innovative and alternative technology.* In accordance with § 35.908(b), the amount of any step 2, step 3, or step 2+3 grant assistance awarded from funds allotted for fiscal years 1979, 1980, and 1981 shall be 85 percent of the estimated cost of construction for those eligible treatment works or significant portions of them that the Regional Administrator determines meet the criteria for innovative or alternative technology in Appendix E. These grants depend on the availability of funds from the reserve under § 35.915–1(b). The proportional State contribution to the non-Federal share of construction costs for 85-percent grants must be the same as or greater than the proportional State contribution (if any) to the non-Federal share of eligible construction costs

for all treatment works which receive 75-percent grants in the State.

(c) *Modification and replacement of innovative and alternative projects.* In accordance with § 35.908(c) and procedures published by EPA, the Regional Administrator may award grant assistance to fund 100 percent of the eligible costs of the modification or replacement of any treatment works constructed with grant assistance based upon a Federal share of 85 percent under paragraph (b) of this section.

EDITORIAL NOTE: For Class deviation documents affecting § 35.930-5, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.930-6 Limitation on Federal share.

The grantee must exert its best efforts to perform the project work as specified in the grant agreement within the approved cost ceiling. If at any time the grantee believes that the costs which it expects to incur in the performance of the project will exceed or be substantially less than the previously approved estimated total project costs, the grantee must notify the Regional Administrator and the State agency promptly in writing. As soon as practicable, the grantee must give the revised estimate of total cost for the performance of the project (see § 30.900 of this subchapter). Delay in submission of the notice and excess cost information may prejudice approval of an increase in the grant amount. The United States shall not be obligated to pay for costs incurred in excess of the approved grant amount or any amendment to it until the State has approved an increase in the grant amount from available allotments under § 35.915 and the Regional Administrator has issued a written grant amendment under § 35.955.

§ 35.935 Grant conditions.

In addition to the EPA general grant conditions (subpart C and Appendix A to part 30 of this subchapter), each treatment works grant shall be subject to the following conditions:

§ 35.935-1 Grantee responsibilities.

(a) Review or approval of project plans and specifications by or for EPA is for administrative purposes only and does not relieve the grantee of its responsibility to design, construct, operate, and maintain the treatment works described in the grant application and agreement.

(b) By its acceptance of the grant, the grantee agrees to complete the treatment works in accordance with the facilities plan, plans and specifications, and related grant documents approved by the Regional Administrator, and to maintain and operate the treatment works to meet the enforceable requirements of the Act for the design life of the treatment works. The Regional Administrator is authorized to seek specific enforcement or recovery of funds from the grantee, or to take other appropriate action (see § 35.965), if he determines that the grantee has failed to make good faith efforts to meet its obligations under the grant.

(c) The grantee agrees to pay, pursuant to section 204(a)(4) of the Act, the non-Federal costs of treatment works construction associated with the project and commits itself to complete the construction of the operable treatment works and complete waste treatment system (see definitions in § 35.905) of which the project is a part.

(d) The Regional Administrator may include special conditions in the grant or administer this subpart in the manner which he determines most appropriate to coordinate with, restate, or enforce NPDES permit terms and schedules.

§ 35.935-2 Procurement.

The grantee and party to any subagreement must comply with the applicable provisions of §§ 35.935 through 35.939 with respect to procurement for step 1, 2, or 3 work. The Regional Administrator will cause appropriate review of grantee procurement to be made.

§ 35.935-3 Property.

(a) The grantee must comply with the property provisions of § 30.810 et seq. of this subchapter with respect to all property (real and personal) acquired with project funds.

(b) With respect to real property (including easements) acquired in connec-

tion with the project, whether such property is acquired with or in anticipation of EPA grant assistance or solely with funds furnished by the grantee or others:

(1) The acquisition must be conducted in accordance with part 4 of this chapter;

(2) Any displacement of a person by or as a result of any acquisition of the real property shall be conducted under the applicable provisions of part 4 of this chapter; and

(3) The grantee must obtain (before initiation of step 3 construction), and must thereafter retain, a fee simple or such estate or interest in the site of a step 3 project, and rights of access, as the Regional Administrator finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project. If a step 3 project serves more than one municipality, the grantee must insure that the participating municipalities have, or will have before the initiation of step 3 construction, such interests or rights in land as the Regional Administrator finds sufficient to assure their undisturbed utilization of the project site for the estimated life of the project.

(c) With respect to real property acquired with EPA grant assistance, the grantee must defer acquisition of such property until approval of the Regional Administrator is obtained under § 35.940–3.

§ 35.935–4 Step 2+3 projects.

A grantee which has received step 2+3 grant assistance must make submittals required by § 35.920–3(c), together with approvable user charge and industrial cost recovery systems and a preliminary plan of operation. The Regional Administrator shall give written approval of these submittals before advertising for bids on the step 3 construction portion of the step 2+3 project. The cost of step 3 work initiated before such approval is not allowable. Failure to make the above submittals as required is cause for invoking sanctions under § 35.965.

§ 35.935–5 Davis-Bacon and related statutes.

Before soliciting bids or proposals for step 3-type work, the grantee must consult with the Regional Administrator concerning compliance with Davis-Bacon and other statutes referenced in § 30.415 *et seq.* of this subchapter.

§ 35.935–6 Equal employment opportunity.

Contracts involving step 3-type work of $10,000 or more are subject to equal employment opportunity requirements under Executive Order 11246 (see part 8 of this chapter). The grantee must consult with the Regional Administrator about equal employment opportunity requirements before issuance of an invitation for bids where the cost of construction work is estimated to be more than $1 million or where required by the grant agreement.

§ 35.935–7 Access.

The grantee must insure that EPA and State representatives will have access to the project work whenever it is in preparation or progress. The grantee must provide proper facilities for access and inspection. The grantee must allow the Regional Administrator, the Comptroller General of the United States, the State agency, or any authorized representative, to have access to any books, documents, plans, reports, papers, and other records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, copies and transcriptions. The grantee must insure that a party to a subagreement will provide access to the project work, sites, documents, and records. See §§ 30.605 and 30.805 of this subchapter, clause 9 of Appendix C–1 to this subpart, and clause 10 of Appendix C–2 to this subpart.

§ 35.935–8 Supervision.

In the case of any project involving Step 3, the grantee will provide and maintain competent and adequate engineering supervision and inspection of the project to ensure that the construction conforms with the approved plans and specifications.

§ 35.935-9 Project initiation and completion.

(a) The grantee agrees to expeditiously initiate and complete the step 1, 2, or 3 project, or cause it to be constructed and completed, in accordance with the grant agreement and application, including the project progress schedule, approved by the Regional Administrator. Failure of the grantee to promptly initiate and complete step 1, 2, or 3 project construction may result in annulment or termination of the grant.

(b) No date reflected in the grant agreement, or in the project completion schedule, or extension of any such date, shall modify any compliance date established in an NPDES permit. It is the grantee's obligation to request any required modification of applicable permit terms or other enforceable requirements.

(c) The invitation for bids for step 3 project work is expected to be issued promptly after grant award. Generally this action should occur within 90 to 120 days after award unless compliance with State or local laws requires a longer period of time. The Regional Administrator shall annul or terminate the grant if initiation of all significant elements of step 3 construction has not occurred within 12 months of the award for the step 3 project (or approval of plans and specifications, in the case of a step 2+3 project). (See definition of "initiation of construction" under "construction" in § 35.905.) However, the Regional Administrator may defer (in writing) the annulment or termination for not more than 6 additional months if:

(1) The grantee has applied for and justified the extension in writing to the Regional Administrator;

(2) The grantee has given written notice of the request for extension to the NPDES permit authority;

(3) The Regional Administrator determines that there is good cause for the delay in initiation of project construction; and

(4) The State agency concurs in the extension.

§ 35.935-10 Copies of contract documents.

In addition to the notification of project changes under § 30.900 of this chapter, a grantee must promptly submit to the Regional Administrator a copy of any prime contract or modification of it and of revisions to plans and specifications.

§ 35.935-11 Project changes.

(a) In addition to the notification of project changes required under § 30.900-1 of this chapter, the Regional Administrator's and (where necessary) the State agency's prior written approval is required for:

(1) Project changes which may—

(i) Substantially alter the design and scope of the project;

(ii) Alter the type of treatment to be provided;

(iii) Substantially alter the location, size, capacity, or quality of any major item of equipment; or

(iv) Increase the amount of Federal funds needed to complete the project.

However, prior EPA approval is not required for changes to correct minor errors, minor changes, or emergency changes; and

(2) Subagreement amendments amounting to more than $100,000 for which EPA review is required under §§ 35.937-6(b) and 35.938-5 (d) and (g).

(b) No approval of a project change under § 30.900 of this chapter shall obligate the United States to any increase in the amount of the grant or grant payments unless a grant increase is also approved under § 35.955. This does not preclude submission or consideration of a request for a grant amendment under § 30.900-1 of this chapter.

§ 35.935-12 Operation and maintenance.

(a) The grantee must make provision satisfactory to the Regional Administrator for assuring economic and effective operation and maintenance of the treatment works in accordance with a plan of operation approved by the State water pollution control agency or, as appropriate, the interstate agency.

(b) As a minimum, the plan shall include provision for:

(1) An operation and maintenance manual for each facility;

(2) An emergency operating and response program;

(3) Properly trained management, operation and maintenance personnel;

(4) Adequate budget for operation and maintenance;

(5) Operational reports;

(6) Provisions for laboratory testing and monitoring adequate to determine influent and effluent characteristics and removal efficiencies as specified in the terms and conditions of the NPDES permit;

(7) An operation and maintenance program for the sewer system.

(c) Except as provided in paragraphs (d) and (e) of this section, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of any step 3 project unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft; or

(2) More than 90 percent of the Federal share unless the grantee has furnished a satisfactory final operation and maintenance manual.

(d) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay—

(1) More than 50 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a draft of the operation and maintenance manual for review, or adequate evidence of timely development of such a draft, or

(2) More than 90 percent of the Federal share of the total of all interdependent step 3 segments unless the grantee has furnished a satisfactory final operation and . maintenance manual.

(e) In multiple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless the operation and maintenance manual (or those portions associated with the operating elements of the treatment works) submitted by the grantee has been approved by the Regional Administrator.

§ 35.935–13 Submission and approval of user charge systems.

The grantee shall obtain the approval of the Regional Administrator of its system of user charges. (See also § 35.929 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974.* (1) Except as paragraph (a)(2) of this section provides, the grantee must obtain the Regional Administrator's approval of its system of user charges based on actual use which complies with § 35.929–1(a). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of user charges nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) A grantee which desires approval of a user charge system based on ad valorem taxes in accordance with § 35.929–1(b) shall submit to the Regional Administrator by July 24, 1978, evidence of compliance of its system with the criteria in § 35.929–1 (b)(1) through (b)(3). As soon as possible, the Regional Administrator shall advise the grantee if the system complies with § 35.929–1 (b)(1). The Regional Administrator's determination may be appealed in accordance with subpart J, "Disputes," of part 30 of this subchapter.

(i) *Grantees whose ad valorem tax systems meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Any step 3 payments held by the Regional Administrator at 50 percent or 80 percent for failure to comply with the requirement for development of a user charge system shall be released. However, the grantee shall obtain approval of its user charge system by June 30, 1979 or no further payments will be made until the sytem is approved and the grants may be terminated or annulled.

(ii) *Grantees whose ad valorem tax systems do not meet the criteria of § 35.929–1 (b)(1) through (b)(3).* Step 3 grants will continue to be administered in accordance with paragraph (a)(1) of this section.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its user charge system based on actual use or ad valorem taxes before July 1, 1979. The Regional Administrator may not make any payments on these grants, may terminate or annul these grants, and may not award any new step 3 grants to the same grantee after June 30, 1979, if the user charge system has not been approved. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The Regional Administrator may not award step 3 grant assistance unless he has approved the user charge system based on actual use or ad valorem taxes. The Regional Administrator shall approve the grantee's user charge or ad valorem tax rates and the ordinance required under § 35.929–2(e) and the grantee shall enact them before the treatment works constructed with the grant are placed in operation.

§ 35.935–14 Final inspection.

The grantee shall notify the Regional Administrator through the State agency of the completion of step 3 project construction. The Regional Administrator shall cause final inspection to be made within 60 days of the receipt of the notice. When final inspection is completed and the Regional Administrator determines that the treatment works have been satisfactorily constructed in accordance with the grant agreement, the grantee may make a request for final payment under § 35.945(e).

§ 35.935–15 Submission and approval of industrial cost recovery system.

The grantee shall obtain the approval of the Regional Administrator of its system of industrial cost recovery. (See also § 35.928 *et seq.*)

(a) *Step 3 grant assistance awarded under regulations promulgated on February 11, 1974.* (1) The grantee must obtain the approval of the Regional Administrator for the system of industrial cost recovery (see § 35.928 et seq). The Regional Administrator shall not pay more than 50 percent of the Federal share of any step 3 project unless the grantee has submitted adequate evidence of timely development of its system of industrial cost recovery nor shall the Regional Administrator pay more than 80 percent of the Federal share unless he has approved the system.

(2) Payments of grantees held under paragraph (a)(1) of this section shall be released after April 25, 1978. However, the grantee shall obtain approval of its industrial cost recovery system by June 30, 1979, or no further payments will be made until the system is approved.

(b) *Step 3 grant assistance awarded after April 24, 1978, but before July 1, 1979.* The grantee must obtain approval of its industrial cost recovery system under these regulations, except for the ordinance and rates, before July 1, 1979. The Regional Administrator shall not make any payments on these grants and shall not award any new step 3 grants to the same grantee after June 30, 1979, if the industrial cost recovery system, except for the ordinance and rates, has not been approved. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

(c) *Step 3 grant assistance awarded after June 30, 1979.* The grantee must obtain the Regional Administrator's approval of the industrial cost recovery system under these regulations, except for the ordinance and rates, before grant award. The grantee shall enact the ordinance required under § 35.928–1(h) and submit the ordinance and industrial cost recovery system rates to the Regional Administrator who must approve the ordinance before the treatment works are placed in operation.

EDITORIAL NOTE: For Class deviation documents affecting § 35.935–15, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.935–16 Sewer use ordinance and evaluation/rehabilitation program.

(a) The grantee must obtain the approval of the Regional Administrator of its sewer use ordinance under § 35.927–4.

(b) Except as provided in paragraphs (c) and (d) of this section, the Regional Administrator shall not pay more than 80 percent of the Federal share of any step 3 project unless he has approved the grantee's sewer use ordinance, and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(c) In projects where segmenting of an operable treatment works has occurred, the Regional Administrator shall not pay more than 80 percent of the Federal share of the total of all interdependent step 3 segments unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

(d) In mulitple facility projects where an element or elements of the treatment works are operable components and have been completely constructed and placed in operation by the grantee, the Regional Administrator shall not make any additional step 3 payment unless he has approved the grantee's sewer use ordinance and the grantee is complying with the sewer system evaluation and rehabilitation schedule incorporated in the grant agreement under § 35.927–5.

§ 35.935–17 Training facility.

If assistance has been provided for the construction of a treatment works required to train and upgrade waste treatment personnel under §§ 35.930–1(b) and 35.920–3(e), the grantee must operate the treatment works as a training facility for a period of at least 10 years after construction is completed.

§ 35.935–18 Value engineering.

A grantee must comply with the applicable value engineering requirements of § 35.926.

§ 35.935–19 Municipal pretreatment program.

The grantee must obtain approval by the Regional Administrator of the municipal pretreatment program in accordance with part 403 of this chapter. Prior to granting such approval, the Regional Administrator shall not pay more than 90 percent of the Federal share of any step 3 project or cost of step 3 work under a step 2+3 project awarded after October 1, 1978, except that for any such grant assistance awarded before December 31, 1980, the Regional Administrator may continue grant payments if he determines that significant progress has been made (and is likely to continue) toward the development of an approvable pretreatment program and that withholding of grant payments would not be in the best interest of protecting the environment.

EDITORIAL NOTE: For Class deviation documents affecting § 35.935–19, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.935–20 Innovative processes and techniques.

If the grantee receives 85-percent grant assistance for innovative processes and techniques, the following conditions apply during the 5-year period following completion of construction:

(a) The grantee shall permit EPA personnel and EPA designated contractors to visit and inspect the treatment works at any reasonable time in order to review the operation of the innovative processes or techniques.

(b) If the Regional Administrator requests, the grantee will provide EPA with a brief written report on the construction, operation, and costs of operation of the innovative processes or techniques.

§ 35.936 Procurement.

(a) Sections 35.936 through 35.939 set forth policies and minimum standards for procurement of architectural or engineering services as defined in § 35.937 and construction contracts as described in § 35.938 by grantees under all steps of grants for construction of treatment works. Acquisition of real

property shall be conducted in accordance with part 4, subpart F of this chapter. Other procurements of goods and services shall be conducted in accordance with the provisions of part 33 of this subchapter.

(b) This subpart does not apply to work beyond the scope of the project for which grant assistance is awarded (i.e., ineligible work).

§ 35.936–1 Definitions.

As used in §§ 35.936 through 35.939, the following words and terms shall have the meaning set forth below. All terms not defined herein shall have the meaning given to them in § 30.135 of this subchapter, and in § 35.905.

(a) *Grant agreement.* The written agreement and amendments thereto between EPA and a grantee in which the terms and conditions governing the grant are stated and agreed to by both parties under § 30.345 of this subchapter.

(b) *Subagreement.* A written agreement between an EPA grantee and another party (other than another public agency) and any tier of agreement thereunder for the furnishing of services, supplies, or equipment necessary to complete the project for which a grant was awarded, including contracts and subcontracts for personal and professional services, agreements with consultants and purchase orders, but excluding employment agreements subject to State or local personnel systems. (See §§ 35.937–12 and 35.938–9 regarding subcontracts of any tier under prime contracts for architectural or engineering services or construction awarded by the grantee—generally applicable only to subcontracts in excess of $10,000.)

(c) *Contractor.* A party to whom a subagreement is awarded.

(d) *Grantee.* Any municipality which has been awarded a grant for construction of a treatment works under this subpart. In addition, where appropriate in §§ 35.936 through 35.939, grantee may also refer to an applicant for a grant.

§ 35.936–2 Grantee procurement systems; State or local law.

(a) *Grantee procurement systems.* Grantees may use their own procurement systems and procedures which meet applicable requirements of State, territorial, or local laws and ordinances to the extent that these systems and procedures do not conflict with the minimum requirements of this subchapter.

(b) *State or local law.* The Regional Administrator will generally rely on a grantee's determination regarding the application of State or local law to issues which are primarily determined by such law. The Regional Administrator may request the grantee to furnish a written legal opinion adequately addressing any such legal issues. The Regional Administrator will accept the grantee's determination unless he finds that it does not have a rational basis.

(c) *Preference.* State or local laws, ordinances, regulations or procedures which effectively give local or in-State bidders or proposers preference over other bidders or proposers shall not be employed in evaluating bids or proposals for subagreements under a grant.

§ 35.936–3 Competition.

EPA's policy is to encourage free and open competition appropriate to the type of project work to be performed.

§ 35.936–4 Profits.

Only fair and reasonable profits may be earned by contractors in subagreements under EPA grants. See § 35.937–7 for discussion of profits under negotiated subagreements for architectural or engineering services, and § 35.938–5(f) for discussion of profits under negotiated change orders to construction contracts. Profit included in a formally advertised, competitively bid, fixed price construction contract awarded under § 35.938 is presumed reasonable.

§ 35.936–5 Grantee responsibility.

(a) The grantee is responsible for the administration and successful accomplishment of the project for which EPA grant assistance is awarded. The grantee is responsible for the settlement and satisfaction of all contractual and administrative issues arising out of subagreements entered into under the grant (except as § 35.936–6

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provides) in accordance with sound business judgment and good administrative practice. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of contracts, protests of award, claims, disputes, and other related procurement matters.

(b) With the prior written approval of the Regional Administrator, the grantee may retain an individual or firm to perform these functions. Such an agent acts for the grantee and is subject to the provisions of this subpart which apply to the grantee.

(c) In accordance with § 35.970, a grantee may request technical and legal assistance from the Regional Administrator for the administration and enforcement of any contract related to treatment works that are assisted by an EPA grant. The Regional Administrator's assistance does not release the grantee from those responsibilities identified in paragraph (a) of this section.

§ 35.936–6 EPA responsibility.

Generally, EPA will only review grantee compliance with Federal requirements applicable to a grantee's procurement. However, where specifically provided in this chapter (e.g., §§ 8.8(j) and 35.939), EPA is responsible for determining compliance with Federal requirements.

§ 35.936–7 Small and minority business.

Grantees shall make positive efforts to use small business and minority-owned business sources of supplies and services. Such efforts should allow these sources the maximum feasible opportunity to compete for subagreements to be performed using Federal grant funds.

§ 35.936–8 Privity of contract.

Neither EPA nor the United States shall be a party to any subagreement (including contracts or subcontracts), nor to any solicitation or request for proposals. (See §§ 35.937-9(a), 35.938-4(c)(5), and Appendices C-1 and C-2 to this subpart for the required solicitation statement and contract provisions.) However, in accordance with § 35.970 the Regional Administrator, if a grantee requests, may provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made.

§ 35.936–9 Disputes.

Only an EPA grantee may initiate and prosecute an appeal to the Administrator under the disputes provision of a grant with respect to its subagreements (see subpart J of part 30 of this subchapter). Neither a contractor nor a subcontractor may prosecute an appeal under the disputes provisions of a grant in its own name or interest.

§ 35.936–10 Federal procurement regulations.

Regulations applicable to direct Federal procurement shall not be applicable to subagreements under grants except as stated in this subchapter.

§ 35.936–11 General requirements for subagreements.

Subagreements must:

(a) Be necessary for and directly related to the accomplishment of the project work;

(b) Be in the form of a bilaterally executed written agreement (except for small purchases of $10,000 or less);

(c) Be for monetary or in-kind consideration; and

(d) Not be in the nature of a grant or gift.

§ 35.936–12 Documentation.

(a) Procurement records and files for purchases in excess of $10,000 shall include the following:

(1) Basis for contractor selection;

(2) Justification for lack of competition if competition appropriate to the type of project work to be performed is required but is not obtained; and

(3) Basis for award cost or price.

(b) The grantee or contractors of the grantee must retain procurement documentation required by § 30.805 of this subchapter and by this subpart including a copy of each subagreement, for the period of time specified in § 30.805. The documentation is subject to all the requirements of § 30.805. A copy of each subagreement must be furnished to the project officer upon request.

§ 35.936–13 Specifications.

(a) *Nonrestrictive specifications.* (1) No specification for bids or statement of work in connection with such works shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words "or equal." If brand or trade names are specified, the grantee must be prepared to identify to the Regional Administrator or in any protest action the salient requirements (relating to the minimum needs of the project) which must be met by any offeror. The single base bid method of solicitation for equipment and parts for determination of a low, responsive bidder may not be utilized. With regard to materials, if a single material is specified, the grantee must be prepared to substantiate the basis for the selection of the material.

(2) Project specifications shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, except to the extent that innovative technologies may be used under § 35.908 of this subpart.

(b) *Sole source restriction.* A specification shall not require the use of structures, materials, equipment, or processes which are known to be available only from a sole source, unless the Regional Administrator determines that the grantee's engineer has adequately justified in writing that the proposed use meets the particular project's minimum needs or the Regional Administrator determines that use of a single source is necessary to promote innovation (see § 35.908). Sole source procurement must be negotiated under § 33.500 et seq., including full cost review.

(c) *Experience clause restriction.* The general use of experience clauses requiring equipment manufacturers to have a record of satisfactory operation for a specified period of time or of bonds or deposits to guarantee replacement in the event of failure is restricted to special cases where the grantee's engineer adequately justifies any such requirement in writing. Where such justification has been made, submission of a bond or deposit shall be permitted instead of a specified experience period. The period of time for which the bond or deposit is required should not exceed the experience period specified. No experience restriction will be permitted which unnecessarily reduces competition or innovation.

(d) *Buy American—*(1) *Definitions.* As used in this subpart, the following definitions apply:

(i) *Construction material* means any article, material, or supply brought to the construction site for incorporation in the building or work.

(ii) *Component* means any article, material, or supply directly incorporated in construction material.

(iii) *Domestic construction material* means an unmanufactured construction material which has been mined or produced in the United States, or a manufactured construction material which has been manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

(iv) *Nondomestic construction material* means a construction material other than a domestic construction material.

(2) *Domestic preference.* Domestic construction material may be used in preference to nondomestic materials if it is priced no more than 6 percent higher than the bid or offered price of the nondomestic materials including all costs of delivery to the construction site, any applicable duty, whether or not assessed. Computations will normally be based on costs on the date of opening of bids or proposals.

(3) *Waiver.* The Regional Administrator may waive the Buy American

provision based upon those factors that he considers relevant, including:

(i) Such use is not in the public interest;

(ii) The cost is unreasonable;

(iii) The Agency's available resources are not sufficient to implement the provision, subject to the Deputy Administrator's concurrence;

(iv) The articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities or satisfactory quality for the particular project; or

(v) Application of this provision is contrary to multilateral government procurement agreements, subject to the Deputy Administrator's concurrence.

(4) *Contract provision.* Notwithstanding any other provision of this subpart, bidding documents and construction contracts for any step 3 project for which the Regional Administrator receives an application after February 1, 1978, shall contain the "Buy American" provision which requires use of domestic construction materials in preference to nondomestic construction materials.

(5) *Substitution.* If a nondomestic construction material or component is proposed for use, a bidder or contractor may substitute an approved domestic material or component (at no change in price), if necessary to comply with this subsection.

(6) *Procedures.* The Regional Administrator may use the appropriate procedures of § 35.939 in making the determinations with respect to this subsection. He shall generally observe the Buy American procedures, regulations, precedents, and requirements of other Federal departments and agencies.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

EDITORIAL NOTE: For Class deviation documents affecting § 35.936–14, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 35.936–14 Force account work.

(a) A grantee must secure the project officer's prior written approval for use of the force account method for (1) any step 1 or step 2 work in excess of $10,000; (2) any sewer rehabilitation work in excess of $25,000 performed during step 1 (see § 35.927–3(a)); or (3) any step 3 work in excess of $25,000; unless the grant agreement stipulates the force account method.

(b) The project officer's approval shall be based on the grantee's demonstration that he possesses the necessary competence required to accomplish such work and that (1) the work can be accomplished more economically by the use of the force account method, or (2) emergency circumstances dictate its use.

(c) Use of the force account method for step 3 construction shall generally be limited to minor portions of a project.

§ 35.936–15 Limitations on subagreement award.

No subagreement shall be awarded:

(a) To any person or organization which does not meet the responsibility standards in § 30.340–2 (a) through (d) and (g) of this subchapter;

(b) If any portion of the contract work not exempted by § 30.420–3(b) of this subchapter will be performed at a facility listed by the Director, EPA Office of Federal Activities, in violation of the antipollution requirements of the Clean Air Act and the Clean Water Act, as set forth in § 30.420–3 of this subchapter and 40 CFR part 15 (Administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts, grants, or loans); or

(c) To any person or organization which is ineligible under the conflict of interest requirements of § 30.420–4 of this subchapter.

§ 35.936–16 Code or standards of conduct.

(a) The grantee must maintain a code or standards of conduct which shall govern the performance of its officers, employees, or agents in the conduct of project work, including procurement and expenditure of project funds. The grantee's officers, employ-

ees, or agents shall neither solicit nor accept gratuities, favors, or anything of monetary value from contractors or potential contractors. The grantee must avoid personal or organizational conflicts of interest or noncompetitive procurement practices which restrict or eliminate competition or otherwise restrain trade.

(b) To the extent permissible by State or local law or formal institutional requirements and procedures, the standards shall provide for penalties, sanctions, or other adequate disciplinary actions to be instituted for project-related violations of law or of the code or standards of conduct by either the grantee officers, employees, or agents, or by contractors or their agents.

(c) The grantee must inform the project officer in writing of each serious allegation of a project-related violation and of each known or proven project-related violation of law or code or standards of conduct, by its officers, employees, contractors, or by their agents. The grantee must also inform the project officer of the prosecutive or disciplinary action the grantee takes, and must cooperate with Federal officials in any Federal prosecutive or disciplinary action. Under § 30.245 of this subchapter, the project officer must notify the Director, EPA Security and Inspection Division, of all notifications from the grantee.

(d) EPA shall cooperate with the grantee in its disciplinary or prosecutive actions taken for any apparent project-related violations of law or of the grantee's code or standards of conduct.

§ 35.936–17 Fraud and other unlawful or corrupt practices.

All procurements under grants are covered by the provisions of § 30.245 of this subchapter relating to fraud and other unlawful or corrupt practices.

§ 35.936–18 Negotiation of subagreements.

(a) Formal advertising, with adequate purchase descriptions, sealed bids, and public openings shall be the required method of procurement unless negotiation under paragraph (b) of this section is necessary to accomplish sound procurement.

(b) All negotiated procurement shall be conducted in a manner to provide to the maximum practicable extent open and free competition appropriate to the type of project work to be performed. The grantee is authorized to negotiate subagreements in accordance with the applicable procedures of this subchapter (see §§ 35.937 *et seq.* and 35.500 *et seq.*) if any of the following conditions exist:

(1) Public exigency will not permit the delay incident to formally advertised procurement (e.g., an emergency procurement).

(2) The aggregate amount involved does not exceed $10,000 (see § 35.936–19 for small purchases).

(3) The material or service to be procured is available from only one person or entity. If the procurement is expected to aggregate more than $10,000, the grantee must document its file with a justification of the need for noncompetitive procurement, and provide such documentation to the project officer on request.

(4) The procurement is for personal or professional services (including architectural or engineering services) or for any service that a university or other educational institution may render.

(5) No responsive, responsible bids at acceptable price levels have been received after formal advertising, and, with respect to procurement under § 35.938–4, the Regional Administrator's prior written approval has been obtained.

(6) The procurement is for materials or services where the prices are established by law.

(7) The procurement is for technical items or equipment requiring standardization and interchangeability of parts with existing equipment.

(8) The procurement is for experimental, developmental or research services.

§ 35.936–19 Small purchases.

(a) A small purchase is the procurement of materials, supplies, and services when the aggregate amount involved in any one transaction does not exceed $10,000. The small purchase limitation of $10,000 applies to the ag-

gregate total of an order, including all estimated handling and freight charges, overhead, and profit to be paid under the order. In arriving at the aggregate amount involved in any one transaction, all items which should properly be grouped together must be included. Reasonable competition shall be obtained.

(b) Subagreements for small purchases need not be in the form of a bilaterally executed written agreement. Where appropriate, unilateral purchase orders, sales slips, memoranda of oral price quotations, and the like may be used to minimize paperwork. Retention in the purchase files of these documents and of written quotations received, or references to catalogs or printed price lists used, will suffice as the record supporting the price paid.

§ 35.936–20 Allowable costs.

(a) Incurring costs under subagreements which are not awarded or administered in compliance with this part or part 33 of this subchapter, as appropriate, shall be cause for disallowance of those costs.

(b) Appropriate cost principles which apply to subagreements under EPA grants are identified in § 30.710 of this subchapter. Under that section, the contractor's actual costs, direct and indirect, eligible for Federal participation in a cost reimbursement contract shall be those allowable under the applicable provisions of 41 CFR 1–15.2 (Principles and Procedures for Use in Cost-Reimbursement Type Supply and Research Contracts With Commercial Organizations) and 41 CFR 1–15.4 (Construction and Architect-Engineer Contracts).

(c) Reasonable costs of compliance with the procurement and project management requirements of these regulations are allowable costs of administration under the grant. Costs of announcement, selection, negotiation, and cost review and analysis in connection with procurement of architectural or engineering services are allowable, even when conducted before award of the grant. Legal and engineering costs which a grantee is required to incur in a protest action under § 35.939 are allowable.

§ 35.936–21 Delegation to State agencies; certification of procurement systems.

(a) Under § 35.912 and subpart F of this part, the Regional Administrator may delegate authority to a State agency to review and certify the technical and administrative adequacy of procurement documentation required under these sections.

(b) If a State agency believes that State laws which govern municipal procurement include the same requirements or operate to provide the same protections as do §§ 35.936, 35.937 and 35.938, the State may request the Administrator to approve the State system instead of the procedures of these sections. EPA shall review the State system to determine its adequacy.

(c) If a State agency determines that an applicant's procurement ordinances or applicable statutes include the same requirements or operate to provide the same protections as do §§ 35.936, 35.937 and 35.938, the State may certify (accompanied by appropriate documentation) the adequacy of the municipality's ordinances and statutes and request the Administrator to approve the municipality's system instead of the procedures of these sections. EPA shall conduct or may request the State to conduct a review of the municipality's system to determine its adequacy.

§ 35.936–22 Bonding and insurance.

(a) On contracts for the building and erection of treatment works or contracts for sewer system rehabilitation exceeding $100,000, each bidder must furnish a bid guarantee equivalent to 5 percent of the bid price. In addition, the contractor awarded a construction contract for the building and erection of treatment works or sewer system rehabilitation must furnish performance and payment bonds, each of which shall be in an amount not less than 100 percent of the contract price. Construction contracts less than $100,000 shall be subject to State and local requirements for bid guarantees, performance bonds, and payment bonds. For contracts or subcontracts in excess of $100,000 the Regional Administrator may authorize the grantee to use

its own bonding policies and requirements if he determines, in writing, that the Government's interest is adequately protected.

(b) Contractors should obtain such construction insurance (e.g., fire and extended coverage, workmen's compensation, public liability and property damage, and "all risk" builder's risk or installation floater coverage) as is required by State or local law or the grantee or as is customary and appropriate. Under the Flood Disaster Protection Act of 1973, a contractor must purchase flood insurance to cover his risk of loss if the grantee has not purchased the insurance (see § 30.405-10 of this subchapter).

§ 35.937 Subagreements for architectural or engineering services.

(a) *Applicability.* Except as § 35.937-2 otherwise provides, the provisions of §§ 35.937 through 35.937-11 apply to all subagreements of grantees for architectural or engineering services where the aggregate amount of services involved is expected to exceed $10,000. The provisions of §§ 35.937-2, 35.937-3, and 35.937-4 are not required, but may be followed, where the population of the grantee municipality is 25,000 or less according to the most recent U.S. census. When $10,000 or less of services (e.g., for consultant or consultant subcontract services) is required, the small purchase provisions of § 35.936-19 apply.

(b) *Policy.* Step 1, step 2, or administration or management of step 3 project work may be performed by negotiated procurement of architectural or engineering services. The Federal Government's policy is to encourage public announcement of the requirements for personal and professional services, including engineering services. Subagreements for engineering services shall be negotiated with candidates selected on the basis of demonstrated competence and qualifications for the type of professional services required and at fair and reasonable prices. All negotiated procurement shall be conducted in a manner that provides to the maximum practicable extent, open and free competition. Nothing in this subpart shall be construed as requiring competitive bids or price competition in the procurement of architectural or engineering services.

(c) *Definitions.* As used in §§ 35.937 through 35.937-11 the following words and terms mean:

(1) *Architectural or engineering services.* Those professional services associated with research, development, design and construction, alteration, or repair of real property, as well as incidental services that members of these professions and those in their employ may logically or justifiably perform, including studies, investigations, surveys, evaluations, consultations, planning, programing, conceptual designs, plans and specifications, cost estimates, inspections, shop drawing reviews, sample recommendations, preparation of operation and maintenance manuals, and other related services.

(2) *Engineer.* A professional firm or individual engaged to provide services as defined in paragraph (c)(1) of this section by subagreement under a grant.

§ 35.937-1 Type of contract (subagreement).

(a) *General.* Cost-plus-percentage-of-cost and percentage-of-construction-cost contracts are prohibited. Cost reimbursement, fixed price, or per diem contracts or combinations of these may be negotiated for architectural or engineering services. A fixed price contract is generally used only when the scope and extent of work to be performed is clearly defined. In most other cases, a cost reimbursement type of contract is more appropriate. A per diem contract may be used if no other type of contract is appropriate. An incentive fee may be used if the grantee submits an adequate independent cost estimate and price comparison under § 35.937-6.

(b) *Cost reimbursement contracts.* Each cost reimbursement contract must clearly establish a cost ceiling which the engineer may not exceed without formally amending the contract and a fixed dollar profit which may not be increased except in case of a contract amendment to increase the scope of work.

(c) *Fixed price contracts.* An acceptable fixed price contract is one which establishes a guaranteed maximum price which may not be increased unless a contract amendment increases the scope of work.

(d) *Compensation procedures.* If, under either a cost reimbursement or fixed price contract, the grantee desires to use a multiplier type of compensation, all of the following must apply:

(1) The multiplier and the portions of the multiplier allocable to overhead and allocable to profit have been specifically negotiated;

(2) The portion of the multiplier allocable to overhead includes only allowable items of cost under the cost principles of 41 CFR 1-15.2 and 1-15.4;

(3) The portions of the multiplier allocable to profit and allocable to overhead have been separately identified in the contract; and

(4) The fixed price contract includes a guaranteed maximum price for completion of the specifically defined scope of work; the cost reimbursement contract includes a fixed dollar profit which may not be increased except in case of a contract amendment which increases the scope of work.

(e) *Per diem contracts.* A per diem agreement expected to exceed $10,000 may be utilized only after a determination that a fixed price or cost reimbursement type contract is not appropriate. Per diem agreements should be used only to a limited extent, e.g., where the first task under a step 1 grant involves establishing the scope and cost of succeeding step 1 tasks, or for incidental services such as expert testimony or intermittent professional or testing services. (Resident engineer and resident inspection services should generally be compensated under paragraph (b) or (c) of this section.) Cost and profit included in the per diem rate must be specifically negotiated and displayed separately in the engineer's proposal. The contract must clearly establish a price ceiling which may not be exceeded without formally amending the contract.

§ 35.937-2 Public notice.

(a) *Requirement.* Adequate public notice as paragraph (a)(1) or (2) of this section provide, must be given of the requirement for architectural or engineering services for all subagreements with an anticipated price in excess of $25,000 except as paragraph (b) of this section provides. In providing public notice under paragraphs (a)(1) and (2) of this section, grantees must comply with the policies in §§ 35.936-2(c), 35.936-3, and 35.936-7.

(1) *Public announcement.* A notice of request for qualifications should be published in professional journals, newspapers, or publications of general circulation over a reasonable area and, in addition, if desired, through posted public notices or written notification directed to interested person, firms, or professional organizations inviting the submission of statements of qualifications. The announcement must clearly state the deadline and place for submission of qualification statements.

(2) *Prequalified list.* As an alternative to publishing public notice as in paragraph (b) of this section, the grantee may secure or maintain a list of qualified candidates. The list must:

(i) Be developed with public notice procedures as in paragraph (a)(1) of this section;

(ii) Provide for continuous updating and

(iii) Be maintained by the grantee or secured from the State or from a nearby political subdivision.

(b) *Exceptions.* The public notice requirement of this section and the related requirements of §§ 35.937-3 and 35.937-4 are not applicable, but may be followed, in the cases described in paragraphs (b)(1) through (3) of this section. All other appropriate provisions of this section, including cost review and negotiation of price, apply.

(1) Where the population of the grantee municipality is 25,000 or less according to the latest U.S. census.

(2) For step 2 or step 3 of a grant, if:

(i) The grantee is satisfied with the qualifications and performance of an engineer who performed all or any part of the step 1 or step 2 work;

(ii) The engineer has the capacity to perform the subsequent steps; and

(iii) The grantee desires the same engineer to provide architectural or engineering services for the subsequent steps.

(3) For subsequent segments of design work under one grant if:

(i) A single treatment works is segmented into two or more step 3 projects;

(ii) The step 2 work is accordingly segmented so that the initial contract for preparation of construction drawings and specifications does not cover the entire treatment works to be built under one grant; and

(iii) The grantee desires to use the same engineering firm that was selected for the initial segment of step 2 work for subsequent segments.

§ 35.937-3 Evaluation of qualifications.

(a) The grantee shall review the qualifications of firms which responded to the announcement or were on the prequalified list and shall uniformly evaluate the firms.

(b) Qualifications shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills).

(c) Criteria which should be considered in the evaluation of candidates for submission of proposals should include:

(1) Specialized experience and technical competence of the candidate or firm and its personnel (including a joint venture, association or professional subcontract), considering the type of services required and the complexity of the project;

(2) Past record of performance on contracts with the grantee, other government agencies or public bodies, and with private industry, including such factors as control of costs, quality of work, and ability to meet schedules;

(3) The candidate's capacity to perform the work (including any specialized services) within the time limitations, considering the firm's current and planned workload;

(4) The candidate's familiarity with types of problems applicable to the project; and

(5) Avoidance of personal and organizational conflicts of interest prohibited under State and local law and § 35.936-16.

§ 35.937-4 Solicitation and evaluation of proposals.

(a) Requests for professional services proposals must be sent to no fewer than three candidates who either responded to the announcement or who were selected from the prequalified list. If, after good faith effort to solicit qualifications in accordance with § 35.937-2, fewer than three qualified candidates respond, all qualified candidates must be provided requests for proposals.

(b) Requests for professional services proposals must be in writing and must contain the information necessary to enable a prospective offeror to prepare a proposal properly. The request for proposals must include the solicitation statement in § 35.937-9(a) and must inform offerors of the evaluation criteria, including all those in paragraph (c) of this section, and of the relative importance attached to each criterion (a numerical weighted formula need not be utilized).

(c) All proposals submitted in response to the request for professional services proposals must be uniformly evaluated. Evaluation criteria shall include, as a minimum, all criteria stated in § 35.937-3(c) of this subpart. The grantee shall also evaluate the candidate's proposed method to accomplish the work required, including, where appropriate, demonstrated capability to explore and develop innovative or advanced techniques and designs. The grantee's evaluation shall comply with § 35.936-7.

(d) Proposals shall be evaluated through an objective process (e.g., the appointment of a board or committee which, to the extent practicable, should include persons with technical skills. Oral (including telephone) or written interviews should be conducted with top rated proposers, and information derived therefrom shall be treated on a confidential basis, except as required to be disclosed under State or local law or to EPA under § 35.937-6.

(e) At no point during the procurement process shall information be conveyed to any candidate which would provide an unfair competitive advantage.

§ 35.937–5 Negotiation.

(a) Grantees are responsible for negotiation of their contracts for architectural or engineering services. Contract procurement including negotiation may be performed by the grantee directly or by another non-Federal governmental body, person or firm retained for the purpose. Contract negotiations may include the services of technical, legal, audit, or other specialists to the extent appropriate.

(b) Negotiations may be conducted in accordance with State or local requirements, as long as they meet the minimum requirements as set forth in this section. In the absence of State or local statutory or code requirements, negotiations may be conducted by the grantee under procedures it adopts based upon Pub. L. 92–582, 40 U.S.C. 541–544 (commonly known as the "Brooks Bill") or upon the negotiation procedures of 40 CFR 33.510–2.

(c) The object of negotiations with any candidate shall be to reach agreement on the provisions of the proposed contract. The grantee and the candidate shall discuss, as a minimum:

(1) The scope and extent of work and other essential requirements;

(2) Identification of the personnel and facilities necessary to accomplish the work within the required time, including where needed, employment of additional personnel, subcontracting, joint ventures, etc.;

(3) Provision of the required technical services in accordance with regulations and criteria established for the project; and

(4) A fair and reasonable price for the required work, to be determined in accordance with the cost and profit considerations set forth in §§ 35.937–6 and 35.937–7, and payment provisions.

§ 35.937–6 Cost and price considerations.

(a) *General.* EPA policy is that the cost or price of all subagreements and amendments to them must be considered. For each subagreement in excess of $10,000 but not greater than $100,000, grantees shall use the procedures described in paragraph (c) of this section, or an equivalent process.

(b) *Subagreements over $100,000.* For each subagreement expected to exceed $100,000, or for two subagreements which aggregate more than $100,000 awarded to an engineer for work on one step, or where renegotiation or amendment of a subagreement will result in a contract price in excess of $100,000, or where the amendment itself is in excess of $100,000, the provisions of this paragraph (b) shall apply.

(1) The candidate(s) selected for negotiation shall submit to the grantee for review sufficient cost and pricing data as described in paragraph (c) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed and the allowability and eligibility of costs proposed.

(2) The grantee shall submit to the EPA Project Officer for review (i) documentation of the public notice of need for architectural or engineering services, and selection procedures used, in those cases where §§ 35.937–2, 35.937–3 and 35.937–4 are applicable; (ii) the cost and pricing data the selected engineer submitted; (iii) a certification of review and acceptance of the selected engineer's cost or price; and (iv) a copy of the proposed subagreement. The EPA Project Officer will review the complete subagreement action and approve the grantee's compliance with appropriate procedures before the grantee awards the subagreement. The grantee shall be notified upon completion of review.

(c) *Cost review.* (1) The grantee shall review proposed subagreement costs.

(2) As a minimum, proposed subagreement costs shall be presented on EPA form 5700–41 on which the selected engineer shall certify that the proposed costs reflect complete, current and accurate cost and pricing data applicable to the date of anticipated subagreement award.

(3) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price contracts and a maximum total dollar amount of profit shall be set forth separately in the cost summary for cost reimbursement contracts.

(4) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed subagreement

costs. EPA normally requires more detailed documentation only when the selected engineer is unable to certify that the cost and pricing data used are complete, current, and accurate. EPA may, on a selected basis, perform a pre-award cost analysis on any subagreement. Normally, a provisional overhead rate will be agreed upon before contract award.

(5) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used to determine the allowability of costs under grants. The engineer's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the subagreement, this subpart and the cost principles included in 41 CFR 1-15.2 and 1-15.4. Examples of cost which are not allowable under those cost principles include entertainment, interest on borrowed capital and bad debts.

(6) The engineer shall have an accounting system which accounts for costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation, and segregation of allowable and unallowable project costs among projects. Allowable project costs shall be determined in accordance with paragraph (c)(5) of this section. The engineer must propose and account for costs in a manner consistent with his normal accounting procedures.

(7) Subagreements awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where the Regional Administrator determines that such certification was not based on complete, current, and accurate cost and pricing data or not based on costs allowable under the appropriate FPR cost principles (41 CFR 1-15.2 and 1-15.4) at the time of award.

§ 35.937-7 Profit.

The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the firm's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of subagreements under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on Federal procurement principles, it may vary from the firm's definition of profit for other purposes.) Profit on a subagreement and each amendment to a subagreement under a grant should be sufficient to attract engineers who possess talents and skills necessary to the accomplishment of project objectives, and to stimulate efficient and expeditious completion of the project. Where cost review is performed, the grantee should review the estimate of profit as he reviews all other elements of price.

§ 35.937-8 Award of subagreement.

After the close of negotiations and after review and approval by the EPA Project Officer if required under § 35.937-6(b), the grantee may award the contract. Unsuccessful candidates should be notified promptly.

§ 35.937-9 Required solicitation and subagreement provisions.

(a) *Required solicitation statement.* Requests for qualifications or proposals must include the following statement, as well as the proposed terms of the subagreement.

> Any contract awarded under this request for (qualifications/professional proposals) is expected to be funded in part by a grant from the United States Environmenal Protection Agency. This procurement will be subject to regulations contained in 40 CFR 35.935, 35.937, and 35.939. Neither the United States nor the United States Environmental Protection Agency is nor will be a party to this request for (qualifications/professional proposals) or any resulting contract.

(b) *Content of subagreement.* Each subagreement must adequately define:

(1) The scope and extent of project work;

(2) The time for performance and completion of the contract work, in-

cluding where appropriate, dates for completion of significant project tasks;

(3) Personnel and facilities necessary to accomplish the work within the required time;

(4) The extent of subcontracting and consultant agreements; and

(5) Payment provisions in accordance with § 35.937–10.

If any of these elements cannot be defined adequately for later tasks or steps at the time of contract execution, the contract should not include the subsequent tasks or steps at that time.

(c) *Required subagreement provisions.* Each consulting engineering contract must include the provisions set forth in Appendix C–1 to this subpart.

§ 35.937–10 Subagreement payments—architectural or engineering services.

The grantee shall make payment to the engineer in accordance with the payment schedule incorporated in the engineering agreement or in accordance with paragraph 7b of Appendix C–1 to this subpart. Any retainage is at the option of the grantee. No payment request made by the Engineer under the agreement may exceed the estimated amount and value of the work and services performed.

§ 35.937–11 Applicability to existing contracts.

Some negotiated engineering subagreements already in existence may not comply with the requirements of §§ 35.936 and 35.937. Appendix D to this subpart contains EPA policy with respect to these subagreements and must be implemented before the grant award action for the next step under the grant.

§ 35.937–12 Subcontracts under subagreements for architectural or engineering services.

(a) Neither award and execution of subcontracts under a prime contract for architectural or engineering services, nor the procurement and negotiation procedures used by the engineer in awarding such subcontracts are required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.937 except as provided in paragraphs (b), (c), and (d) of this section.

(b) The award or execution of subcontracts in excess of $10,000 under a prime contract for architectural or engineering services and the procurement procedures used by the engineer in awarding such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) Section 35.936–7 (Small and minority business);

(3) Section 35.936–15 (Limitations on subagreement award);

(4) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(5) Section 35.937–6 (Cost and price considerations);

(6) Section 35.937–7 (Profit);

(7) Prohibition of percentage-of-construction-cost and cost-plus-percentage-of-cost contracts (see § 35.937–1); and

(8) Applicable subagreement clauses (see Appendix C–1, clauses 9, 17, 18; note clause 10).

(c) The applicable provisions of this subpart shall apply to lower tier subagreements where an engineer acts as an agent for the grantee under a management subagreement (see § 35.936–5(b)).

(d) If an engineer procures items or services (other than architectural or engineering services) which are more appropriately procured by formal advertising or competitive negotiation procedures, the applicable procedures of § 35.938 or of part 33 shall be observed.

§ 35.938 Construction contracts (subagreements) of grantees.

§ 35.938–1 Applicability.

This section applies to construction contracts (subagreements) in excess of $10,000 awarded by grantees for any step 3 project.

§ 35.938–2 Performance by contract.

The project work shall be performed under one or more contracts awarded by the grantee to private firms, except for force account work authorized by § 35.936–14.

§ 35.938–3 Type of contract.

Each contract shall be a fixed price (lump sum or unit price or a combination of the two) contract, unless the Regional Administrator gives advance written approval for the grantee to use some other acceptable type of contract. The cost-plus-percentage-of-cost contract shall not be used in any event.

§ 35.938–4 Formal advertising.

Each contract shall be awarded after formal advertising, unless negotiation is permitted in accordance with § 35.936–18. Formal advertising shall be in accordance with the following:

(a) *Adequate public notice.* The grantee will cause adequate notice to be given of the solicitation by publication in newspapers or journals of general circulation beyond the grantee's locality (statewide, generally), inviting bids on the project work, and stating the method by which bidding documents may be obtained or examined. Where the estimated cost of step 3 construction is $10 million or more, the grantee must generally publish the notice in trade journals of nationwide distribution. The grantee should, in addition, solicit bids directly from bidders if it maintains a bidders list.

(b) *Adequate time for preparing bids.* Adequate time, generally not less than 30 days, must be allowed between the date when public notice under paragraph (a) of this section is first published and the date by which bids must be submitted. Bidding documents (including specifications and drawings) shall be available to prospective bidders from the date when such notice is first published.

(c) *Adequate bidding documents.* The grantee shall prepare a reasonable number of bidding documents (invitations for bids) and shall furnish them upon request on a first-come, first-served basis. The grantee shall maintain a complete set of bidding documents and shall make them available for inspection and copying by any party. The bidding documents shall include:

(1) A complete statement of the work to be performed, including necessary drawings and specifications, and the required completion schedule. (Drawings and specifications may be made available for inspection and purchase, instead of being furnished.);

(2) The terms and conditions of the contract to be awarded;

(3) A clear explanation of the method of bidding and the method of evaluation of bid prices, and the basis and method for award of the contract;

(4) Responsibility requirements or criteria which will be employed in evaluating bidders;

(5) The following statement:

> Any contract or contracts awarded under this invitation for bids are expected to be funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is or will be a party to this invitation for bids or any resulting contract. This procurement will be subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939.;

and

(6) A copy of §§ 35.936, 35.938, and 35.939.

(d) *Sealed bids.* The grantee shall provide for bidding by sealed bid and for the safeguarding of bids received until public opening.

(e) *Addenda to bidding documents.* If a grantee desires to amend any part of the bidding documents (including drawings and specifications) during the period when bids are being prepared, the addenda shall be communicated in writing to all firms which have obtained bidding documents in time to be considered before the bid opening time.

(f) *Bid modifications.* A firm which has submitted a bid shall be allowed to modify or withdraw its bid before the time of bid opening.

(g) *Public opening of bids.* The grantee shall provide for a public opening of bids at the place, date and time announced in the bidding documents.

(h) *Award to the low, responsive, responsible bidder.* (1) After bids are opened, the grantee shall evaluate them in accordance with the methods and criteria set forth in the bidding documents.

(2) The grantee may reserve the right to reject all bids. Unless all bids are rejected for good cause, award

shall be made to the low, responsive, responsible bidder.

(3) If the grantee intends to make the award to a firm which did not submit the lowest bid, he shall prepare a written statement before any award, explaining why each lower bidder was deemed nonresponsible or nonresponsive, and shall retain it in his files.

(4) State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids.

(5) If an unresolved procurement review issue or a protest relates only to award of a subcontract or procurement of a subitem under the prime contract, and resolution of that issue or protest is unduly delaying performance of the prime contract, the Regional Administrator may authorize award and performance of the prime contract before resolution of the issue or protest, if the Regional Administrator determines that:

(i) Resolution of the protest—

(A) Will not affect the placement of the prime contract bidders; and

(B) Will not materially affect initial performance of the prime contract; and that

(ii) Award of the prime contract—

(A) Is in the Government's best interest;

(B) Will not materially affect resolution of the protest; and

(C) Is not barred by State law.

(6) The grantee shall not reject a bid as nonresponsive for failure to list or otherwise indicate the selection of a subcontractor(s) or equipment, unless the grantee has unambiguously stated in the solicitation documents that such failure to list shall render a bid nonresponsive and shall cause rejection of a bid.

§ 35.938–5 Negotiation of contract amendments (change orders).

(a) *Grantee responsibility.* Grantees are responsible for negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by his engineer. During negotiations with the contractor the grantee shall:

(1) Make certain that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

(2) Assure that the contractor demonstrates that he will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

(3) Assure a fair and reasonable price for the required work.

(b) *Changes in contract price or time.* The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with paragraph (c) or (d) of this section, as appropriate. The value of any work covered by a change order or of any claim for increase or decrease in the contract price shall be determined by the method set forth in paragraphs (b)(1) through (3) of this section which is most advantageous to the grantee.

(1) *Unit prices*—(i) *Original bid items.* Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15 percent of the original bid quantity and the total dollar change of that bid item is significant, the grantee shall review the unit price to determine if a new unit price should be negotiated.

(ii) *New items.* Unit prices of new items shall be negotiated.

(2) A lump sum to be negotiated.

(3) *Cost reimbursement*—the actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

(c) For each change order not in excess of $100,000 the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(d) For each change order in excess of $100,000, the contractor shall submit to the grantee for review sufficient cost and pricing data as described in paragraphs (d) (1) through

(6) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(1) As a minimum, proposed change order costs shall be presented on EPA Form 5700–41 on which the contractor shall certify that proposed costs reflect complete, current, and accurate cost and pricing data applicable to the date of the change order.

(2) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price change orders and a specific total dollar amount of profit will be set forth separately in the cost summary for cost reimbursement change orders.

(3) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed change order costs. EPA normally requires more detailed documentation only when the contractor is unable to certify that proposed change order cost data are complete, current, and accurate. EPA may, on a selected basis, perform a detailed cost analysis on any change order.

(4) Appropriate consideration should be given to § 30.710 of this subchapter which contains general cost principles which must be used for the determination and allowability of costs under grants. The contractor's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the contract, this subpart and the cost principles included in 41 CFR 1–15.2 and 1–15.4. Examples of costs which are not allowable under those cost principles include, but are not limited to, entertainment, interest on borrowed capital and bad debts.

(5) For costs under cost reimbursement change orders, the contractor shall have an accounting system which accounts for such costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation and segregation of allowable and unallowable change orders. Allowable change order costs shall be determined in accordance with paragraph (d)(4) of this section. The contractor must propose and account for such costs in a manner consistent with his normal accounting procedures.

(6) Change orders awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds where subsequent audit substantiates that such certification was not based on complete, current and accurate cost and pricing data and on costs allowable under the appropriate FPR cost principles (41 CFR 1–15.2 and 1–15.4) at the time of change order execution.

(e) *EPA review.* In addition to the requirements of §§ 35.935–10 (copies of contract documents) and 35.935–11 (project changes), the grantee shall submit, before the execution of any change order in excess of $100,000, to the EPA Project Officer for review:

(1) The cost and pricing data the contractor submitted;

(2) A certification of review and acceptance of the contractor's cost or price; and

(3) A copy of the proposed change order.

(f) *Profit.* The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the contractor's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of negotiated change orders to construction contracts under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. The grantee should review the estimate or profit as he reviews all other elements of price.

(g) *Related work.* Related work shall not be split into two amendments or change orders merely to keep it under $100,000 and thereby avoid the requirements of paragraph (d) of this section. For change orders which include both additive and deductive items:

(1) If any single item (additive or deductive) exceeds $100,000, the require-

ments of paragraph (d) of this section shall be applicable.

(2) If no single additive or deductive item has a value of $100,000, but the total price of the change order is over $100,000, the requirements of paragraph (d) of this section shall be applicable.

(3) If the total of additive items of work in the change order exceeds $100,000, or the total of deductive items of work in the change order exceeds $100,000, and the net price of the change order is less than $100,000, the requirements of paragraph (d) of this section shall apply.

§ 35.938–6 Progress payments to contractors.

(a) *Policy.* EPA policy is that, except as State law otherwise provides, grantees should make prompt progress payments to prime contractors and prime contractors should make prompt progress payment to subcontractors and suppliers for eligible construction, material, and equipment costs, including those of undelivered specifically manufactured equipment, incurred under a contract under an EPA construction grant.

(b) *Conditions of progress payments.* For purposes of this section, progress payments are defined as follows:

(1) Payments for work in place.

(2) Payments for materials or equipment which have been delivered to the construction site, or which are stockpiled in the vicinity of the construction site, in accordance with the terms of the contract, when conditional or final acceptance is made by or for the grantee. The grantee shall assure that items for which progress payments have been made are adequately insured and are protected through appropriate security measures. Costs of such insurance and security are allowable costs in accordance with § 35.940.

(3) Payments for undelivered specifically manufactured items or equipment (excluding off-the-shelf or catalog items), as work on them progresses. Such payments must be made if provisions therefor are included in the bid and contract documents. Such provisions may be included at the option of the grantee only when all of the following conditions exist:

(i) The equipment is so designated in the project specifications;

(ii) The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and

(iii) A fabrication period of more than 6 months is anticipated.

(c) *Protection of progress payments made for specifically manufactured equipment.* The grantee will assure protection of the Federal interest in progress payments made for items or equipment referred to in paragraph (b)(3) of this section. This protection must be acceptable to the grantee and must take the form of:

(1) Securities negotiable without recourse, condition or restrictions, a progress payment bond, or an irrevocable letter of credit provided to the grantee through the prime contractor by the subcontractor or supplier; and,

(2) For items or equipment in excess of $200,000 in value which are manufactured in a jurisdiction in which the Uniform Commercial Code is applicable, the creation and perfection of a security interest under the Uniform Commercial Code reasonably adequate to protect the interests of the grantee.

(d) *Limitations on progress payments for specifically manufactured equipment.* (1) Progress payments made for specifically manufactured equipment or items shall be limited to the following:

(i) A first payment upon submission by the prime contractor of shop drawings for the equipment or items in an amount not exceeding 15 percent of the contract or item price plus appropriate and allowable higher tier costs; and

(ii) Subsequent to the grantee's release or approval for manufacture, additional payments not more frequently than monthly thereafter up to 75 percent of the contract or item price plus appropriate and allowable higher tier costs. However, payment may also be made in accordance with the contract and grant terms and conditions for ancillary onsite work before delivery of the specifically manufactured equipment or items.

(2) In no case may progress payments for undelivered equipment or items under paragraph (d)(1)(i) or

(d)(1)(ii) of this section be made in an amount greater than 75 percent of the cumulative incurred costs allocable to contract performance with respect to the equipment or items. Submission of a request for any such progress payments must be accompanied by a certification furnished by the fabricator of the equipment or item that the amount of progress payment claimed constitutes not more than 75 percent of cumulative incurred costs allocable to contract performance, and in addition, in the case of the first progress payment request, a certification that the amount claimed does not exceed 15 percent of the contract or item price quoted by the fabricator.

(3) As used in this section, the term "costs allocable to contract performance" with respect to undelivered equipment or items includes all expenses of contract performance which are reasonable, allocable to the contract, consistent with sound and generally accepted accounting principles and practices consistently applied, and which are not excluded by the contract.

(e) *Enforcement.* A subcontractor or supplier which is determined by the Regional Administrator to have frustrated the intent of the provisions regarding progress payments for major equipment or specifically manufactured equipment through intentional forfeiture of its bond or failure to deliver the equipment may be determined nonresponsible and ineligible for further work under EPA grants.

(f) *Contract provisions.* Where applicable, appropriate provisions regarding progress payments must be included in each contract and subcontract. Grantees must use clauses acceptable to the EPA Regional Administrator.

(g) *Implementation.* The foregoing progress payments policy should be implemented in invitations for bids under step 3 grants. If provision for progress payments is made after contract award, it must be for consideration that the grantee deems adequate.

§ 35.938–7 Retention from progress payments.

(a) The grantee may retain a portion of the amount otherwise due the contractor. Except as State law otherwise provides, the amount the grantee retains shall be limited to the following:

(1) Withholding of not more than 10 percent of the payment claimed until work is 50 percent complete;

(2) When work is 50 percent complete, reduction of the withholding to 5 percent of the dollar value of all work satisfactorily completed to date, provided that the contractor is making satisfactory progress and there is no specific cause for greater withholding;

(3) When the work is substantially complete (operational or beneficial occupancy), the withheld amount shall be further reduced below 5 percent to only that amount necessary to assure completion.

(4) The grantee may reinstate up to 10 percent withholding if the grantee determines, at its discretion, that the contractor is not making satisfactory progress or there is other specific cause for such withholding.

(5) The grantee may accept securities negotiable without recourse, condition or restrictions, a release of retainage bond, or an irrevocable letter of credit provided by the contractor instead of all or part of the cash retainage.

(b) The foregoing retention policy shall be implemented with respect to all step 3 projects for which plans and specifications are approved after March 1, 1976. Appropriate provision to assure compliance with this policy must be included in the bid documents for such projects initially or by addendum before the bid submission date, and as a special condition in the grant agreement or in a grant amendment. For all previous active projects, the grantee may implement the foregoing policy through contract amendment upon written request to the grantee by the contractor upon consideration that the grantee deems adequate.

(c) Under § 30.620–3 of this subchapter, a grantee who delays disbursement of grant funds will be required to credit to the United States all interest earned on those funds.

§ 35.938–8 Required construction contract provisions.

Each construction contract must include the "Supplemental General Conditions" set forth in Appendix C–2 to this subpart.

§ 35.938–9 Subcontracts under construction contracts.

(a) The award or execution of subcontracts by a prime contractor under a construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by prime contractors in awarding or executing subcontracts are not required to comply with any of the provisions, selection procedures, policies or principles set forth in § 35.936 or § 35.938 except those specificially stated in this section. In addition, the bid protest procedures of § 35.939 are not available to parties executing subcontracts with prime contractors except as specificially provided in that section.

(b) The award or execution of subcontracts by a prime contractor under a formally advertised, competitively bid, fixed price construction contract awarded to the prime contractor by the grantee, and the procurement and negotiation procedures used by such prime contractors in awarding or executing such subcontracts must comply with the following:

(1) Section 35.936–2 (Grantee procurement systems; State or local law);

(2) Section 35.936–7 (Small and minority business);

(3) Section 35.936–13 (Specifications);

(4) Section 35.936–15 (Limitations on subagreement award);

(5) Section 35.936–17 (Fraud and other unlawful or corrupt practices);

(6) Section 35.938–5(d) (Negotiation of contract amendments); and

(7) Applicable subagreement clauses (see Appendix C–2, clauses 8, 10, 14, 15, 16; note clause 11).

(c) The award of subcontracts under construction contracts not described above in paragraph (b) of this section and the procurement and negotiation procedures of prime contractors on contracts not meeting that description must comply with paragraphs (b)(1) through (4) of this section as well as the principles of § 35.938–5.

§ 35.939 Protests.

(a) *General.* A protest based upon an alleged violation of the procurement requirements of §§ 35.936 through 35.938–9 of this subpart may be filed against a grantee's procurement action by a party with an adversely affected direct financial interest. Any such protest must be received by the grantee within the time period in paragraph (b)(1) of this section. The grantee is responsible for resolution of the protest before the taking of the protested action, in accordance with paragraph (d) of this section, except as otherwise provided by paragraph (j) or (k) or § 35.938–4(h)(5). The Regional Administrator will review grantee protest determinations in accordance with paragraph (e) of this section, if a timely request for such review is filed under paragraph (b)(2) of this section. In the case of protests which he determines are untimely, frivolous, or without merit, the Regional Administrator may take such actions as are described in paragraphs (f)(7), (i)(2), and (k) of this section.

(b) *Time limitations.* (1) A protest under paragraph (d) of this section should be made as early as possible during the procurement process (for example, immediately after issuance of a solicitation for bids) to avoid disruption of or unnecessary delay to the procurement process. A protest authorized by paragraph (d) of this section must be received by the grantee within 1 week after the basis for the protest is knqwn or should have been known, whichever is earlier (generally, for formally advertised procurement, after bid opening, within 1 week after the basis for the protest is, or should have been, known).

(i) However, in the case of an alleged violation of the specification requirements of § 35.936–13 (e.g., that a product fails to qualify as an "or equal") or other specification requirements of this subpart, a protest need not be filed prior to the opening of bids. But the grantee may resolve the issue before receipt of bids or proposals through a written or other formal de-

termination, after notice and opportunity to comment is afforded to any party with a direct financial interest.

(ii) In addition, where an alleged violation of the specification requirements of § 35.936–13 or other requirements of this subpart first arises subsequent to the receipt of bids or proposals, the grantee must decide the protest if the protest was received by the grantee within 1 week of the time that the grantee's written or other formal notice is first received.

(2) A protest appeal authorized by paragraph (e) of this section must be received by the Regional Administrator within 1 week after the complainant has received the grantee's determination.

(3) If a protest is mailed, the complaining party bears the risk of nondelivery within the required time period. It is suggested that all documents transmitted in accordance with this section be mailed by certified mail (return receipt requested) or otherwise delivered in a manner which will objectively establish the date of receipt. Initiation of protest actions under paragraph (d) or (e) of this section may be made by brief telegraphic notice accompanied by prompt mailing or other delivery of a more detailed statement of the basis for the protest. Telephonic protests will not be considered.

(c) *Other initial requirements.* (1) The initial protest document must briefly state the basis for the protest, and should—

(i) Refer to the specific section(s) of this subpart which allegedly prohibit the procurement action;

(ii) Specifically request a determination pursuant to this section;

(iii) Identify the specific procurement document(s) or portion(s) of them in issue; and

(iv) Include the name, telephone number, and address of the person representing the protesting party.

(2) The party filing the protest must concurrently transmit a copy of the initial protest document and any attached documentation to all other parties with a direct financial interest which may be adversely affected by the determination of the protest (generally, all bidders or proposers who appear to have a substantial and reasonable prospect of receiving an award if the protest is denied or sustained) and to the appropriate EPA Regional Administrator.

(d) *Grantee determination.* (1) The grantee is responsible for the initial resolution of protests based upon alleged violations of the procurement requirements of this subpart.

(2) When the grantee receives a timely written protest, he must defer the protested procurement action (see paragraph (h) of this section) and:

(i) Afford the complaining party and interested parties an opportunity to present arguments in support of their views in writing or at a conference or other suitable meeting (such as a city council meeting),

(ii) Inform the complainant and other interested parties of the procedures which the grantee will observe for resolution of the protest;

(iii) Obtain an appropriate extension of the period for acceptance of the bid and bid bond(s) of each interested party, where applicable; failure to agree to a suitable extension of such bid and bid bond(s) by the party which initiated the protest shall be cause for summary dismissal of the protest by the grantee or the Regional Administrator; and

(iv) Promptly deliver (preferably by certified mail, return receipt requested, or by personal delivery) its written determination of the protest to the complaining party and to each other participating party.

(3) The grantee's determination must be accompanied by a legal opinion addressing issues arising under State, territorial, or local law (if any) and, where step 3 construction is involved, by an engineering report, if appropriate.

(4) The grantee should decide the protest as promptly as possible—generally within 3 weeks after receipt of a protest, unless extenuating circumstances require a longer period of time for proper resolution of the protest.

(e) *Regional Administrator review.* (1) A party with a direct financial interest adversely affected by a grantee determination made under paragraph (d) with respect to a procurement requirement of this subpart may submit

a written request to the Regional Administrator for his review of such determination. Any such request must be in writing, must adequately state the basis for the protest (including reference to the specific section(s) of this subpart alleged to prohibit the procurement action), and must be received by the Regional Administrator within 1 week after the complaining party has received the grantee's determination of the protest. A copy of the grantee's determination and other documentation in support of the request for review shall be transmitted with the request.

(2) The Regional Counsel or his delegee will afford both the grantee and the complaining party, as well as any other party with a financial interest which may be adversely affected by determination of the protest, an opportunity to present arguments in support of their views in writing or at a conference at a time and place convenient to the parties as determined by the Regional Counsel or his delegee, and he shall thereafter promptly submit in writing his report and recommendations (or recommended determination) concerning the protest to the Regional Administrator.

(3) Any such conference should be held within not more than 10 days after receipt of the request for review and the report should be transmitted to the Regional Administrator within 10 days after the date set for receipt of the participants' written materials or for the conference. The Regional Administrator should transmit his determination of the protest with an adequate explanation thereof to the grantee and simultaneously to each participating party within 1 week after receipt of the report and recommendations. His determination shall constitute final agency action, from which there shall be no further administrative appeal. The Regional Counsel may extend these time limitations, where appropriate.

(4) The Regional Administrator may review the record considered by the grantee, and any other documents or arguments presented by the parties, to determine whether the grantee has complied with this subpart and has a rational basis for its determination.

(5) If a determination is made by the Regional Administrator which is favorable to the complainant, the grantee's procurement action (for example, contract award) must be taken in accordance with such determination.

(f) *Procedures.* (1) Where resolution of an issue properly raised with respect to a procurement requirement of this subpart requires prior or collateral resolution of a legal issue arising under State or local law, and such law is not clearly established in published legal decisions of the State or other relevant jurisdiction, the grantee or Regional Administrator may rely upon:

(i) An opinion of the grantee's legal counsel adequately addressing the issue (see § 35.936-2(b));

(ii) The established or consistent practice of the grantee, to the extent appropriate; or

(iii) The law of other States or local jurisdictions as established in published legal decisions; or

(iv) If none of the foregoing adequately resolve the issue, published decisions of the Comptroller General of the United States (U.S. General Accounting Office) or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(2) For the determination of Federal issues presented by the protest, the Regional Administrator may rely upon:

(i) Determinations of other protests decided under this section, unless such protests have been reversed; and

(ii) Decisions of the Comptroller General of the United States or of the Federal courts addressing Federal requirements comparable to procurement requirements of this subpart.

(3) The Regional Counsel may establish additional procedural requirements or deadlines for the submission of materials by parties or for the accomplishment of other procedures. Where time limitations are established by this section or by the Regional Counsel, participants must seek to accomplish the required action as promptly as possible in the interest of expediting the procurement action.

(4) A party who submits a document subsequent to initiation of a protest

proceeding under paragraph (d) or (e) of this section must simultaneously furnish each other party with a copy of such document.

(5) The procedures established by this section are not intended to preclude informal resolution or voluntary withdrawal of protests. A complainant may withdraw its appeal at any time, and the protest proceeding shall thereupon be terminated.

(6) The Regional Administrator may utilize appropriate provisions of this section in the discharge of his responsibility to review grantee procurement under 40 CFR 35.935–2.

(7) A protest may be dismissed for failure to comply with procedural requirements of this section.

(g) *Burden of proof.* (1) In proceedings under paragraphs (d) and (e) of this section, if the grantee proposes to award a formally advertised, competitively bid, fixed price contract to a party who has submitted the apparent lowest price, the party initiating the protest will bear the burden of proof in the protest proceedings.

(2) In the proceedings under paragraph (e) of this section—

(i) If the grantee proposes to award a formally advertised, competitively bid, fixed-price contract to a bidder other than the bidder which submitted the apparent lowest price, the grantee will bear the burden of proving that its determination concerning responsiveness is in accordance with this subchapter; and

(ii) If the basis for the grantee's determination is a finding of nonresponsibility, the grantee must establish and substantiate the basis for its determination and must adequately establish that such determination has been made in good faith.

(h) *Deferral of procurement action.* Upon receipt of a protest under paragraph (d) of this section, the grantee must defer the protested procurement action (for example, defer the issuance of solicitations, contract award, or issuance of notice to proceed under a contract) until 10 days after delivery of its determination to the participating parties. (The grantee may receive or open bids at it own risk, if it considers this to be in its best interest; and see § 35.938–4(h)(5).) Where the Regional Administrator has received a written protest under paragraph (e) of this section, he must notify the grantee promptly to defer its protested procurement action until notified of the formal or informal resolution of the protest.

(i) *Enforcement.* (1) Noncompliance with the procurement provisions of this subchapter by the grantee shall be cause for enforcement action in accordance with one or more of the provisions of § 35.965 of this subpart.

(2) If the Regional Administrator determines that a protest prosecuted pursuant to this section is frivolous, he may determine the party which prosecuted such protest to be nonresponsible and ineligible for future contract award (see also paragraph (k) of this section).

(j) *Limitation.* A protest may not be filed under this section with respect to the following:

(1) Issues not arising under the procurement provisions of this subchapter; or

(2) Issues relating to the selection of a consulting engineer, provided that a protest may be filed only with respect to the mandatory procedural requirements of §§ 35.937 through 35.937–9;

(3) Issues primarily determined by State or local law or ordinances and as to which the Regional Administrator, upon review, determines that there is no contravening Federal requirement and that the grantee's action has a rational basis (see paragraph (e)(4) of this section).

(4) Provisions of Federal regulations applicable to direct Federal contracts, unless such provisions are explicitly referred to or incorporated in this subpart;

(5) Basic project design determinations (for example, the selection of incineration versus other methods of disposal of sludge);

(6) Award of subcontracts or issuance of purchase orders under a formally advertised, competitively bid, lump-sum construction contract. However, protest may be made with respect to alleged violation of the following:

(i) Specification requirements of § 35.936–13; or

(ii) Provisions of this subpart applicable to the procurement procedures, negotiation or award of subcontracts or issuance of purchase orders under §§ 35.937-12 (subcontracts under subagreements for architectural or engineering services) or § 35.938-9 (subcontracts under construction contracts).

(k) *Summary disposition.* The Regional Administrator may summarily dismiss a protest, without proceedings under paragraph (d) or (e) of this section, if he determines that the protest is untimely, frivolous or without merit—for example, that the protested action of the grantee primarily involves issues of State or local law. Any such determination shall refer briefly to the facts substantiating the basis for the determination.

(l) *Index.* The EPA General Counsel will publish periodically as a notice document in the FEDERAL REGISTER an index of Regional Administrator protest determinations. (See, e.g., 43 FR 29085, July 5, 1978.)

§ 35.940 Determination of allowable costs.

The grantee will be paid, upon request in accordance with § 35.945, for the Federal share of all necessary costs within the scope of the approved project and determined to be allowable in accordance with § 30.705 of this chapter, this subpart, and the grant agreement.

§ 35.940-1 Allowable project costs.

Allowable costs include:

(a) Costs of salaries, benefits, and expendable material the grantee incurs for the project, except as provided in § 35.940-2(g);

(b) Costs under construction contracts;

(c) Professional and consultant services;

(d) Facilities planning directly related to the treatment works;

(e) Sewer system evaluation (§ 35.927);

(f) Project feasibility and engineering reports;

(g) Costs required under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4621 *et seq.*, 4651 *et seq.*), and part 4 of this chapter;

(h) Costs of complying with the National Environmental Policy Act, including costs of public notices and hearings;

(i) Preparation of construction drawings, specifications, estimates, and construction contract documents;

(j) Landscaping;

(k) Removal and relocation or replacement of utilities, for which the grantee is legally obligated to pay;

(l) Materials acquired, consumed, or expended specifically for the project;

(m) A reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operations;

(n) Development and preparation of an operation and maintenance manual;

(o) A plan of operation, in accordance with guidance issued by the Administrator;

(p) Start-up services for new treatment works, in accordance with guidance issued by the Administrator;

(q) Project identification signs (§ 30.625-3 of this chapter);

(r) Development of a municipal pretreatment program approvable under part 403 of this chapter, and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program;

(s) Costs of complying with the procurement requirements of these regulations (see § 35.936-20).

(t) Reasonable costs of public participation incurred by grantees which are identified in a public participation work plan, or which are otherwise approved by EPA, shall be allowable.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 10304, Feb. 16, 1979]

§ 35.940-2 Unallowable costs.

Costs which are not necessary for the construction of a treatment works project are unallowable. Such costs include, but are not limited to:

(a) Basin or areawide planning not directly related to the project;

(b) Bonus payments not legally required for completion of construction before a contractual completion date;

(c) Personal injury compensation or damages arising out of the project.

whether determined by adjudication, arbitration, negotiation, or otherwise;

(d) Fines and penalties due to violations of, or failure to comply with, Federal, State, or local laws;

(e) Costs outside the scope of the approved project;

(f) Interest on bonds or any other form of indebtedness required to finance the project costs;

(g) Ordinary operating expenses of local government, such as salaries and expenses of a mayor, city council members, or city attorney, except as provided in § 35.940-4;

(h) Site acquisition (for example, sewer rights-of-way, sewage treatment plantsite, sanitary landfills and sludge disposal areas) except as otherwise provided in § 35.940-3(a);

(i) Costs for which payment has been or will be received under another Federal assistance program;

(j) Costs of equipment or material procured in violation of § 35.938-4(h);

(k) Costs of studies under § 35.907 (d)(6) and (7) when performed solely for the purpose of seeking an allowance for removal of pollutants under part 403 of this chapter;

(l) Costs of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works;

(m) Construction of privately-owned treatment works, including pretreatment facilities, except as authorized by section 201(h) of the Act and § 35.918;

(n) Preparation of a grant application, including a plan of study.

§ 35.940-3 Costs allowable, if approved.

Certain direct costs are sometimes necessary for the construction of a treatment works. The following costs are allowable if reasonable and if the Regional Administrator approves them in the grant agreement.

(a) Land acquired after October 17, 1972, that will be an integral part of the treatment process, or that will be used for ultimate disposal of residues resulting from such treatment (for example, land for spray irrigation of sewage effluent).

(b) Land acquired after December 26, 1977, that will be used for storage of treated wastewater in land treatment systems before land application.

(c) Land acquired after December 26, 1977, that will be used for composting or temporary storage of compost residues which result from wastewater treatment, if EPA has approved a program for use of the compost.

(d) Acquisition of an operable portion of a treatment works. This type of acquisition is generally not allowable except when determined by the Regional Administrator in accordance with guidance issued by the Administrator.

(e) Rate determination studies required under § 35.925-11.

(f) A limited amount of end-of-pipe sampling and associated analysis of industrial discharges to municipal treatment works as provided in § 35.907(f).

§ 35.940-4 Indirect costs.

Indirect costs shall be allowable in accordance with an indirect cost agreement negotiated and incorporated in the grant agreement. An indirect cost agreement must identify those cost elements allowable under § 35.940-1. Where the benefits derived from indirect services cannot be readily determined, a lump sum for overhead may be negotiated if EPA determines that this amount will be approximately the same as the actual indirect costs.

§ 35.940-5 Disputes concerning allowable costs.

The grantee should seek to resolve any questions relating to cost allowability or allocation at its earliest opportunity (if possible, before execution of the grant agreement). Final determinations concerning the allowability of costs shall be conclusive unless appealed within 30 days in accordance with the "Disputes" provisions of part 30, subpart J, of this subchapter.

§ 35.945 Grant payments.

The grantee shall be paid the Federal share of allowable project costs incurred within the scope of an approved project and which are currently due and payable from the grantee (i.e., not including withheld or deferred amounts), subject to the limitations of §§ 35.925-18, 35.930-5, 35.930-

6, and 35.965 (b) and (c), up to the grant amount set forth in the grant agreement and any amendments thereto. Payments for engineering services for step 1, 2 or 3 shall be made in accordance with § 35.937-10 and payments for step 3 construction contracts shall be made in accordance with §§ 35.938-6 and 35.938-7. All allowable costs incurred before initiation of construction of the project must be claimed in the application for grant assistance for that project before the award of the assistance or no subsequent payment will be made for the costs.

(a) *Initial request for payment.* Upon award of grant assistance, the grantee may request payment for the unpaid Federal share of actual or estimated allowable project costs incurred before grant award subject to the limitations of § 35.925-18. Payment for such costs shall be made in accordance with the negotiated payment schedule included in the grant agreement.

(b) *Interim requests for payment.* The grantee may submit requests for payments for allowable costs in accordance with the negotiated payment schedule included in the grant agreement. Upon receipt of a request for payment, subject to the limitations set forth in § 30.615-3 of this subchapter and §§ 35.935-12, 35.935-13, and 35.935-16, the Regional Administrator shall cause to be disbursed from available appropriated funds such amounts as are necessary so that the total amount of Federal payments to the grantee for the project is equal to the Federal share of the actual or estimated allowable project costs incurred to date, as certified by the grantee in its most recent request for payment. Generally, payments will be made within 20 days after receipt of a request for payment.

(c) *Adjustment.* At any time before final payment under the grant, the Regional Administrator may cause any request(s) for payment to be reviewed or audited. Based on such review or audit, any payment may be reduced for prior overpayment or increased for prior underpayment.

(d) *Refunds, rebates, credits, etc.* The Federal share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be credited to the current State allotment or paid to the United States. Reasonable expenses incurred by the grantee for the purpose of securing such refunds, rebates, credits, or other amounts shall be allowable under the grant when approved by the Regional Administrator.

(e) *Final payment.* After completion of final inspection under § 35.935-14, approval of the request for payment which the grantee designates as the "final payment request," and the grantee's compliance with all applicable requirements of this subchapter and the grant agreement, the Regional Administrator shall pay to the grantee any balance of the Federal share of allowable project costs which has not already been paid. The grantee must submit the final payment request promptly after final inspection.

(f) *Assignment and release.* By its acceptance of final payment, the grantee agrees to assign to the United States the Federal share of refunds, rebates, credits or other amounts (including any interest) properly allocable to costs for which the grantee has been paid by the Government under the grant. The grantee thereby also releases and discharges the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to exceptions previously specified in writing between the Regional Administrator and the grantee.

(g) *Payment of costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.* Notwithstanding the provisions of paragraph (a) of this section, if the Regional Administrator determines it is necessary for the expeditious completion of a project, he may make advance payment after grant award under § 4.502(c) of this subchapter for the EPA share of the cost of any payment of relocation assistance by the grantee. The requirements in § 30.615-1 (b) and (d) of this subchapter apply to any advances of funds for assistance payments.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 39340, July 5, 1979]

§ 35.950 Suspension, termination or annulment of grants.

Grants may be suspended under § 30.915, or terminated or annulled under § 30.920. The State agency shall be concurrently notified in writing of any such action.

§ 35.955 Grant amendments to increase grant amounts.

Grant agreements may be amended under § 30.900-1 of this chapter for project changes which have been approved under §§ 30.900 and 35.935-11 of this subchapter. However, no grant agreement may be amended to increase the amount of a grant unless the State agency has approved the grant increase from available State allotments and reallotments under § 35.915.

§ 35.960 Disputes.

(a) The Regional Administrator's final determination on the ineligibility of a project (see § 35.915(h)) or a grant applicant (see § 35.920-1), on the Federal share (see § 35.930-5(b)), or on any dispute arising under a grant shall be final and conclusive unless the applicant or grantee appeals within 30 days from the date of receipt of the final determination. (See subpart J of part 30 of this subchapter.)

(b) The EPA General Counsel will publish periodically as a Notice document in the FEDERAL REGISTER a digest of grant appeals decisions.

§ 35.965 Enforcement.

If the Regional Administrator determines that the grantee has failed to comply with any provision of this subpart, he may impose any of the following sanctions:

(a) The grant may be terminated or annulled under § 30.920 of this subchapter;

(b) Project costs directly related to the noncompliance may be disallowed;

(c) Payment otherwise due to the grantee of up to 10 percent may be withheld (see § 30.615-3 of this chapter);

(d) Project work may be suspended under § 30.915 of this subchapter;

(e) A noncomplying grantee may be found nonresponsible or ineligible for future Federal assistance or a noncomplying contractor may be found nonresponsible or ineligible for approval for future contract award under EPA grants;

(f) An injunction may be entered or other equitable relief afforded by a court of appropriate jurisdiction;

(g) Such other administrative or judicial action may be instituted if it is legally available and appropriate.

§ 35.970 Contract enforcement.

(a) *Regional Administrator authority.* At the request of a grantee, the Regional Administrator is authorized to provide technical and legal assistance in the administration and enforcement of any contract related to treatment works for which an EPA grant was made and to intervene in any civil action involving the enforcement of such contracts, including contract disputes which are the subject of either arbitration or court action. Any assistance is to be provided at the discretion of the Regional Administrator and in a manner determined to best serve the public interest. Factors which the Regional Administrator may consider in determining whether to provide assistance are:

(1) Available agency resources.

(2) Planned or ongoing enforcement action.

(3) The grantee's demonstration of good faith to resolve contract matters at issue.

(4) The grantee's adequate documentation.

(5) The Federal interest in the contract matters at issue.

(b) *Grantee request.* The grantee's request for technical or legal assistance should be submitted in writing and be accompained by documentation adequate to inform the Regional Administrator of the nature and necessity of the requested assistance. A grantee may orally request assistance from the Regional Administrator on an emergency basis.

(c) *Privity of contract.* The Regional Administrator's technical or legal involvement in any contract dispute will not make EPA a party to any contract

entered into by the grantee. (See § 35.936-8.)

(d) *Delegation to States.* The authority to provide technical and legal assistance in the administration of contract matters described in this section may be delegated to a State agency under Subpart F of this part if the State agency can demonstrate that it has the appropriate legal authority to undertake such functions.

APPENDIX A—COST-EFFECTIVENESS ANALYSIS GUIDELINES

1. *Purpose.* These guidelines represent Agency policies and procedures for determining the most cost-effective waste treatment management system or component part.

2. *Authority.* These guidelines are provided under sections 212(2)(C) and 217 of the Clean Water Act.

3. *Applicability.* These guidelines, except as otherwise noted, apply to all facilities planning under step 1 grant assistance awarded after September 30, 1978. The guidelines also apply to State or locally financed facilities planning on which subsequent step 2 or step 3 Federal grant assistance is based.

4. *Definitions.* Terms used in these guidelines are defined as follows:

a. *Waste treatment management system.* Used synonymously with "complete waste treatment system" as defined in § 35.905 of this subpart.

b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

c. *Planning period.* The period over which a waste treatment management system is evaluated for cost-effectiveness. The planning period begins with the system's initial operation.

d. *Useful life.* The estimated period of time during which a treatment works or a component of a waste treatment management system will be operated.

e. *Disaggregation.* The process or result of breaking down a sum total of population or economic activity for a State or other jurisdiction (i.e., designated 208 area or SMSA) into smaller areas or jurisdictions.

5. *Identification, selection, and screening of alternatives.* a. *Identification of alternatives.* All feasible alternative waste management systems shall be initially identified. These alternatives should include systems discharging to receiving waters, land application systems, on-site and other non-centralized systems, including revenue generating applications, and systems employing the reuse of wastewater and recycyling of pollutants. In identifying alternatives, the applicant shall consider the possibility of no action and staged development of the system.

b. *Screening of alternatives.* The identified alternatives shall be systematically screened to determine those capable of meeting the applicable Federal, State and local criteria.

c. *Selection of alternatives.* The identified alternatives shall be initially analyzed to determine which systems have cost-effective potential and which should be fully evaluated according to the cost-effectiveness analysis procedures established in the guidelines.

d. *Extent of effort.* The extent of effort and the level of sophistication used in the cost-effectiveness analysis should reflect the project's size and importance. Where processes or techniques are claimed to be innovative technology on the basis of the cost reduction criterion contained in paragraph 6e(1) of Appendix E to this subpart, a sufficiently detailed cost analysis shall be included to substantiate the claim to the satisfaction of the Regional Administrator.

6. *Cost-effectiveness analysis procedures.*

a. *Method of analysis.* The resources costs shall be determined by evaluating opportunity costs. For resources that can be expressed in monetary terms, the analysis will use the interest (discount) rate established in paragraph 6e. Monetary costs shall be calculated in terms of present worth values or equivalent annual values over the planning period defined in section 6b. The analysis shall descriptively present nonmonetary factors (e.g., social and environmental) in order to determine their significance and impact. Nonmonetary factors include primary and secondary environmental effects, implementation capability, operability, performance reliability and flexibility. Although such factors as use and recovery of energy and scarce resources and recycling of nutrients are to be included in the monetary cost analysis, the non-monetary evaluation shall also include them. The most cost-effective alternative shall be the waste treatment management system which the analysis determines to have the lowest present worth or equivalent annual value unless nonmonetary costs are overriding. The most cost-effective alternative must also meet the minimum requirements of applicable effluent limitations, groundwater protection, or other , applicable standards established under the Act.

b. *Planning period.* The planning period for the cost-effectiveness analysis shall be 20 years.

c. *Elements of monetary costs.* The monetary costs to be considered shall include the

total value of the resources which are attributable to the waste treatment management system or to one of its component parts. To determine these values, all monies necessary for capital construction costs and operation and maintenance costs shall be identified.

(1) Capital construction costs used in a cost-effective analysis shall include all contractors' costs of construction including overhead and profit, costs of land, relocation, and right-of-way and easement acquisition; costs of design engineering, field exploration and engineering services during construction; costs of administrative and legal services including costs of bond sales; start-up costs such as operator training; and interest during construction. Capital construction costs shall also include contingency allowances consistent with the cost estimate's level of precision and detail.

(2) The cost-effectiveness analysis shall include annual costs for operation and maintanance (including routine replacement of equipment and equipment parts). These costs shall be adequate to ensure effective and dependable operation during the system's planning period. Annual costs shall be divided between fixed annual costs and costs which would depend on the annual quantity of waste water collected and treated. Annual revenues generated by the waste treatment management system through energy recovery, crop production, or other outputs shall be deducted from the annual costs for operation and maintenance in accordance with guidance issued by the Administrator.

d. *Prices.* The applicant shall calculate the various components of costs on the basis of market prices prevailing at the time of the cost-effectiveness analysis. The analysis shall not allow for inflation of wages and prices, except those for land, as described in paragraph 6h(1) and for natural gas. This stipulation is based on the implied assumption that prices, other than the exceptions, for resources involved in treatment works construction and operation, will tend to change over time by approximately the same percentage. Changes in the general level of prices will not affect the results of the cost-effectiveness analysis. Natural gas prices shall be escalated at a compound rate of 4 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified use of a greater or lesser percentage based upon regional differentials between historical natural gas price escalation and construction cost escalation. Land prices shall be appreciated as provided in paragraph 6h(1). Both historical data and future projections support the gas and land price escalations relative to those for other goods and services related to waste water treatment. Price escalation rates may be updated periodically in accordance with Agency guidelines.

e. *Interest (discount) rate.* The rate which the Water Resources Council establishes annually for evaluation of water resource projects shall be used.

f. *Interest during construction.* (1) Where capital expenditures can be expected to be fairly uniform during the construction period, interest during construction may be calculated at I=1/2PCi where:

I=the interest accrued during the construction period,
P=the construction period in years,
C=the total capital expenditures,
i=the interest rate (discount rate in section 6e).

(2) Where expenditures will not be uniform, or when the construction period will be greater than 4 years, interest during construction shall be calculated on a year-by-year basis.

g. *Useful life.* (1) The treatment works' useful life for a cost-effectiveness analysis shall be as follows:

Land—permanent.
Waste water conveyance structures (includes collection systems, outfall pipes, interceptors, force mains, tunnels, etc.)—50 years.
Other structures (includes plant building, concrete process tankage, basins, lift stations structures, etc.)—30–50 years.
Process equipment—15–20 years.
Auxiliary equipment—10–15 years.

(2) Other useful life periods will be acceptable when sufficient justification can be provided. Where a system or a component is for interim service, the anticipated useful life shall be reduced to the period for interim service.

h. *Salvage value.* (1) Land purchased for treatment works, including land used as part of the treatment process or for ultimate disposal of residues, may be assumed to have a salvage value at the end of the planning period at least equal to its prevailing market value at the time of the analysis. In calculating the salvage value of land, the land value shall be appreciated at a compound rate of 3 percent annually over the planning period, unless the Regional Administrator determines that the grantee has justified the use of a greater or lesser percentage based upon historical differences between local land cost escalation and construction cost escalation. The land cost escalation rate may be updated periodically in accordance with Agency guidelines. Right-of-way easements shall be considered to have a salvage value not greater than the prevailing market value at the time of the analysis.

(2) Structures will be assumed to have a salvage value if there is a use for them at the end of the planning period. In this case, salvage value shall be estimated using straight line depreciation during the useful life of the treatment works.

(3) The method used in paragraph 6h(2) may be used to estimate salvage value at the end of the planning period for phased additions of process equipment and auxiliary equipment.

(4) When the anticipated useful life of a facility is less than 20 years (for analysis of interim facilities), salvage value can be claimed for equipment if it can be clearly demonstrated that a specific market or reuse opportunity will exist.

7. *Innovative and alternative wastewater treatment processes and techniques.*

a. Beginning October 1, 1973, the capital costs of publicly owned treatment works which use processes and techniques meeting the criteria of Appendix E to this subpart and which have only a water pollution control function, may be eligible if the present worth cost of the treatment works is not more than 115 percent of the present worth cost of the most cost-effective pollution control system, exclusive of collection sewers and interceptors common to the two systems being compared, by 115 percent, except for the following situation.

b. Where innovative or alternative unit processes would serve in lieu of conventional unit processes in a conventional waste water treatment plant, and the present worth costs of the nonconventional unit processes are less than 50 percent of the present worth costs of the treatment plant, multiply the present worth costs of the replaced conventional processes by 115 percent, and add the cost of nonreplaced unit processes.

c. The eligibility of multipurpose projects which combine a water pollution control function with another function, and which use processes and techniques meeting the criteria of Appendix E to this subpart, shall be determined in accordance with guidance issued by the Administrator.

d. The above provisions exclude individual systems under § 35.918. The regional Administrator may allow a grantee to apply the 15-percent preference authorized by this section to facility plans prepared under step 1 grant assistance awarded before October 1, 1978.

8. *Cost-effective staging and sizing of treatment works.*

a. *Population projections.* (1) The disaggregation of State projections of population shall be the basis for the population forecasts presented in individual facility plans, except as noted. These State projections shall be those developed in 1977 by the Bureau of Economic Analysis (BEA), Department of Commerce, unless, as of June 26, 1978, the State has already prepared projections. These State projections may be used instead of the BEA projections if the year 2000 State population does not exceed that of the BEA projection by more than 5 percent. If the difference exceeds this amount, the State must either justify or lower its projection. Justification must be based on the historical and current trends (e.g., energy and industrial development, military base openings) not taken into account in the BEA projections. The State must submit for approval to the Administrator the request and justification for use of State projections higher than the BEA projections. By that time, the State shall issue a public notice of the request. Before the Administrator's approval of the State projection, the Regional Administrator shall solicit public comments and hold a public hearing if important issues are raised about the State projection's validity. State projections and disaggregations may be updated periodically in accordance with Agency guidelines.

(2) Each State, working with designated 208 planning agencies, organizations certified by the Governor under section 174(a) of the Clean Air Act, as amended, and other regional planning agencies in the State's nondesignated areas, shall disaggregate the State population projection among its designated 208 areas, other standard metropolitan statistical areas (SMSA's) not included in the 208 area, and non-SMSA counties or other appropriate jurisdictions. States that had enacted laws, as of June 26, 1978, mandating disaggregation of State population totals to each county for areawide 208 planning may retain this requirement. When disaggregating the State population total the State shall take into account the projected population and economic activities identified in facility plans, areawide 208 plans and municipal master plans. The sum of the disaggregated projections shall not exceed the State projection. Where a designated 208 area has, as of June 26, 1978, already prepared a population projection, it may be used if the year 2000 population does not exceed that of the disaggregated projection by more than 10 percent. The State may then increase its population projection to include all such variances rather than lower the population projection totals for the other areas. If the 208 area population forecast exceeds the 10 percent allowance, the 208 agency must lower its projection within the allowance and submit the revised projection for approval to the State and the Regional Administrator.

(3) The State projection totals and the disaggregations will be submitted as an output of the statewide water quality management process. The submission shall include a list of designated 208 areas, all SMSA's, and counties or other units outside

the 208 areas. For each unit the disaggregated population shall be shown for the years 1980, 1990, and 2000. Each State will submit its projection totals and disaggregations for the Regional Administrator's approval before October 1, 1979. Before this submission, the State shall hold a public meeting on the disaggregations and shall provide public notice of the meeting consistent with part 25 of this chapter. (See § 35.917(e).)

(4) When the State projection totals and disaggregations are approved they shall be used thereafter for areawide water quality management planning as well as for facility planning and the needs surveys under section 516(b) of the Act. Within areawide 208 planning areas, the designated agencies, in consultation with the States, shall disaggregate the 208 area projections among the SMSA and non-SMSA areas and then disaggregate these SMSA and non-SMSA projections among the facility planning areas and the remaining areas. For those SMSA's not included within designated 208 planning areas, each State, with assistance from appropriate regional planning agencies, shall disaggregate the SMSA projection among the facility planning areas and the remaining areas within the SMSA. The State shall check the facility planning area forecasts to ensure reasonableness and consistency with the SMSA projections.

(5) For non-SMSA facility planning areas not included in designated areawide 208 areas, the State may disaggregate population projections for non-SMSA counties among facility planning areas and remaining areas. Otherwise, the grantee is to forecast future population growth for the facility planning area by linear extrapolation of the recent past (1960 to present) population trends for the planning area, use of correlations of planning area growth with population growth for the township, county or other larger parent area population, or another appropriate method. A population forecast may be raised above that indicated by the extension of past trends where likely impacts (e.g., significant new energy developments, large new industries, Federal installations, or institutions) justify the difference. The facilities plan must document the justification. These population forecasts should be based on estimates of new employment to be generated. The State shall check individual population forecasts to insure consistency with overall projections for non-SMSA counties and justification for any difference from past trends.

(6) Facilities plans prepared under step 1 grant assistance awarded later than 6 months after Agency approval of the State disaggregations shall follow population forecasts developed in accordance with these guidelines.

b. *Wastewater flow estimates.* (1) In determining total average daily flow for the design of treatment works, the flows to be considered include the average daily base flows (ADBF) expected from residential sources, commercial sources, institutional sources, and industries the works will serve plus allowances for future industries and nonexcessive infiltration/inflow. The amount of nonexcessive infiltration/inflow not included in the base flow estimates presented herein, is to be determined according to the Agency guidance for sewer system evaluation or Agency policy on treatment and control of combined sewer overflows (PRM 75-34).

(2) The estimation of existing and future ADBF, exclusive of flow reduction from combined residential, commercial and institutional sources, shall be based upon one of the following methods:

(a) *Preferred method.* Existing ADBF is estimated based upon a fully documented analysis of water use records adjusted for consumption and losses or on records of wastewater flows for extended dry periods less estimated dry weather infiltration. Future flows for the treatment works design should be estimated by determining the existing per capita flows based on existing sewered resident population and multiplying this figure by the future projected population to be served. Seasonal population can be converted to equivalent full time residents using the following multipliers:

Day-use visitor	0.1–0.2
Seasonal visitor	0.5–0.8

The preferred method shall be used wherever water supply records or wastewater flow data exist. Allowances for future increases of per capita flow over time will not be approved.

(b) *Optional method.* Where water supply and wastewater flow data are lacking, existing and future ADBF shall be estimated by multiplying a gallon per capita per day (gpcd) allowance not exceeding those in the following table, except as noted below, by the estimated total of the existing and future resident populations to be served. The tabulated ADBF allowances, based upon several studies of municipal water use, include estimates for commercial and institutional sources as well as residential sources. The Regional Administrator may approve exceptions to the tabulated allowances where large (more than 25 percent of total estimated ADBF) commercial and institutional flows are documented.

Description	Gallons per capita per day
Non-SMSA cities and towns with projected total 10-year populations of 5,000 or less	60–70
Other cities and towns	65–80

c. *Flow reduction.* The cost-effectiveness analysis for each facility planning area shall include an evaluation of the costs, cost savings, and effects of flow reduction measures unless the existing ADBF from the area is less than 70 gpcd, or the current population of the applicant municipality is under 10,000, or the Regional Administrator exempts the area for having an effective existing flow reduction program. Flow reduction measures include public education, pricing and regulatory approaches or a combination of these. In preparing the facilities plan and included cost effectiveness analysis, the grantee shall, as a minimum:

(1) Estimate the flow reductions implementable and cost effective when the treatment works become operational and after 10 and 20 years of operation. The measures to be evaluated shall include a public information program; pricing and regulatory approaches; installation of water meters, and retrofit of toilet dams and low-flow showerheads for existing homes and other habitations; and specific changes in local ordinances, building codes or plumbing codes requiring installations of water saving devices such as water meters, water conserving toilets, showerheads, lavatory faucets, and appliances in new homes, motels, hotels, institutions, and other establishments.

(2) Estimate the costs of the proposed flow reduction measures over the 20-year planning period, including costs of public information, administration, retrofit of existing buildings and the incremental costs, if any, of installing water conserving devices in new homes and establishments.

(3) Estimate the energy reductions; total cost savings for wastewater treatment, water supply and energy use; and the net cost savings (total savings minus total costs) attributable to the proposed flow reduction measures over the planning period. The estimated cost savings shall reflect reduced sizes of proposed wastewater treatment works plus reduced costs of future water supply facility expansions.

(4) Develop and provide for implementing a recommended flow reduction program. This shall include a public information program highlighting effective flow reduction measures, their costs, and the savings of water and costs for a typical household and for the community. In addition, the recommended program shall comprise those flow reduction measures which are cost effective, supported by the public and within the implementation authority of the grantee or another entity willing to cooperate with the grantee.

(5) Take into account in the design of the treatment works the flow reduction estimated for the recommended program.

d. *Industrial flows.* (1) The treatment works' total design flow capacity may include allowances for industrial flows. The allowances may include capacity needed for industrial flows which the existing treatment works presently serves. However, these flows shall be carefully reviewed and means of reducing them shall be considered. Letters of intent to the grantee are required to document capacity needs for existing flows from significant industrial users and for future flows from all industries intending to increase their flows or relocate in the area. Requirements for letters of intent from significant industrial dischargers are set forth in § 35.925–11(c).

(2) While many uncertainties accompany forecasting future industrial flows, there is still a need to allow for some unplanned future industrial growth. Thus, the cost-effective (grant eligible) design capacity and flow of the treatment works may include (in addition to the existing industrial flows and future industrial flows documented by letters of intent) a nominal flow allowance for future nonidentifiable industries or for unplanned industrial expansions, provided that 208 plans, land use plans and zoning provide for such industrial growth. This additional allowance for future unplanned industrial flow shall not exceed 5 percent (or 10 percent for towns with less than 10,000 population) of the total design flow of the treatment works exclusive of the allowance or 25 percent of the total industrial flow (existing plus documented future), whichever is greater.

e. *Staging of treatment plants.* (1) The capacity of treatment plants (i.e., new plants, upgraded plants, or expanded plants) to be funded under the construction grants program shall not exceed that necessary for wastewater flows projected during an initial staging period determined by one of the following methods:

(a) *First method.* The grantee shall analyze at least three alternative staging periods (10 years, 15 years, and 20 years). He shall select the least costly (i.e., total present worth or average annual cost) staging period.

(b) *Second method.* The staging period shall not exceed the period which is appropriate according to the following table.

STAGING PERIODS FOR TREATMENT PLANTS

Flow growth factors (20 years)[1]	Staging period[2] (years)
Less than 1.3	20
1.3 to 1.8	15
Greater than 1.8	10

[1] Ratio of wastewater flow expected at end of 20 year planning period to initial flow at the time the plant is expected to become operational.
[2] Maximum initial staging period.

(2) A municipality may stage the construction of a treatment plant for a shorter period than the maximum allowed under this policy. A shorter staging period might be based upon environmental factors (secondary impacts, compliance with other environmental laws under § 35.925–14, energy conservation, water supply), an objective concerning planned modular construction, the utilization of temporary treatment plants, or attainment of consistency with locally adopted plans including comprehensive and capital improvement plans. However, the staging period in no case may be less than 10 years, because of associated cost penalties and the time necessary to plan, apply for and receive funding, and construct later stages.

(3) The facilities plan shall present the design parameters for the proposed treatment plant. Whenever the proposed treatment plant components' size or capacity would exceed the minimum reliability requirements suggested in the EPA technical bulletin, "Design Criteria for Mechanical, Electric, and Fluid System and Component Reliability," a complete justification, including supporting data, shall be provided to the Regional Administrator for his approval.

f. *Staging of interceptors.* Since the location and length of interceptors will influence growth, interceptor routes and staging of construction shall be planned carefully. They shall be consistent with approved 208 plans, growth management plans and other environmental laws under § 35.925–14 and shall also be consistent with Executive orders for flood plains and wetlands.

(1) Interceptors may be allowable for construction grant funding if they eliminate existing point source discharges and accommodate flows from existing habitations that violate an enforceable requirement of the Act. Unless necessary to meet those objectives, interceptors should not be extended into environmentally sensitive areas, prime agricultural lands and other undeveloped areas (density less than one household per 2 acres). Where extension of an interceptor through such areas would be necessary to interconnect two or more communities, the grantee shall reassess the need for the interceptor by further consideration of alternative wastewater treatment systems. If the reassessment demonstrates a need for the interceptor, the grantee shall evaluate the interceptor's primary and secondary environmental impacts, and provide for appropriate mitigating measures such as rerouting the pipe to minimize adverse impacts or restricting future connections to the pipe. Appropriate and effective grant conditions (e.g., restricting sewer hookups) should be used where necessary to protect environmentally sensitive areas or prime agricultural lands from new development. NPDES permits shall include the conditions to insure implementation of the mitigating measures when new permits are issued to the affected treatment facilities in those cases where the measures are required to protect the treatment facilities against overloading.

(2) Interceptor pipe sizes (diameters for cylindrical pipes) allowable for construction grant funding shall be based on a staging period of 20 years. A larger pipe size corresponding to a longer staging period not to exceed 40 years may be allowed if the grantee can demonstrate, wherever water quality management plans or other plans developed for compliance with laws under § 35.925–14 have been approved, that the larger pipe would be consistent with projected land use patterns in such plans and that the larger pipe would reduce overall (primary plus secondary) environmental impacts. These environmental impacts include:

(a) *Primary impacts.* (i) Short-term disruption of traffic, business and other daily activities.

(ii) Destruction of flora and fauna, noise, erosion, and sedimentation.

(b) *Secondary impacts.* (i) Pressure to rezone or otherwise facilitate unplanned development.

(ii) Pressure to accelerate growth for quicker recovery of the non-Federal share of the interceptor investments.

(iii) Effects on air quality and environmentally sensitive areas by cultural changes.

(3) The estimation of peak flows in interceptors shall be based upon the following considerations:

(a) Daily and seasonal variations of pipe flows, the timing of flows from the various parts of the tributary area, and pipe storage effects.

(b) The feasibility of off-pipe storage to reduce peak flows.

(c) The use of an appropriate peak flow factor that decreases as the average daily flow to be conveyed increases.

9. *State guidelines.* If a State has developed or chooses to develop comprehensive guidelines on cost-effective sizing and staging of treatment works, the Regional Administrator may approve all or portions of

the State guidance for application to step 1 facility plans. Approved State guidance may be used instead of corresponding portions of these guidelines, if the following conditions are met:

a. The State guidance must be at least as stringent as the provisions of these guidelines.

b. The State must have held at least one public hearing on proposed State guidance, under regulations in part 25 of this chapter, before submitting the guidance for Agency approval.

10. *Additional capacity beyond the cost-effective capacity.* Treatment works which propose to include additional capacity beyond the cost-effective capacity determined in accordance with these guidelines may receive Federal grant assistance if the following requirements are met:

a. The facilities plan shall determine the most cost-effective treatment works and its associated capacity in accordance with these guidelines. The facilities plan shall also determine the actual characteristics and total capacity of the treatment works to be built.

b. Only a portion of the cost of the entire proposed treatment works including the additional capacity shall be eligible for Federal funding. The portion of the cost of construction which shall be eligible for Federal funding under sections 203(a) and 202(a) of the Act shall be equivalent to the estimated construction costs of the most cost-effective treatment works. For the eligibility determination, the costs of construction of the actual treatment works and the most cost-effective treatment works must be estimated on a consistent basis. Up-to-date cost curves published by EPA's Office of Water Program Operations or other cost estimating guidance shall be used to determine the cost ratios between cost-effective project components and those of the actual project. These cost ratios shall be multiplied by the step 2 cost and step 3 contract costs of actual components to determine the eligible step 2 and step 3 costs.

c. The actual treatment works to be built shall be assessed. It must be determined that the actual treatment works meets the requirements of the National Environmental Policy Act and all applicable laws, regulations, and guidance, as required of all treatment works by §§ 35.925–8 and 35.925–14. Particular attention should be given to assessing the project's potential secondary environmental effects and to ensuring that air quality standards will not be violated. The actual treatment works' discharge must not cause violations of water quality standards.

d. The Regional Administrator shall approve the plans, specifications, and estimates for the actual treatment works under section 203(a) of the Act, even though EPA will be funding only a portion of its designed capacity.

e. The grantee shall satisfactorily assure the Agency that the funds for the construction costs due to the addtional capacity beyond the cost-effective treatment works' capacity as determined by EPA (i.e., the ineligible portion of the treatment works), as well as the local share of the grant eligible portion of the construction costs will be available.

f. The grantee shall execute appropriate grant conditions or releases providing that the Federal Government is protected from any further claim by the grantee, the State, or any other party for any of the costs of construction due to the additional capacity.

g. Industrial cost recovery shall be based upon the portion of the Federal grant allocable to the treatment of industrial wastes.

h. The grantee must implement a user charge system which applies to the entire service area of the grantee, including any area served by the additional capacity.

Appendix B—Federal Guidelines—User Charges for Operation and Maintenance of Publicly Owned Treatment Works

(a) *Purpose.* To set forth advisory information concerning user charges based on actual use pursuant to section 204 of the Clean Water Act, hereinafter referred to as the Act. Applicable requirements are set forth in subpart E (40 CFR part 35).

(b) *Authority.* The authority for establishment of the user charge guidelines is contained in section 204(b)(2) of the Act.

(c) *Background.* Section 204(b)(1) of the Act provides that after March 1, 1973, Federal grant applicants shall be awarded grants only after the Regional Administrator has determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services will pay its proportionate share of the costs of operation and maintenance, including replacement. The intent of the Act with respect to user charges is to distribute the cost of operation and maintenance of publicly owned treatment works to the pollutant source and to promote self-sufficiency of treatment works with respect to operation and maintenance costs. The 1977 Amendments amended section 204(b) to allow grantees to establish user charge systems based on ad valorem taxes. This appendix does not apply to ad valorem user charge systems.

(d) *Definitions*—(1) *Replacement.* Expenditures for obtaining and installing equipment, accessories, or appurtenances which are necessary to maintain the capacity and performance during the service life of the

treatment works for which such works were designed and constructed. The term "operation and maintenance" includes replacement.

(2) *User charge.* A charge levied on users of treatment works for the cost of operation and maintenance of such works.

(e) *Classes of users.* At least two basic types of user charge systems are common. The first is to charge each user a share of the treatment works operation and maintenance costs based on his estimate of measured proportional contribution to the total treatment works loading. The second system establishes classes for users having similar flows and waste water characteristics; i.e., levels of biochemical oxygen demand, suspended solids, etc. Each class is then assigned its share of the waste treatment works operation and maintenance costs based on the proportional contribution of the class to the total treatment works loading. Either system is in compliance with these guidelines.

(f) *Criteria against which to determine the adequacy of user charges.* The user charge system shall be approved by the Regional Administrator and shall be maintained by the grantee in accordance with the following requirements:

(1) The user charge system must result in the distribution of the cost of operation and maintenance of treatment works within the grantee's jurisdiction to each user (or user class) in proportion to such user's contribution to the total wastewater loading of the treatment works. Factors such as strength, volume, and delivery flow rate characteristics shall be considered and included as the basis for the user's contribution to ensure a proportional distribution of operation and maintenance costs to each user (or user class).

(2) For the first year of operation, operation and maintenance costs shall be based upon past experience for existing treatment works or some other rational method that can be demonstrated to be applicable.

(3) The grantee shall review user charges annually and revise them periodically to reflect actual treatment works operation and maintenance costs.

(4) The user charge system must generate sufficient revenue to offset the cost of all treatment works operation and maintenance provided by the grantee.

(5) The user charge system must be incorporated in one or more municipal legislative enactments or other appropriate authority. If the project is a regional treatment works accepting wastewaters from treatment works owned by others, then the subscribers receiving waste treatment services from the grantee shall have adopted user charge systems in accordance with these guidelines. Such user charge systems shall also be incorporated in the appropriate municipal legislative enactments or other appropriate authority.

(g) *Model user charge systems.* The user charge system adopted by the applicant must result in the distribution of treatment works operation and maintenance costs to each user (or user class) in approximate proportion to his contribution to the total wastewater loading of the treatment works. The following user charge models can be used for this purpose; however, the applicant is not limited to their use. The symbols used in the models are as defined below:

C_T = Total operation and maintenance (O. & M.) costs per unit of time.
C_u = A user's charge for O. & M. per unit of time.
C_s = A surcharge for wastewaters of excessive strength.
V_c = O&M cost for transportation and treatment of a unit of wastewater volume.
V_u = Volume contribution from a user per unit of time.
V_T = Total volume contribution from all users per unit of time.
B_c = O&M cost for treatment of a unit of biochemical oxygen demand (BOD).
B_u = Total BOD contribution from a user per unit of time.
B_T = Total BOD contribution from all users per unit of time.
B = Concentration of BOD from a user above a base level.
S_c = O&M cost for treatment of a unit of suspended solids.
S_u = Total suspended solids contribution from a user per unit of time.
S = Concentration of SS from a user above a base level.
P_c = O&M cost for treatment of a unit of any pollutant.
P_u = Total contribution of any pollutant from a user per unit of time.
P_T = Total contribution of any pollutant from all users per unit of time.
P = Concentration of any pollutant from a user above a base level.

(1) *Model No. 1.* If the treatment works is primarily flow dependent or if the BOD, suspended solids, and other pollutant concentrations discharged by all users are approximately equal, then user charges can be developed on a volume basis in accordance with the model below:

$$C_u = C_T / V_T (V_u)$$

(2) *Model No. 2.*—When BOD, suspended solids, or other pollutant concentrations from a user exceed the range of concentration of these pollutants in normal domestic sewage, a surcharge added to a base charge, calculated by means of Model No. 1, can be levied. The surcharge can be computed by the model below:

40-138 O—90——18

$$C_u = [B_c(B) + S_c(S) + P_c(P)]V_u$$

(3) *Model No. 3.*—This model is commonly called the "quantity/quality formula":

$$C_u = V_cV_u + B_cB_u + S_cS_u + P_cP_u$$

(h) *Other considerations.*—(1) Quantity discounts to large volume users will not be acceptable. Savings resulting from economies of scale should be apportioned to all users or user classes.

(2) User charges may be established based on a percentage of the charge for water usage only in cases where the water charge is based on a constant cost per unit of consumption.

[39 FR 5270, Feb. 11, 1974]

APPENDIX C-1—REQUIRED PROVISIONS—CONSULTING ENGINEERING AGREEMENTS

1. General
2. Responsibility of the Engineer
3. Scope of Work
4. Changes
5. Termination
6. Remedies
7. Payment
8. Project Design
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13. Equal Employment Opportunity
14. Utilization of Small or Minority Business
15. Covenant Against Contingent Fees
16. Gratuities
17. Patents
18. Copyrights and Rights in Data

1. GENERAL

(a) The owner and the engineer agree that the following provisions apply to the EPA grant-eligible work to be performed under this agreement and that such provisions supersede any conflicting provisions of this agreement.

(b) The work under this agreement is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor the U.S. Environmental Protection Agency (hereinafter, "EPA") is a party to this agreement. This agreement which covers grant-eligible work is subject to regulations contained in 40 CFR 35.936, 35.937, and 35.939 in effect on the date of execution of this agreement. As used in these clauses, the words "the date of execution of this agreement" mean the date of execution of this agreement and any subsequent modification of the terms, compensation or scope of services pertinent to unperformed work.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or this agreement.

2. RESPONSIBILITY OF THE ENGINEER

(a) The engineer shall be responsible for the professional quality, technical accuracy, timely completion, and the coordination of all designs, drawings, specifications, reports, and other services furnished by the engineer under this agreement. The engineer shall, without additional compensation, correct or revise any errors, omissions, or other deficiencies in his designs, drawings, specifications, reports, and other services.

(b) The engineer shall perform such professional services as may be necessary to accomplish the work required to be performed under this agreement, in accordance with this agreement and applicable EPA requirements in effect on the date of execution of this agreement.

(c) The owner's or EPA's approval of drawings, designs, specifications, reports, and incidental engineering work or materials furnished hereunder shall not in any way relieve the engineer of responsibility for the technical adequacy of his work. Neither the owner's nor EPA's review, approval or acceptance of, nor payment for, any of the services shall be construed to operate as a waiver of any rights under this agreement or of any cause of action arising out of the performance of this agreement.

(d) The engineer shall be and shall remain liable, in accordance with applicable law, for all damages to the owner or EPA caused by the engineer's negligent performance of any of the services furnished under this agreement, except for errors, omissions or other deficiencies to the extent attributable to the owner, owner-furnished data or any third party. The engineer shall not be responsible for any time delays in the project caused by circumstances beyond the engineeer's control. Where innovative processes or techniques (see 40 CFR 35.908) are recommended by the engineer and are used, the engineer shall be liable only for gross negligence to the extent of such use.

3. SCOPE OF WORK

The services to be performed by the engineer shall include all services required to complete the task or Step in accordance with applicable EPA regulations (40 CFR part 35, subpart E in effect on the date of execution of this agreement) to the extent of the scope of work as defined and set out in the engineering services agreement to which these provisions are attached.

4. CHANGES

(a) The owner may, at any time, by written order, make changes within the general scope of this agreement in the services or work to be performed. If such changes cause an increase or decrease in the engineer's cost of, or time required for, performance of any services under this agreement, whether or not changed by any order, an equitable adjustment shall be made and this agreement shall be modified in writing accordingly. The engineer must assert any claim for adjustment under this clause in writing within 30 days from the date of receipt by the engineer of the notification of change, unless the owner grants a further period of time before the date of final payment under this agreement.

(b) No services for which an additional compensation will be charged by the engineer shall be furnished without the written authorization of the owner.

(c) In the event that there is a modification of EPA requirements relating to the services to be performed under this agreement after the date of execution of this agreement, the increased or decreased cost of performance of the services provided for in this agreement shall be reflected in an appropriate modification of this agreement.

5. TERMINATION

(a) Either party may terminate this agreement, in whole or in part, in writing, if the other party substantially fails to fulfill its obligations under this agreement through no fault of the terminating party. However, no such termination may be effected unless the other party is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate and (2) an opportunity for consultation with the terminating party before termination.

(b) The owner may terminate this agreement, in whole or in part, in writing, for its convenience, if the termination is for good cause (such as for legal or financial reasons, major changes in the work or program requirements, initiation of a new step) and the engineer is given (1) not less than ten (10) calendar days written notice (delivered by certified mail, return receipt requested) of intent to terminate, and (2) an opportunity for consultation with the terminating party before termination.

(c) If the owner terminates for default, an equitable adjustment in the price provided for in this agreement shall be made, but (1) no amount shall be allowed for anticipated profit on unperformed services or other work, and (2) any payment due to the engineer at the time of termination may be adjusted to the extent of any additional costs the owner incurs because of the engineer's default. If the engineer terminates for default or if the owner terminates for convenience, the equitable adjustment shall include a reasonable profit for services or other work performed. The equitable adjustment for any termination shall provide for payment to the engineer for services rendered and expenses incurred before the termination, in addition to termination settlement costs the engineer reasonably incurs relating to commitments which had become firm before the termination.

(d) Upon receipt of a termination action under paragraph (a) or (b) of this section 5., the engineer shall (1) promptly discontinue all services affected (unless the notice directs otherwise), and (2) deliver or otherwise make available to the owner all data, drawings, specifications, reports, estimates, summaries, and such other information and materials as the engineer may have accumulated in performing this agreement, whether completed or in process.

(e) Upon termination under paragraph (a) or (b) of this section 5., the owner may take over the work and prosecute the same to completion by agreement with another party or otherwise. Any work the owner takes over for completion will be completed at the owner's risk, and the owner will hold harmless the engineer from all claims and damages arising out of improper use of the engineer's work.

(f) If, after termination for failure of the engineer to fulfill contractual obligations, it is determined that the engineer had not so failed, the termination shall be deemed to have been effected for the convenience of the owner. In such event, adjustment of the price provided for in this agreement shall be made as paragraph (c) of this clause provides.

6. REMEDIES

Except as this agreement otherwise provides, all claims, counter-claims, disputes, and other matters in question between the owner and the engineer arising out of or relating to this agreement or the breach of it will be decided by arbitration if the parties hereto mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

7. PAYMENT

(a) Payment shall be made in accordance with the payment schedule incorporated in this agreement as soon as practicable upon submission of statements requesting payment by the engineer to the owner. If no such payment schedule is incorporated in this agreement, the payment provisions of paragraph (b) of this clause shall apply.

(b) The engineer may request monthly progress payments and the owner shall make them as soon as practicable upon sub-

mission of statements requesting payment by the engineer to the owner. When such progress payments are made, the owner may withhold up to ten (10) percent of the vouchered amount until satisfactory completion by the engineer of work and services within a step called for under this agreement. When the owner determines that the work under this agreement or any specified task hereunder is substantially complete and that the amount of retained percentages is in excess of the amount considered by him to be adequate for his protection, he shall release to the engineer such excess amount.

(c) No payment request made under paragraph (a) or (b) of this clause shall exceed the estimated amount and value of the work and services performed by the engineer under this agreement. The engineer shall prepare the estimates of work performed and shall supplement them with such supporting data as the owner may require.

(d) Upon satisfactory completion of the work performed under this agreement, as a condition precedent to final payment under this agreement or to settlement upon termination of the agreement, the engineer shall execute and deliver to the owner a release of all claims against the owner arising under or by virtue of this agreement, other than such claims, if any, as may be specifically exempted by the engineer from the operation of the release in stated amounts to be set forth therein.

8. PROJECT DESIGN

(a) In the performance of this agreement, the engineer shall, to the extent practicable, provide for maximum use of structures, machines, products, materials, construction methods, and equipment which are readily available through competitive procurement, or through standard or proven production techniques, methods, and processes, consistent with 40 CFR 35.936–3 and 35.936–13 in effect on the date of execution of this agreement, except to the extent to which innovative technology may be used under 40 CFR 35.908 in effect on the date of execution of this agreement.

(b) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which would require the use of structures, machines, products, materials, construction methods, equipment, or processes which the engineer knows to be available only from a sole source, unless the engineer has adequately justified the use of a sole source in writing.

(c) The engineer shall not, in the performance of the work under this agreement, produce a design or specification which would be restrictive in violation of section 204(a)(6) of the Clean Water Act. This statute requires that no specification for bids or statement of work shall be written in such a manner as to contain proprietary, exclusionary, or discriminatory requirements other than those based upon performance, unless such requirements are necessary to test or demonstrate a specific thing, or to provide for necessary interchangeability of parts and equipment, or at least two brand names or trade names of comparable quality or utility are listed and are followed by the words "or equal." With regard to materials, if a single material is specified, the engineer must be prepared to substantiate the basis for the selection of the material.

(d) The engineer shall report to the owner any sole-source or restrictive design or specification giving the reason or reasons why it is necessary to restrict the design or specification.

(e) The engineer shall not knowingly specify or approve the performance of work at a facility which is in violation of clean air or water standards and which is listed by the Director of the EPA Office of Federal Activities under 40 CFR part 15.

9. AUDIT; ACCESS TO RECORDS

(a) The engineer shall maintain books, records, documents, and other evidence directly pertinent to performance on EPA grant work under this agreement in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this agreement. The engineer shall also maintain the financial information and data used by the engineer in the preparation or support of the cost submission required under 40 CFR 35.937–6(b) in effect on the date of execution of this agreement and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, the owner, and [the State water pollution control agency] or any of their duly authorized representatives shall have access to such books, records, documents, and other evidence for inspection, audit, and copying. The engineer will provide proper facilities for such access and inspection.

(b) The engineer agrees to include paragraphs (a) through (e) of this clause in all his contracts and all tier subcontracts directly related to project performance that are in excess of $10,000.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The engineer agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a), provided that

the engineer is afforded the opportunity for an audit exit conference and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final audit report will include written comments of reasonable length, if any, of the engineer.

(e) The engineer shall maintain and make available records under paragraphs (a) and (b) of this clause during performance on EPA grant work under this agreement and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any "Dispute" appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until 3 years after the date of resolution of such appeal, litigation, claim, or exception.

10. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(This clause is applicable if the amount of this agreement exceeds $100,000.)

(a) If the owner or EPA determines that any price, including profit, negotiated in connection with this agreement or any cost reimbursable under this agreement was increased by any significant sums because the engineer or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700-41), then such price, cost, or profit shall be reduced accordingly and the agreement shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the remedies clause of this agreement.

(Note: Since the agreement is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the engineer may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the engineer. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.)

11. SUBCONTRACTS

(a) Any subcontractors and outside associates or consultants required by the engineer in connection with services under this agreement will be limited to such individuals or firms as were specifically identified and agreed to during negotiations, or as the owner specifically authorizes during the performance of this agreement. The owner must give prior approval for any substitutions in or additions to such subcontractors, associates, or consultants.

(b) The engineer may not subcontract services in excess of thirty (30) percent (or ——— percent, if the owner and the engineer hereby agree) of the contract price to subcontractors or consultants without the owner's prior written approval.

12. LABOR STANDARDS

To the extent that this agreement involves "construction" (as defined by the Secretary of Labor), the engineer agrees that such construction work shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a—276a-7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327-333);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (Equal Employment Opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or EPA. The engineer further agrees that this agreement shall include and be subject to the "Labor Standards Provisions for Federally Assisted Construction Contracts" (EPA form 5720-4) in effect at the time of execution of this agreement.

13. EQUAL EMPLOYMENT OPPORTUNITY

In accordance with EPA policy as expressed in 40 CFR 30.420-5, the engineer agrees that he will not discriminate against any employee or applicant for employment because of race, religion, color, sex, age, or national origin.

14. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936-7, the engineer agrees that qualified small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

15. COVENANT AGAINST CONTINGENT FEES

The engineer warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees. For breach or violation of this warranty the owner shall have the right to annul this agreement without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full

amount of such commission, percentage, brokerage, or contingent fee.

16. GRATUITIES

(a) If it is found, after notice and hearing, by the owner that the engineer, or any of the engineer's agents or representatives, offered or gave gratuities (in the form of entertainment, gifts, or otherwise), to any official, employee, or agent of the owner, of the State, or of EPA in an attempt to secure a contract or favorable treatment in awarding, amending, or making any determinations related to the performance of this agreement, the owner may, by written notice to the engineer, terminate the right of the engineer to proceed under this agreement. The owner may also pursue other rights and remedies that the law or this agreement provides. However, the existence of the facts upon which the owner bases such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this agreement.

(b) In the event this agreement is terminated as provided in paragraph (a) hereof, the owner shall be entitled: (1) To pursue the same remedies against the engineer as it could pursue in the event of a breach of the contract by the engineer, and (2) as a penalty, in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the costs the engineer incurs in providing any such gratuities to any such officer or employee.

17. PATENTS

If this agreement involves research, developmental, experimental, or demonstration work and any discovery or invention arises or is developed in the course of or under this agreement, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30, in effect on the date of execution of this agreement, including Appendix B of part 30. In such case, the engineer shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The engineer agrees that the disposition of rights to inventions made under this agreement shall be in accordance with the terms and conditions of Appendix B. The engineer shall include appropriate patent provisions to achieve the purpose of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

18. COPYRIGHTS AND RIGHTS IN DATA

(a) The engineer agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid f with EPA grant funds), technical report operating manuals, and other work submi ted with a step 1 facilities plan or with step 2 or step 3 grant application or whic are specified to be delivered under th agreement or which are developed or pr duced and paid for under this agreemen (referred to in this clause as "Subje Data") are subject to the rights in th United States, as set forth in subpart D o 40 CFR part 30 and in Appendix C to 4 CFR part 30, in effect on the date of execu tion of this agreement. These rights includ the right to use, duplicate, and disclose such subject data, in whole or in part, in an manner for any purpose whatsoever, and t have others do so. For purposes of this clause, "grantee" as used in Appendix C refers to the engineer. If the material i copyrightable, the engineer may copyright it, as Appendix C permits, subject to the rights in the Government in Appendix C but the owner and the Federal Government reserve a royalty-free, nonexclusive, and ir revocable license to reproduce, publish, and use such materials, in whole or in part, and to authorize others to do so. The engineer shall include appropriate provisions to achieve the purpose of this condition in all subcontracts expected to produce copyrightable subject data.

(b) All such subject data furnished by the engineer pursuant to this agreement are instruments of his services in respect of the project. It is understood that the engineer does not represent such subject data to be suitable for reuse on any other project or for any other purpose. If the owner reuses the subject data without the engineer's specific written verification or adaptation, such reuse will be at the risk of the owner, without liability to the engineer. Any such verification or adaptation will entitle the engineer to further compensation at rates agreed upon by the owner and the engineer.

APPENDIX C–2—REQUIRED PROVISIONS—CONSTRUCTION CONTRACTS

SUPPLEMENTAL GENERAL CONDITIONS

1. General
2. Changes
3. Differing Site Conditions
4. Suspension of Work
5. Termination for Default; Damages for Delay; Time Extensions
6. Termination for Convenience
7. Remedies
8. Labor Standards
9. Utilization of Small or Minority Business
10. Audit; Access to Records
11. Price Reduction for Defective Cost or Pricing Data

12. Covenant Against Contingent Fees
13. Gratuities
14. Patents
15. Copyrights and Rights in Data
16. Prohibition Against Listed Violating Facilities
17. Buy American

1. GENERAL

(a) The owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.

(b) This contract is funded in part by a grant from the U.S. Environmental Protection Agency. Neither the United States nor any of its departments, agencies or employees is a party to this contract. This contract is subject to regulations contained in 40 CFR 35.936, 35.938, and 35.939 in effect on the date of execution of this contract.

(c) The owner's rights and remedies provided in these clauses are in addition to any other rights and remedies provided by law or under this contract.

2. CHANGES

(a) The owner may, at any time, without notice to the sureties, by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract, including but not limited to changes—

(1) In the specifications (including drawings and designs);

(2) In the method or manner of performance of the work;

(3) In the owner-furnished facilities, equipment, materials, services, or site; or

(4) Directing acceleration in the performance of the work.

(b) Any other written order or an oral order (which terms as used in this paragraph (b) shall include direction, instruction, interpretation, or determination) from the owner, which causes any such change, shall be treated as a change order under this clause, if the contractor gives the owner written notice stating the date, circumstances, and source of the order and if the contractor regards the order as a change order.

(c) Except as provided in this clause, no order, statement, or conduct of the owner shall be treated as a change under this clause or shall entitle the contractor to an equitable adjustment.

(d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. However, except for claims based on defective specifications, no claim for any change under paragraph (b) of this section 2., shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as there required. Also, in the case of defective specifications for which the owner is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under paragraph (b) of this section 2., submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period. The statement of claim hereunder may be included in the notice under paragraph (b) of this section 2.

(f) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

3. DIFFERING SITE CONDITIONS

(a) The contractor shall promptly, and before such conditions are disturbed, notify the owner in writing of: (1) Subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The owner shall promptly investigate the conditions. If he finds that such conditions do materially differ and cause an increase or decrease in the contractor's cost of, or the time required for, performance of any part of the work under this contract, whether or not changed as a result of such conditions, an equitable adjustment shall be made and the contract modified in writing accordingly.

(b) No claim of the contractor under this clause shall be allowed unless the contractor has given the notice required in paragraph (a) of this clause, except that the owner may extend the prescribed time.

(c) No claim by the contractor for an equitable adjustment hereunder shall be allowed if asserted after final payment under this contract.

4. SUSPENSION OF WORK

(a) The owner may order the contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time

as he may determine to be appropriate for the convenience of the owner.

(b) If the performance of all or any part of the work is, for an unreasonable period of time, suspended, delayed, or interrupted by an act of the owner in administration of this contract, or by his failure to act within the time specfied in this contract (or if no time is specified, within a reasonable time), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption, and the contract modified in writing accordingly. However, no adjustment shall be made under this clause for any suspension, delay, or interruption to the extent (1) that performance would have been so suspended, delayed, or interrupted by any other cause, including the fault or negligence of the contractor or (2) for which an equitable adjustment is provided for or excluded under any other provision of this contract.

(c) No claim under this clause shall be allowed (1) for any costs incurred more than 20 days before the contractor shall have notified the owner in writing of the act or failure to act involved (but this requirement shall not apply as to a claim resulting from a suspension order), and (2) unless the claim, in an amount stated, is asserted in writing as soon as practicable after the termination of such suspension, delay, or interruption, but not later than the date of final payment under the contract.

5. TERMINATION FOR DEFAULT; DAMAGES FOR DELAY; TIME EXTENSIONS

(a) If the contractor refuses or fails to prosecute the work, or any separable part of the work, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the owner may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the owner may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and use in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the owner resulting from his refusal or failure to complete the work within the specified time.

(b) If the contract provides for liquidated damages, and if the owner terminates the contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs the owner incurs in completing the work.

(c) If the contract provides for liquidated damages and if the owner does not terminate the contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The contractor's right to proceed shall not be terminated nor the contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from causes other than normal weather beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the owner in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the owner, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from causes other than normal weather beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers; and

(2) The contractor, within 10 days from the beginning of any such delay (unless the owner grants a further period of time before the date of final payment under the contract), notifies the owner in writing of the causes of delay. The owner shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension. His findings of fact shall be final and conclusive on the parties, subject only to appeal as the remedies clause of this contract provides.

(e) If, after notice of termination of the contractor's right to proceed under the provisions of this clause, it is determined for any reason that the contractor was not in default under this clause, or that the delay was excusable under this clause, the rights and obligations of the parties shall be the same as if the notice of termination had been issued under the clause providing for termination for convenience of the owner.

(f) The rights and remedies of the owner provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

(g) As used in paragraph (d)(1) of this clause, the term "subcontractors or suppliers" means subcontractors or suppliers at any tier.

6. TERMINATION FOR CONVENIENCE

(a) The owner may terminate the performance of work under this contract in accordance with this clause in whole, or from time to time in part, whenever the owner shall determine that such termination is in

the best interest of the owner. Any such termination shall be effected by delivery to the contractor of a notice of termination specifying the extent to which performance of work under the contract is terminated, and the date upon which such termination becomes effective.

(b) After receipt of a notice of termination, and except as otherwise directed by the owner, the contractor shall:

(1) Stop work under the contract on the date and to the extent specified in the notice of termination;

(2) Place no further orders or subcontracts for materials, services, or facilities except as necessary to complete the portion of the work under the contract which is not terminated;

(3) Terminate all orders and subcontracts to the extent that they relate to the performance of work terminated by the notice of termination;

(4) Assign to the owner, in the manner, at the times, and to the extent directed by the owner, all of the right, title, and interest of the contractor under the orders and subcontracts so terminated. The owner shall have the right, in its discretion, to settle or pay any or all claims arising out of the termination of such orders and subcontracts;

(5) Settle all outstanding liabilities and all claims arising out of such termination of orders and subcontracts, with the approval or ratification of the owner to the extent he may require. His approval or ratification shall be final for all the purposes of this clause;

(6) Transfer title to the owner, and deliver in the manner, at the times, and to the extent, if any, directed by the owner, (i) the fabricated or unfabricated parts, work in process, completed work, supplies, and other material produced as a part of, or acquired in connection with the performance of, the work terminated by the notice of termination, and (ii) the completed or partially completed plans, drawings, information, and other property which, if the contract had been completed, would have been required to be furnished to the owner;

(7) Use his best efforts to sell, in the manner, at the times, to the extent, and at the price or prices that the owner directs or authorizes, any property of the types referred to in paragraph (b)(6) of this clause, but the contractor (i) shall not be required to extend credit to any purchaser, and (ii) may acquire any such property under the conditions prescribed and at a price or prices approved by the owner. The proceeds of any such transfer or disposition shall be applied in reduction of any payments to be made by the owner to the contractor under this contract or shall otherwise be credited to the price or cost of the work covered by this contract or paid in such other manner as the owner may direct;

(8) Complete performance of such part of the work as shall not have been terminated by the notice of termination; and

(9) Take such action as may be necessary, or as the owner may direct, for the protection and preservation of the property related to this contract which is in the possession of the contractor and in which the owner has or may acquire an interest.

(c) After receipt of a notice of termination, the contractor shall submit to the owner his termination claim, in the form and with the certification the owner prescribes. Such claim shall be submitted promptly but in no event later than 1 year from the effective date of termination, unless one or more extensions in writing are granted by the owner upon request of the contractor made in writing within such 1-year period or authorized extension. However, if the owner determines that the facts justify such action, he may receive and act upon any such termination claim at any time after such 1-year period or extension. If the contractor fails to submit his termination claim within the time allowed, the owner may determine, on the basis of information available to him, the amount, if any, due to the contractor because of the termination. The owner shall then pay to the contractor the amount so determined.

(d) Subject to the provisions of paragraph (c), the contractor and the owner may agree upon the whole or any part of the amount or amounts to be paid to the contractor because of the total or partial termination of work under this clause. The amount or amounts may include a reasonable allowance for profit on work done. However, such agreed amount or amounts, exclusive of settlement costs, shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. The contract shall be amended accordingly, and the contractor shall be paid the agreed amount. Nothing in paragraph (e) of this clause, prescribing the amount to be paid to the contractor in the event of failure of the contractor and the owner to agree upon the whole amount to be paid to the contractor because of the termination of work under this clause, shall be deemed to limit, restrict, or otherwise determine or affect the amount or amounts which may be agreed upon to be paid to the contractor pursuant to this paragraph (d).

(e) If the contractor and the owner fail to agree, as paragraph (d) of this section 6., provides, on the whole amount to be paid to the contractor because of the termination of work under this clause, the owner shall determine, on the basis of information available to him, the amount, if any, due to the contractor by reason of the termination and

shall pay to the contractor the amounts determined as follows:

(1) For all contract work performed before the effective date of the notice of termination, the total (without duplication of any items) of—

(i) The cost of such work;

(ii) The cost of settling and paying claims arising out of the termination of work under subcontracts or orders as paragraph (b)(5) of this clause provides. This cost is exclusive of the amounts paid or payable on account of supplies or materials delivered or services furnished by the subcontractor before the effective date of the notice of termination. These amounts shall be included in the cost on account of which payment is made under paragraph (1)(i) of this section 6.; and

(iii) A sum, as profit on paragraph (1)(i) of this section 6., that the owner determines to be fair and reasonable. But, if it appears that the contractor would have sustained a loss on the entire contract had it been completed, no profit shall be included or allowed under this paragraph (1) (iii) of this section 6., and an appropriate adjustment shall be made reducing the amount of the settlement to reflect the indicated rate of loss; and

(2) The reasonable cost of the preservation and protection of property incurred under paragraph (b)(9) of this clause; and any other reasonable cost incidental to termination of work under this contract, including expense incidental to the determination of the amount due to the contractor as the result of the termination of work under this contract. The total sum to be paid to the contractor under paragraph (e)(1) of this clause shall not exceed the total contract price as reduced by the amount of payments otherwise made and as further reduced by the contract price of work not terminated. Except for normal spoilage, and except to the extent that the owner shall have otherwise expressly assumed the risk of loss, there shall be excluded from the amounts payable to the contractor under paragraph (1) of this clause 6., the fair value, as determined by the owner of property which is destroyed, lost, stolen, or damaged, to the extent that it is undeliverable to the owner, or to a buyer under paragraph (b)(7) of this clause.

(f) The contractor shall have the right to dispute under the clause of this contract entitled "Remedies," from any determination the owner makes under paragraph (c) or (e) of this clause. But, if the contractor has failed to submit his claim within the time provided in paragraph (c) of this clause and has failed to request extension of such time, he shall have no such right of appeal. In any case where the owner has determined the amount due under paragraph (c) or (e) of this clause, the owner shall pay to the contractor the following: (1) If there is no right of appeal hereunder or if no timely appeal has been taken, the amount so determined by the owner or (2) if a "Remedies" proceeding is initiated, the amount finally determined in such "Remedies" proceeding.

(g) In arriving at the amount due the contractor under this clause there shall be deducted (1) all unliquidated advance or other payments on account theretofore made to the contractor, applicable to the terminated portion of this contract, (2) any claim which the owner may have against the contractor in connection with this contract, and (3) the agreed price for, or the proceeds of sale of, any materials, supplies, or other things kept by the contractor or sold, under the provisions of this clause, and not otherwise recovered by or credited to the owner.

(h) If the termination hereunder be partial, before the settlement of the terminated portion of this contract, the contractor may file with the owner a request in writing for an equitable adjustment of the price or prices specified in the contract relating to the continued portion of the contract (the portion not terminated by the notice of termination). Such equitable adjustment as may be agreed upon shall be made in the price or prices. Nothing contained herein shall limit the right of the owner and the contractor to agree upon the amount or amounts to be paid to the contractor for the completion of the continued portion of the contract when the contract does not contain an established contract price for the continued portion.

7. REMEDIES

Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the owner and the contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the owner is located.

8. LABOR STANDARDS

The contractor agrees that "construction" work (as defined by the Secretary of Labor) shall be subject to the following labor standards provisions, to the extent applicable:

(a) Davis-Bacon Act (40 U.S.C. 276a–276a–7);

(b) Contract Work Hours and Safety Standards Act (40 U.S.C. 327–33);

(c) Copeland Anti-Kickback Act (18 U.S.C. 874); and

(d) Executive Order 11246 (equal employment opportunity);

and implementing rules, regulations, and relevant orders of the Secretary of Labor or

EPA. The contractor further agrees that this contract shall include and be subject to the "Labor Standards Provisions for Federally assisted Construction Contracts" (EPA form 5720–4) in effect at the time of execution of this agreement.

9. UTILIZATION OF SMALL AND MINORITY BUSINESS

In accordance with EPA policy as expressed in 40 CFR 35.936–7, the contractor agrees that small business and minority business enterprises shall have the maximum practicable opportunity to participate in the performance of EPA grant-assisted contracts and subcontracts.

10. AUDIT; ACCESS TO RECORDS

(a) The contractor shall maintain books, records, documents and other evidence directly pertinent to performance on EPA grant work under this contract in accordance with generally accepted accounting principles and practices consistently applied, and 40 CFR 30.605, 30.805, and 35.935–7 in effect on the date of execution of this contract. The contractor shall also maintain the financial information and data used by the contractor in the preparation or support of the cost submission required under 40 CFR 35.938–5 in effect on the date of execution of this contract for any negotiated contract or change order and a copy of the cost summary submitted to the owner. The U.S. Environmental Protection Agency, the Comptroller General of the United States, the U.S. Department of Labor, owner, and [the State water pollution control agency] or any of their authorized representatives shall have access to such books, records, documents and other evidence for the purpose of inspection, audit and copying. The contractor will provide proper facilities for such access and inspection.

(b) If this contract is a formally advertised, competitively awarded, fixed price contract, the contractor agrees to make paragraphs (a) through (f) of this clause applicable to all negotiated change orders and contract amendments affecting the contract price. In the case of all other types of prime contracts, the contractor agrees to include paragraphs (a) through (f) of this clause in all his contracts in excess of $10,000 and all tier subcontracts in excess of $10,000 and to make paragraphs (a) through (f) of this clause applicable to all change orders directly related to project performance.

(c) Audits conducted under this provision shall be in accordance with generally accepted auditing standards and established procedures and guidelines of the reviewing or audit agency(ies).

(d) The contractor agrees to the disclosure of all information and reports resulting from access to records under paragraphs (a) and (b) of this clause, to any of the agencies referred to in paragraph (a) of this clause 10., provided that the contractor is afforded the opportunity for an audit exit conference, and an opportunity to comment and submit any supporting documentation on the pertinent portions of the draft audit report and that the final EPA audit report will include written comments of reasonable length, if any, of the contractor.

(e) Records under paragraphs (a) and (b) of this clause 10., shall be maintained and made available during performance on EPA grant work under this contract and until 3 years from the date of final EPA grant payment for the project. In addition, those records which relate to any "Dispute" appeal under an EPA grant agreement, to litigation, to the settlement of claims arising out of such performance, or to costs or items to which an audit exception has been taken, shall be maintained and made available until three years after the date of resolution of such appeal, litigation, claim or exception.

(f) The right of access which this clause confers will generally be exercised (with respect to financial records) under (1) negotiated prime contracts, (2) negotiated change orders or contract amendments in excess of $10,000 affecting the price of any formally advertised, competitively awarded, fixed price contract, and (3) subcontracts or purchase orders under any contract other than a formally advertised, competitively awarded, fixed price contract. However, this right of access will generally not be exercised with respect to a prime contract, subcontract, or purchase order awarded after effective price competition. In any event, such right of access may be exercised under any type of contract or subcontract (1) with respect to records pertaining directly to contract performance, excluding any financial records of the contractor, (2) if there is any indication that fraud, gross abuse, or corrupt practices may be involved or (3) if the contract is terminated for default or for convenience.

11. PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA

(This clause is applicable to (1) any negotiated prime contract in excess of $100,000; (2) negotiated contract amendments or change orders in excess of $100,000 affecting the price of a formally advertised, competitively awarded, fixed price contract; or (3) any subcontract or purchase order in excess of $100,000 under a prime contract other than a formally advertised, competitively awarded, fixed price contract. Change orders shall be determined to be in excess of $100,000 in accordance with 40 CFR 35.938–5(g). However, this clause is not applicable for contracts or subcontracts to the extent

that they are awarded on the basis of effective price competition.)

(a) If the owner or EPA determines that any price (including profit) negotiated in connection with this contract, or any cost reimbursable under this contract, was increased by any significant sums because the contractor, or any subcontractor furnished incomplete or inaccurate cost or pricing data or data not current as certified in his certification of current cost or pricing data (EPA form 5700–41), then such price or cost or profit shall be reduced accordingly and the contract shall be modified in writing to reflect such reduction.

(b) Failure to agree on a reduction shall be subject to the Remedies clause of this contract.

(*Note: Since the contract is subject to reduction under this clause by reason of defective cost or pricing data submitted in connection with certain subcontracts, the contractor may wish to include a clause in each such subcontract requiring the subcontractor to appropriately indemnify the contractor. It is also expected that any subcontractor subject to such indemnification will generally require substantially similar indemnification for defective cost or pricing data required to be submitted by his lower tier subcontractors.*)

12. COVENANT AGAINST CONTINGENT FEES

The contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business. For breach or violation of this warranty the owner shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

13. GRATUITIES

(a) If the owner finds, after notice and hearing, that the contractor or any of the contractor's agents or representatives offered or gave gratuities (in the form of entertainment, gifts, or otherwise) to any official, employee or agent of the owner, of the State, or of EPA in an attempt to secure a contract or favorable treatment in the awarding, amending, or making any determinations related to the performance of this contract, the owner may, by written notice to the contractor, terminate the right of the contractor to proceed under this contract. The owner may also pursue other rights and remedies that the law or this contract provides. However, the existence of the facts upon which the owner makes such findings shall be in issue and may be reviewed in proceedings under the remedies clause of this contract.

(b) In the event this contract is terminated as provided in paragraph (a) of this clause, the owner shall be entitled (1) to pursue the same remedies against the contractor as it could pursue in the event of a breach of the contract by the contractor, and (2) as a penalty in addition to any other damages to which it may be entitled by law, to exemplary damages in an amount (as determined by the owner) which shall be not less than 3 nor more than 10 times the cost the contractor incurs in providing any such gratuities to any such officer or employee.

14. PATENTS

If this contract involves research, developmental, experimental, or demonstration work, and any discovery or invention arises or is developed in the course of or under this contract, such invention or discovery shall be subject to the reporting and rights provisions of subpart D of 40 CFR part 30 in effect on the date of execution of this contract, including Appendix B of part 30. In such case, the contractor shall report the discovery or invention to EPA directly or through the owner, and shall otherwise comply with the owner's responsibilities in accordance with subpart D of 40 CFR part 30. The contractor agrees that the disposition of rights to inventions made under this contract shall be in accordance with the terms and conditions of Appendix B. The contractor shall include appropriate patent provisions to achieve the intent of this condition in all subcontracts involving research, developmental, experimental, or demonstration work.

15. COPYRIGHTS AND RIGHTS IN DATA

The contractor agrees that any plans, drawings, designs, specifications, computer programs (which are substantially paid for with EPA grant funds), technical reports, operating manuals, and other work submitted with a proposal or grant application or which are specified to be delivered under this contract or which are developed or produced and paid for under this contract (referred to in this clause as "Subject Data") are subject to the rights in the United States, as set forth in subpart D of 40 CFR part 30 and in Appendix C to 40 CFR part 30, in effect on the date of execution of this contract. These rights include the right to use, duplicate and disclose such Subject Data, in whole or in part, in any manner for any purpose whatsoever, and to have others do so. For purposes of this clause, "grantee" as used in Appendix C refers to the contra

tor. If the material is copyrightable, the contractor may copyright it, as Appendix C permits, subject to the rights in the Government as set forth in Appendix C, but the owner and the Federal Government reserve a royalty-free, nonexclusive, and irrevocable license to reproduce, publish and use such materials, in whole or in part, and to authorize others to do so. The contractor shall include provisions appropriate to achieve the intent of this condition in all subcontracts expected to produce copyrightable Subject Data.

16. PROHIBITION AGAINST LISTED VIOLATING FACILITIES

(*Applicable only to a contract in excess of $100,000 and when otherwise applicable under 40 CFR part 15.*)

(a) The contractor agrees as follows:

(1) To comply with all the requirements of section 114 of the Clean Air Act, as amended (42 U.S.C. 1857, *et seq.*, as amended by Pub. L. 92-604) and section 308 of the Clean Water Act (33 U.S.C. 1251, as amended), respectively, which relate to inspection, monitoring, entry, reports, and information, as well as other requirements specified in section 114 and section 308 of the Air Act and the Water Act, respectively, and all regulations and guidelines issued thereunder before the award of this contract.

(2) That no portion of the work required by this prime contract will be performed in a facility listed on the Environmental Protection Agency list of violating facilities on the date when this contract was awarded unless and until the EPA eliminates the name of such facility or facilities from the listing.

(3) To use his best efforts to comply with clean air and clean water standards at the facilities in which the contract is being performed.

(4) To insert the substance of the provisions of this clause, including this paragraph (4), in any nonexempt subcontract.

(b) The terms used in this clause have the following meanings:

(1) The term *Air Act* means the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(2) The term *Water Act* means the Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*).

(3) The term *Clean Air Standards* means any enforceable rules, regulations, guidelines, standards, limitations, orders, controls, prohibitions, or other requirements which are contained in, issued under, or otherwise adopted under the Air Act or Executive Order 11738, an applicable implementation plan as described in section 110(d) of the Air Act (42 U.S.C. 1857c-5(d)), an approved implementation procedure or plan under section 111(c) or section 111(d), or an approved implementation procedure under section 112(d) of the Air Act (42 U.S.C. 1857c-7(d)).

(4) The term *Clean Water Standards* means any enforceable limitation, control, condition, prohibition, standard, or other requirement which is promulgated under the Water Act or contained in a permit issued to a discharger by the Environmental Protection Agency or by a State under an approved program, as authorized by section 402 of the Water Act (33 U.S.C. 1342), or by a local government to ensure compliance with pretreatment regulations as required by section 307 of the Water Act (33 U.S.C. 1317).

(5) The term *Compliance* means compliance with clean air or water standards. Compliance shall also mean compliance with a schedule or plan ordered or approved by a court of competent jurisdiction, the Envrionmental Protection Agency or an Air or Water Pollution Control Agency in accordance with the requirements of the Air Act or Water Act and regulations.

(6) The term *Facility* means any building, plant, installation, structure, mine, vessel, or other floating craft, location, or site of operations, owned, leased, or supervised by a contractor or subcontractor, to be used in the performance of a contract or subcontract. Where a location or site of operations contains or includes more than one building, plant, installation, or structure, the entire location or site shall be deemed to be a facility except where the Director, Office of Federal Activities, Environmental Protection Agency, determines that independent facilities are located in one geographical area.

17. BUY AMERICAN

In accordance with section 215 of the Clean Water Act, and implementing EPA regulations and guidelines, the contractor agrees that preference will be given to domestic construction material by the contractor, subcontractors, materialmen, and suppliers in the performance of this contract.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

APPENDIX D—EPA TRANSITION POLICY—EXISTING CONSULTING ENGINEERING AGREEMENTS

A. ACCESS TO RECORDS—AUDIT

1. *Access clause.* After June 30, 1975, a construction grant for Steps 1, 2 or 3 will not be awarded nor will initiation of Step 1 work be approved under 40 CFR 35.917(e) or 35.925-18(a)(3), unless an acceptable records and access clause is included in the consulting engineering subagreement. The clause

contained in Appendix C-1 shall be used on or after March 1, 1976. The clause required by former PG-53 or approved as an alternate thereto may be used for all contracts under grants awarded before March 1, 1976.

2. *EPA exercise of right of access to records.* Under applicable statutory and regulatory provisions, EPA has a broad right of access to grantees' consulting engineers' records pertinent to performance of EPA project work. The extent to which EPA will exercise this right of access will depend upon the nature of the records and upon the type of agreement.

a. In order to determine where EPA shall exercise its right of access, engineers' project-related records have been divided into three categories:

(1) *Category A:* Records that pertain directly to the professional, technical and other services performed, excluding any type of financial records of the consulting engineer.

(2) *Category B:* Financial records of the consulting engineer pertaining to the direct costs of professional, technical and other services performed, excluding financial records pertaining to profit and overhead or other indirect costs.

(3) *Category C:* Financial records of the consulting engineer excluded from category B.

b. In all cases, EPA will exercise its right of access to Category A records. Also, where there is an indication that fraud, gross abuse, or corrupt practices may be involved, EPA will exercise its right of access to records in all categories. Otherwise, access to consulting engineers' financial records (categories B and C) will depend principally upon the method(s) of compensation stipulated in the agreement:

(1) *Agreements based upon a percentage of construction cost.* Category B and C records will not be audited. However, terms of the agreement, including the total amount of compensation, will be evaluated for fairness, reasonableness, and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties relied on or used in negotiation of the agreement. Such evaluation shall also consider comparable contracts for which EPA grants have been awarded.

(2) *Agreements based upon salary cost times a multiplier including profit.* Category B records will be audited. Category C records will not be audited. However, terms of the agreement, including the total amount of compensation and the multiplier, will be evaluated for fairness and reasonableness and consistency with historical and advisory guidelines in general use and acceptable locally. These guidelines include those in ASCE manual 45 or other analyses or data which the contracting parties rel on or used in negotiation of the agreeme Such evaluation shall also consider comp rable contracts for which EPA grants ha been awarded. Items of overhead or oth indirect costs will only be audited to th extent necessary to assure that types costs found both in overhead and reimbu able direct costs, if any, are prope charged.

(3) *Per diem agreements.* Category records will be audited. Category C record will not be audited. Audit will be performe to the extent necessary to determine th hours claimed and classes of personnel use were properly supported. The per die rates will be evaluated according to the a propriate portions of paragraphs A.2.b. (1 and (2) of this appendix.

(4) *Cost plus a fixed fee (profit).* All dire costs, overhead, and other indirect cos claimed will be audited to determine th they are reasonable, allowable, and proper supported by the consulting engineer records. The amount of fixed fee will not b questioned unless the total compensatio appears unreasonable when evaluated a cording to paragraphs A.2.b. (1) and (2) this appendix.

(5) *Fixed price lump sum contracts.* Ca gory B and C records will not be audite The contract amount will not be questione unless the total compensation appears u reasonable when evaluated in accordan with appropriate portions of paragraph A.2.b. (1) and (2) of this appendix.

c. If an agreement covers both grant-eli ble and ineligible work, access to record will be exercised to the extent necessary t allocate contract work or costs betwee work grant-eligible for title II construction grant assistance and ineligible work or cost

d. Under agreements that use two or mor methods of compensation, each part of th agreement will be separately audited accord ing to the appropriate paragraph of para graph (b)(2) of this section.

e. Any audited firm and the grantee wi be afforded opportunity for an audit exi conference and an opportunity to receiv and comment upon the pertinent portion of each draft audit report. The final audi report will include the written comments, i any, of the audited parties in addition t those of the appropriate State and/or Fed eral agency(ies).

B. TYPE OF CONTRACT

1. The percentage-of-construction-cos type of contract, and the multiplier con tract, where the multiplier includes profit may not be used for step 1 or step 2 work initiated after June 30, 1975, when the step 1 or step 2 grant is awarded after June 30, 1975. (A multiplier type of compensation

may be used only under acceptable types of contracts; see 40 CFR 35.937-1(d).)

2. Step 1 and step 2 work performed under the percentage-of-construction-cost type of contract and the multiplier contract, where the multiplier includes profit, will be reimbursed and such contracts will not be questioned where such costs are reimbursed in conjunction with a step 3 grant award within the scope of step 2 work contracted for prior to July 1, 1975. However, the current step 2 work will not be continued indefinitely for multiple, subsequent step 3 projects in order to avoid modifying the consultant agreement.

3. Where step 2 work is initiated after June 30, 1975, under contracts prohibited by paragraphs B.1. and B.2. of this appendix, EPA approval may not be given nor grant assistance awarded until the contract's terms of compensation have been renegotiated.

4. Establishing an "upset" figure (an upper limit which cannot be exceeded without a formal amendment to the agreement) under a multiplier contract, where the multiplier includes profit, is not acceptable where renegotiation of such contracts is required. In such renegotiation, the amount of profit must be specifically identified.

5. Total allowable contract costs for grant payment for a contract based on a percentage-of-construction-cost will be based on the following:

a. Where work for the design step is essentially continuous from start of design to bidding, and bid opening for step 3 construction occurs within 1 year after substantial completion of step 2 design work, the total allowable contract costs for grant payment may not exceed an amount based upon the low, responsive, responsible bid for construction.

b. Where work for the design step is not essentially continuous from start of design to bidding, or 1 year or more elapses between substantial completion of step 2 design work and bid opening for step 3 construction, the total allowable contract costs for grant payment may not exceed an amount based upon the lower of:

(1) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus an escalation of this construction cost estimate of up to 5 percent, but not to exceed the consulting engineer's total compensation based on the low, responsive, responsible bid for construction, or

(2) The consulting engineer's construction cost estimate provided at the time of such substantial completion plus a consulting engineer's compensation esclation not to exceed $50,000, but not to exceed the consulting engineer's total compensation based upon the low, responsive, responsible bid for construction.

c. Where the low, responsive, responsible bid for construction would have resulted in a higher consulting engineer's total compensation than paragraph b. of this clause, provides, the Regional Administrator may also consider a reasonable additional compensation for updating the plans and specifications, revising cost estimates, or similar services.

d. The limitations of paragraph B5 apply to all grants awarded under subpart E except that—

(1) If the Regional Administrator had made final payment on a project before December 17, 1975, the limitations do not apply; and

(2) For other projects on which construction for the building and erection of a treatment works was initiated prior to December 17, 1975, the limitations do not apply to any request for engineering fee increases attributable to construction contract awards or change orders approved by the grantee prior to December 17, 1975.

6. Where renegotiation is required under this Appendix D, such renegotiation is subject to 40 CFR 35.937-1, 35.937-6, 35.937-7, 35.937-9, and 35.937-10.

C. ANNOUNCEMENT AND SELECTION

The requirements of 40 CFR 35.937-2 through 35.937-4 shall not apply to step 1 work where the step 1 grant was awarded or the initiation of step 1 work was approved by EPA (under 40 CFR 35.917(e)) before March 1, 1976, nor to subsequent step 2 and step 3 work in accordance with 40 CFR 35.937-2(d), if the grantee is satisfied with the qualifications and performance of the engineer employed.

D. REQUIRED CONSULTING ENGINEERING PROVISIONS

Effective March 1, 1976, the subagreement clauses required under Appendix C-1 must be included in the consulting engineering subagreement before grant assistance for step 1, 2 or 3 will be awarded and before initiation of step 1 work will be approved under 40 CFR 35.917(e) or 35.925-18(a) 3.

E. ENFORCEMENT

1. Refusal by a consulting engineer to insert the required access clause, or to allow access to its records, or to renegotiate a consulting engineering contract according to the foregoing requirements, will render costs incurred under such contract unallowable. Accordingly, all such costs will be questioned and disallowed pending compliance with this appendix.

2. Where the Regional Administrator determines that the time required to comply with the access to records and type of contract provisions of this appendix will unduly

delay award of grant assistance, he may award the grant assistance conditioned upon compliance with this appendix within a specified period of time. In such event, no grant payments for the affected engineering work may be made until such compliance has been obtained.

APPENDIX E—INNOVATIVE AND ALTERNATIVE TECHNOLOGY GUIDELINES

1. *Purpose.* These guidelines provide the criteria for identifying and evaluating innovative and alternative waste water treatment processes and techniques. The Administrator may publish additional information.

2. *Authority.* These guidelines are provided under section 304(d)(3) of the Clean Water Act.

3. *Applicability.* These guidelines apply to:

a. The analysis of innovative and alternative treatment processes and techniques under § 35.917-1(d)(8);

b. Increased grants for eligible treatment works under §§ 35.930-5 (b) and (c) and 35.908(b)(1);

c. The funding available for innovative and alternative processes and techniques under § 35.915-1(b);

d. The funding available for alternatives to conventional treatment works for small communities under § 35.915-1(e);

e. The cost-effectiveness preference given innovative and alternative processes and techniques in section 7 of Appendix A to this subpart;

f. The treatment works that may be given higher priority on State project priority lists under § 35.915(a)(1)(iii);

g. Alternative and innovative treatment systems in connection with Federal facilities;

h. Individual systems authorized by § 35.918, as modified in that section to include unconventional or innovative sewers;

i. The access and reports conditions in § 35.935-20.

4. *Alternative processes and techniques.* Alternative waste water treatment processes and techniques are proven methods which provide for the reclaiming and reuse of water, productively recycle waste water constituents or otherwise eliminate the discharge of pollutants, or recover energy.

a. In the case of processes and techniques for the treatment of effluents, these include land treatment, aquifer recharge, aquaculture, silviculture, and direct reuse for industrial and other nonpotable purposes, horticulture and revegetation of disturbed land. Total containment ponds and ponds for the treatment and storage of waste water prior to land application and other processes necessary to provide minimum levels of preapplication treatment are considered to be part of alternative technology systems for the purpose of this section.

b. For sludges, these include land application for horticultural, silvicultural, or agricultural purposes (including supplemental processing by means such as composting or drying), and revegetation of disturbed lands.

c. Energy recovery facilities include codisposal measures for sludge and refuse which produce energy; anaerobic digestion facilities (*Provided,* That more than 90 percent of the methane gas is recovered and used as fuel); and equipment which provides for the use of digester gas within the treatment works. Self-sustaining incineration may also be included provided that the energy recovered and productively used is greater than the energy consumed to dewater the sludge to an autogenous state.

d. Also included are individual and other onsite treatment systems with subsurface or other means of effluent disposal and facilities constructed for the specific purpose of septage treatment.

e. The term "alternative" as used in these guidelines includes the terms "unconventional" and "alternative to conventional" as used in the Act.

f. The term "alternative" does not include collector sewers, interceptors, storm or sanitary sewers or the separation thereof; or major sewer rehabilitation, except insofar as they are alternatives to conventional treatment works for small communities under § 35.915-1(e) or part of individual systems under § 35.918.

5. *Innovative processes and techniques.* Innovative waste water treatment processes and techniques are developed methods which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of meeting the national goals of cost reduction, increased energy conservation or recovery, greater recycling and conservation of water resources (including preventing the mixing of pollutants with water), reclamation or reuse of effluents and resources (including increased productivity of arid lands), improved efficiency and/or reliability, the beneficial use of sludges or effluent constituents, better management of toxic materials or increased environmental benefits. For the purpose of these guidelines, innovative waste water treatment processes and techniques are generally limited to new and improved applications of those alternative processes and techniques identified in accordance with paragraph 4 of these guidelines, including both treatment at centralized facilities and individual and other onsite treatment. Treatment processes based on the conventional concept of treatment (by means of biological or physical-chemical unit processes) and discharge to

surface waters shall not be considered innovative waste water treatment processes and techniques except where it is demonstrated that these processes and techniques, as a minimum, meet either the cost-reduction or energy-reduction criterion described in section 6 of these guidelines. Treatment and discharge systems include primary treatment, suspended-growth or fixed-growth biological systems for secondary or advance waste water treatment, physical/chemical treatment, disinfection, and sludge processing. The term "innovative" does not include collector sewers, interceptors, storm or sanitary sewers or the separation of them, or major sewer rehabilitation, except insofar as they meet the criteria in paragraph 6 of these guidelines and are alternatives to conventional treatment works for small communities under § 35.915–1(e) or part of individual systems under § 35.918.

6. *Criteria for determining innovative processes and techniques.* a. The Regional Administrator will use the following criteria in determining whether a waste water treatment process or technique is innovative. The criteria should be read in the context of paragraph 5. These criteria do not necessarily preclude a determination by the Regional Administrator that a treatment system is innovative because of local variations in geographic or climatic conditions which affect treatment plant design and operation or because it achieves significant public benefits through the advancement of technology which would otherwise not be possible. The Regional Administrator should consult with EPA headquarters about determinations made in other EPA regions on similar processes and techniques.

b. New or improved applications of alternative waste water treatment processes and techniques may be innovative for the purposes of this regulation if they meet one or more of the criteria in paragraphs e(1) through e(6) of this paragraph. Treatment and discharge systems (i.e., systems which are not new or improved applications of alternative waste water treatment processes and techniques in accordance with paragraph 4 of these guidelines) must meet the criteria of either paragraph 6e(1) or 6e(2), as a minimum, in order to be innovative for the purposes of these guidelines.

c. These six criteria are essentially the same as those used to evaluate any project proposed for grant assistance. The principal difference is that some newly developed processes and techniques may have the potential to provide significant advancements in the state of the art with respect to one or more of these criteria. Inherent in the concept of advancement of technology is a degree of risk which is necessary to initially demonstrate a method on a full, operational scale under the circumstances of its contemplated use. This risk, while recognized to be a necessary element in the implementation of innovative technology, must be minimized by limiting the projects funded to those which have been fully developed and shown to be feasible through operation on a smaller scale. The risk must also be commensurate with the potential benefits (i.e., greater potential benefits must be possible in the case of innovative technology projects where greater risk is involved).

d. Increased Federal funding under § 35.908(b) may be made only from the reserve in § 35.915–1(b). The Regional Administrator may fund a number of projects using the same type of innovative technology if he desires to encourage certain innovative processes and techniques because the potential benefits are great in comparison to the risks, or if operation under differing conditions of climatic, geology, etc., is desirable to demonstrate the technology.

e. The Regional Administrator will use the following criteria to determine whether waste water treatment processes and techniques are innovative:

(1) The life cycle cost of the eligible portion of the treatment works excluding conventional sewer lines is at least 15 percent less than that for the most cost-effective alternative which does not incorporate innovative waste water treatment processes and techniques (i.e., is no more than 85 percent of the life cycle cost of the most cost-effective noninnovative alternative).

(2) The net primary energy requirements for the operation of the eligible portion of the treatment works excluding conventional sewer lines are at least 20 percent less than the net energy requirements of the least net energy alternative which does not incorporate innovative waste water treatment processes and techniques (i.e., the net energy requirements are no more than 80 percent of those for the least net energy noninnovative alternative). The least net energy noninnovative alternative must be one of the alternatives selected for analysis under section 5 of Appendix A.

(3) The operational reliability of the treatment works is improved in terms of decreased susceptibility to upsets or interference, reduced occurrence of inadequately treated discharges and decreased levels of operator attention and skills required.

(4) The treatment works provides for better management of toxic materials which would otherwise result in greater environmental hazards.

(5) The treatment works results in increased environmental benefits such as water conservation, more effective land use, improved air quality, improved ground water quality, and reduced resource requirements for the construction and operation of the works.

(6) The treatment works provide for new or improved methods of joint treatment and management of municipal and industrial wastes that are discharged into municipal systems.

[43 FR 44049, Sept. 27, 1978, as amended at 44 FR 37596, June 27, 1979; 44 FR 39340, July 5, 1979]

Subparts F–G—[Reserved]

Subpart H—Cooperative Agreements for Protecting and Restoring Publicly Owned Freshwater Lakes

AUTHORITY: Sections 314, 501 and 518, Clean Water Act (86 Stat. 816, 33 U.S.C. 1251 *et seq.*).

SOURCE: 45 FR 7792, Feb. 5, 1980, unless otherwise noted.

§ 35.1600 Purpose.

This subpart supplements the EPA general grant regulations and procedures (part 31 of this chapter) and establishes policies and procedures for cooperative agreements to assist States and Indian Tribes treated as States in carrying out approved methods and procedures for restoration (including protection against degradation) of publicly owned freshwater lakes.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1603 Summary of clean lakes assistance program.

(a) Under section 314 of the Clean Water Act, EPA may provide financial assistance to States to implement methods and procedures to protect and restore publicly owned freshwater lakes. Although cooperative agreements may be awarded only to States, these regulations allow States, through substate agreements, to delegate some or all of the required work to substate agencies.

(b) Only projects that deal with publicly owned freshwater lakes are eligible for assistance. The State must have assigned a priority to restore the lake, and the State must certify that the lake project is consistent with the State Water Quality Management Plan (§ 35.1521) developed under the State/EPA Agreement. The State/EPA Agreement is a mechanism for EPA Regional Administrators and States to coordinate a variety of programs under the Clean Water Act, the Resource Conservation and Recovery Act, the Safe Drinking Water Act and other laws administered by EPA.

(c) These regulations provide for Phase 1 and 2 cooperative agreements. The purpose of a Phase 1 cooperative agreement is to allow a State to conduct a diagnostic-feasibility study to determine a lake's quality, evaluate possible solutions to existing pollution problems, and recommend a feasible program to restore or preserve the quality of the lake. A Phase 2 cooperative agreement is to be used for implementing recommended methods and procedures for controlling pollution entering the lake and restoring the lake. EPA award of Phase 1 assistance does not obligate EPA to award Phase 2 assistance for that project. Additionally, a Phase 1 award is not a prerequisite for receiving a Phase 2 award. However, a Phase 2 application for a proposed project that was not evaluated under a Phase 1 project shall contain the information required by Appendix A.

(d) EPA will evaluate all applications in accordance with the application review criteria of § 35.1640–1. The review criteria include technical feasibility, public benefit, reasonableness of proposed costs, environmental impact, and the State's priority ranking of the lake project.

(e) Before awarding funding assistance, the Regional Administrator shall determine that pollution control measures in the lake watershed authorized by section 201, included in an approved 208 plan, or required by section 402 of the Act are completed or are being implemented according to a schedule that is included in an approved plan or discharge permit. Clean lakes funds may not be used to control the discharge of pollutants from a point source where the cause of pollution can be alleviated through a municipal or industrial permit under section 402 of the Act or through the planning and construction of wastewater treatment facilities under section 201 of the Act.

§ 35.1605 Definitions.

The terms used in this subpart have the meanings defined in sections 502 and 518(h) of the Act. In addition, the following terms shall have the meaning set forth below.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1605–1 The Act.

The Clean Water Act, as amended (33 U.S.C. 1251 *et seq.*).

§ 35.1605–2 Freshwater lake.

Any inland pond, reservoir, impoundment, or other similar body of water that has recreational value, that exhibits no oceanic and tidal influences, and that has a total dissolved solids concentration of less than 1 percent.

§ 35.1605–3 Publicly owned freshwater lake.

A freshwater lake that offers public access to the lake through publicly owned contiguous land so that any person has the same opportunity to enjoy nonconsumptive privileges and benefits of the lake as any other person. If user fees are charged for public use and access through State or substate operated facilities, the fees must be used for maintaining the public access and recreational facilities of this lake or other publicly owned freshwater lakes in the State, or for improving the quality of these lakes.

§ 35.1605–4 Nonpoint source.

Pollution sources which generally are not controlled by establishing effluent limitations under sections 301, 302, and 402 of the Act. Nonpoint source pollutants are not traceable to a discrete identifiable origin, but generally result from land runoff, precipitation, drainage, or seepage.

§ 35.1605–5 Eutrophic lake.

A lake that exhibits any of the following characteristics: (a) Excessive biomass accumulations of primary producers; (b) rapid organic and/or inorganic sedimentation and shallowing; or (c) seasonal and/or diurnal dissolved oxygen deficiencies that may cause obnoxious odors, fish kills, or a shift in the composition of aquatic fauna to less desirable forms.

§ 35.1605–6 Trophic condition.

A relative description of a lake's biological productivity based on the availability of plant nutrients. The range of trophic conditions is characterized by the terms of oligotrophic for the least biologically productive, to eutrophic for the most biologically productive.

§ 35.1605–7 Desalinization.

Any mechanical procedure or process where some or all of the salt is removed from lake water and the freshwater portion is returned to the lake.

§ 35.1605–8 Diagnostic-feasibility study.

A two-part study to determine a lake's current condition and to develop possible methods for lake restoration and protection.

(a) The diagnostic portion of the study includes gathering information and data to determine the limnological, morphological, demographic, socio-economic, and other pertinent characteristics of the lake and its watershed. This information will provide recipients an understanding of the quality of the lake, specifying the location and loading characteristics of significant sources polluting the lake.

(b) The feasibility portion of the study includes: (1) Analyzing the diagnostic information to define methods and procedures for controlling the sources of pollution; (2) determining the most energy and cost efficient procedures to improve the quality of the lake for maximum public benefit; (3) developing a technical plan and milestone schedule for implementing pollution control measures and in-lake restoration procedures; and (4) if necessary, conducting pilot scale evaluations.

§ 35.1605–9 Indian Tribe treated as a State.

A Tribe meeting the requirements set forth for treatment as a State in accordance with 40 CFR 130.6(d) and 130.15.

[54 FR 14359, Apr. 11, 1989]

§ 35.1610 Eligibility.

EPA shall award cooperative agreements for restoring publicly owned freshwater lakes only to the State agency designated by the State's Chief Executive. The award will be for projects which meet the requirements of this subchapter.

§ 35.1613 Distribution of funds.

(a) For each fiscal year EPA will notify each Regional Administrator of the amount of funds targeted for each Region through annual clean lakes program guidance. To assure an equitable distribution of funds the targeted amounts will be based on the clean lakes program which States identify in their State WQM work programs.

(b) EPA may set aside up to twenty percent of the annual appropriations for Phase 1 projects.

§ 35.1615 Substate agreements.

States may make financial assistance available to substate agencies by means of a written interagency agreement transferring project funds from the State to those agencies. The agreement shall be developed, administered and approved in accordance with the provisions of 40 CFR 33.240 (Intergovernmental agreements). A State may enter into an agreement with a substate agency to perform all or a portion of the work under a clean lakes cooperative agreement. Recipients shall submit copies of all interagency agreements to the Regional Administrator. If the sum involved exceeds $100,000, the agreement shall be approved by the Regional Administrator before funds are released by the State to the substate agency. The agreement shall incorporate by reference the provisions of this subchapter. The agreement shall specify outputs, milestone schedule, and the budget required to perform the associated work in the same manner as the cooperative agreement between the State and EPA.

§ 35.1620 Application requirements.

(a) EPA will process applications in accordance with subpart B of part 30 of this subchapter. Applicants for assistance under the clean lakes program shall submit EPA form 5700-33 (original with signature and two copies) to the appropriate EPA Regional Office (see 40 CFR 30.130).

(b) Before applying for assistance, applicants should contact the appropriate Regional Administrator to determine EPA's current funding capability.

§ 35.1620-1 Types of assistance.

EPA will provide assistance in two phases in the clean lakes program.

(a) *Phase 1—Diagnostic-feasibility studies.* Phase 1 awards of up to $100,000 per award (requiring a 30 percent non-Federal share) are available to support diagnostic-feasibility studies (see Appendix A).

(b) *Phase 2—Implementation.* Phase 2 awards (requiring a 50 percent non-Federal share) are available to support the implementation of pollution control and/or in-lake restoration methods and procedures including final engineering design.

(c) *Indian Tribes treated as States.* In either phase, the Regional Administrator may increase the 50 and 70 percent maximum Federal share for an Indian Tribe treated as a State based upon application and demonstration by the Tribe that it does not have adequate funds (including Federal funds authorized by statute to be used for matching purposes, tribal funds or in-kind contributions to meet the required match). In no case shall the Federal share be greater than 90 percent.

[45 FR 7792, Feb. 5, 1980, as amended at 54 FR 14359, Apr. 11, 1989]

§ 35.1620-2 Contents of applications.

(a) All applications shall contain a written State certification that the project is consistent with State Water Quality Management work program (see § 35.1513 of this subchapter) and the State Comprehensive Outdoor Recreation Plan (if completed). Additionally, the State shall indicate the priority ranking for the particular project (see § 35.1620-5).

(b) Phase 1 applications shall contain: (1) A narrative statement describing the specific procedures that will be used by the recipient to conduct the diagnostic-feasibility study including a description of the public participation

to be involved (see § 25.11 of this chapter);

(2) A milestone schedule;

(3) An itemized cost estimate including a justification for these costs;

(4) A written certification from the appropriate areawide or State 208 planning agency that the proposed work will not duplicate work completed under any 208 planning grant, and that the applicant is proposing to use any applicable approved 208 planning in the clean lakes project design; and

(5) For each lake being investigated, the information under paragraph (5)(i) of this paragraph (b) and, when available, the information under paragraph (5)(ii) of this paragraph (b).

(i) Mandatory information.

(A) The legal name of the lake, reservoir, or pond.

(B) The location of the lake within the State, including the latitude and longitude, in degrees, minutes, and seconds of the approximate center of the lake.

(C) A description of the physical characteristics of the lake, including its maximum depth (in meters); its mean depth (in meters); its surface area (in hectares); its volume (in cubic meters); the presence or absence of stratified conditions; and major hydrologic inflows and outflows.

(D) A summary of available chemical and biological data demonstrating the past trends and current water quality of the lake.

(E) A description of the type and amount of public access to the lake, and the public benefits that would be derived by implementing pollution control and lake restoration procedures.

(F) A description of any recreational uses of the lake that are impaired due to degraded water quality. Indicate the cause of the impairment, such as algae, vascular aquatic plants, sediments, or other pollutants.

(G) A description of the local interests and fiscal resources committed to restoring the lake.

(H) A description of the proposed monitoring program to provide the information required in Appendix A paragraph (a)(10) of this section.

(ii) Discretionary information. States should submit this information when available to assist EPA in reviewing the application.

(A) A description of the lake watershed in terms of size, land use (list each major land use classification as a percentage of the whole), and the general topography, including major soil types.

(B) An identification of the major point source pollution discharges in the watershed. If the sources are currently controlled under the National Pollutant Discharge Elimination System (NPDES), include the permit numbers.

(C) An estimate of the percent contribution of total nutrient and sediment loading to the lake by the identified point sources.

(D) An indication of the major nonpoint sources in the watershed. If the sources are being controlled describe the control practice(s), including best land management practices.

(E) An indication of the lake restoration measures anticipated, including watershed management, and a projection of the net improvement in water quality.

(F) A statement of known or anticipated adverse environmental impacts resulting from lake restoration.

(c) Phase 2 applications shall include: (1) The information specified in Appendix A in a diagnostic/feasibility study or its equivalent; (2) certification by the appropriate areawide or State 208 planning agencies that the proposed Phase 2 lake restoration proposal is consistent with any approved 208 planning; and (3) copies of all issued permits or permit applications (including a summary of the status of applications) that are required for the discharge of dredged or fill material under section 404 of the Act.

§ 35.1620–3 Environmental evaluation.

Phase 2 applicants shall submit an evaluation of the environmental impacts of the proposed project in accordance with the requirements in Appendix A of this regulation.

§ 35.1620–4 Public participation.

(a) *General.* (1) In accordance with this part and part 25 of this chapter, the applicant shall provide for, en-

courage, and assist public participation in developing a proposed lake restoration project.

(2) Public consultation may be coordinated with related activities to enhance the economy, the effectiveness, and the timeliness of the effort, or to enhance the clarity of the issue. This procedure shall not discourage the widest possible participation by the public.

(b) *Phase 1.* (1) Phase 1 recipients shall solicit public comment in developing, evaluating, and selecting alternatives; in assessing potential adverse environmental impacts; and in identifying measures to mitigate any adverse impacts that were identified. The recipient shall provide information relevant to these decisions, in fact sheet or summary form, and distribute them to the public at least 30 days before selecting a proposed method of lake restoration. Recipients shall hold a formal or informal meeting with the public after all pertinent information is distributed, but before a lake restoration method is selected. If there is significant public interest in the cooperative agreement activity, an advisory group to study the process shall be formed in accordance with the requirements of § 25.3(d)(4) of this chapter.

(2) A formal public hearing shall be held if the Phase 1 recipient selects a lake restoration method that involves major construction, dredging, or significant modifications to the environment, or if the recipient or the Regional Administrator determines that a hearing would be beneficial.

(c) *Phase 2.* (1) A summary of the recipient's response to all public comments, along with copies of any written comments, shall be prepared and submitted to EPA with a Phase 2 application.

(2) Where a proposed project has not been studied under a Phase 1 cooperative agreement, the applicant for Phase 2 assistance shall provide an opportunity for public consultation with adequate and timely notices before submitting an application to EPA. The public shall be given the opportunity to discuss the proposed project, the alternatives, and any potentially adverse environmental impacts. A public hearing shall be held where the proposed project involves major construction, dredging or other significant modification of the environment. The applicant shall provide a summary of his responses to all public comments and submit the summary, along with copies of any written comments, with the application.

§ 35.1620–5 State work programs and lake priority lists.

(a)(1) A State shall submit to the Regional Administrator as part of its annual work program (§ 35.1513 of this subchapter) a description of the activities it will conduct during the Federal fiscal year to classify its lakes according to trophic condition (§ 35.1630) and to set priorities for implementing clean lakes projects within the State. The work plan must list in priority order the cooperative agreement applications that will be submitted by the State for Phase 1 and Phase 2 projects during the upcoming fiscal year, along with the rationale used to establish project priorities. Each State must also list the cooperative agreement applications, with necessary funding, which it expects to submit in the following fiscal year. This information will assist EPA in targeting resources under § 35.1613.

(2) A State may petition the Regional Administrator by letter to modify the EPA approved priority list established under paragraph (a)(1) of this section. This may be done at any time if the State believes there is sufficient justification to alter the priority list contained in its annual work program, e.g., if a community with a lower priority project has sufficient resources available to provide the required matching funding while a higher priority project does not, or if new data indicates that a lower priority lake will have greater public benefit than a higher priority lake.

(b) Clean lakes restoration priorities should be consistent with the Statewide water quality management strategy (see § 35.1511–2 of this subchapter). In establishing priorities on particular lake restoration projects, States should use as criteria the application review criteria (§ 35.1640–1)

that EPA will use in preparing funding recommendations for specific projects. If a State chooses to use different criteria, the State should indicate this to the Regional Administrator as part of the annual work program.

§ 35.1620–6 Intergovernmental review.

EPA will not award funds under this subpart without review and consultation in accordance with the requirements of Executive Order 12372, as implemented in 40 CFR part 29 of this chapter.

[48 FR 29302, June 24, 1983]

§ 35.1630 State lake classification surveys.

States that wish to participate in the clean lakes program shall establish and submit to EPA by January 1, 1982, a classification, according to trophic condition, of their publicly owned freshwater lakes that are in need of restoration or protection. After December 31, 1981, States that have not complied with this requirement will not be eligible for Federal financial assistance under this subpart until they complete their survey.

§ 35.1640 Application review and evaluation.

EPA will review applications as they are received. EPA may request outside review by appropriate experts to assist with technical evaluation. Funding decisions will be based on the merit of each application in accordance with the application review criteria under § 35.1640–1. EPA will consider Phase 1 applications separately from Phase 2 applications.

§ 35.1640–1 Application review criteria.

(a) When evaluating applications, EPA will consider information supplied by the applicant which address the following criteria:

(1) The technical feasibility of the project, and where appropriate, the estimated improvement in lake water quality.

(2) The anticipated positive changes that the project would produce in the overall lake ecosystem, including the watershed, such as the net reduction in sediment, nutrient, and other pollutant loadings.

(3) The estimated improvement in fish and wildlife habitat and associated beneficial effects on specific fish populations of sport and commercial species.

(4) The extent of anticipated benefits to the public. EPA will consider such factors as

(i) The degree, nature and sufficiency of public access to the lake;

(ii) The size and economic structure of the population residing near the lake which would use the improved lake for recreational and other purposes;

(iii) The amount and kind of public transportation available for transport of the public to and from the public access points;

(iv) Whether other relatively clean publicly owned freshwater lakes within 80 kilometer radius already adequately serve the population; and

(v) Whether the restoration would benefit primarily the owners of private land adjacent to the lake.

(5) The degree to which the project considers the "open space" policies contained in sections 201(f), 201(g), and 208(b)(2)(A) of the Act.

(6) The reasonableness of the proposed costs relative to the proposed work, the likelihood that the project will succeed, and the potential public benefits.

(7) The means for controlling adverse environmental impacts which would result from the proposed restoration of the lake. EPA will give specific attention to the environmental concerns listed in section (c) of Appendix A.

(8) The State priority ranking for a particular project.

(9) The State's operation and maintenance program to ensure that the pollution control measures and/or in-lake restorative techniques supported under the project will be continued after the project is completed.

(b) For Phase 1 applications, the review criteria presented in paragraph (a) of this section will be modified in relation to the smaller amount of technical information and analysis that is available in the application. Specifically, under criterion (a)(1),

EPA will consider a technical assessment of the proposed project approach to meet the requirements stated in Appendix A to this regulation. Under criterion (a)(4), EPA will consider the degree of public access to the lake and the public benefit. Under criterion (a)(7), EPA will consider known or anticipated adverse environmental impacts identified in the application or that EPA can presume will occur. Criterion (a)(9) will not be considered.

§ 35.1650 Award.

(a) Under 40 CFR 30.345, generally 90 days after EPA has received a complete application, the application will either be: (1) Approved for funding in an amount determined to be appropriate for the project; (2) returned to the applicant due to lack of funding; or (3) disapproved. The applicant shall be promptly notified in writing by the EPA Regional Administrator of any funding decisions.

(b) Applications that are disapproved can be submitted as new applications to EPA if the State resolves the issues identified during EPA review.

§ 35.1650–1 Project period.

(a) The project period for Phase 1 projects shall not exceed three years.

(b) The project period for Phase 2 projects shall not exceed four years. Implementation of complex projects and projects incorporating major construction may have longer project periods if approved by the Regional Administrator.

§ 35.1650–2 Limitations on awards.

(a) Before awarding assistance, the Regional Administrator shall determine that:

(1) The applicant has met all of the applicable requirements of § 35.1620 and § 35.1630; and

(2) State programs under section 314 of the Act are part of a State/EPA Agreement which shall be completed before the project is awarded.

(b) Before awarding Phase 2 projects, the Regional Administrator shall further determine that:

(1) When a Phase 1 project was awarded, the final report prepared under Phase 1 is used by the applicant to apply for Phase 2 assistance. The lake restoration plan selected under the Phase 1 project must be implemented under a Phase 2 cooperative agreement.

(2) Pollution control measures in the lake watershed authorized by section 201, included in an approved 208 plan, or required by section 402 of the Act have been completed or are being implemented according to a schedule that is included in an approved plan or discharge permit.

(3) The project does not include costs for controlling point source discharges of pollutants where those sources can be alleviated by permits issued under section 402 of the Act, or by the planning and construction of wastewater treatment facilities under section 201 of the Act.

(4) The State has appropriately considered the "open space" policy presented in sections 201(f), 201(g)(6), and 208(b)(2)(A) of the Act in any wastewater management activities being implemented by them in the lake watershed.

(5)(i) The project does not include costs for harvesting aquatic vegetation, or for chemical treatment to alleviate temporarily the symptoms of eutrophication, or for operating and maintaining lake aeration devices, or for providing similar palliative methods and procedures, unless these procedures are the most energy efficient or cost effective lake restorative method.

(ii) Palliative approaches can be supported only where pollution in the lake watershed has been controlled to the greatest practicable extent, and where such methods and procedures are a necessary part of a project during the project period. EPA will determine the eligibility of such a project, based on the applicant's justification for the proposed restoration, the estimated time period for improved lake water quality, and public benefits associated with the restoration.

(6) The project does not include costs for desalinization procedures for naturally saline lakes.

(7) The project does not include costs for purchasing or long term leas-

ing of land used solely to provide public access to a lake.

(8) The project does not include costs resulting from litigation against the recipient by EPA.

(9) The project does not include costs for measures to mitigate adverse environmental impacts that are not identified in the approved project scope of work. (EPA may allow additional costs for mitigation after it has reevaluated the cost-effectiveness of the selected alternative and has approved a request for an increase from the recipient.)

§ 35.1650-3 Conditions on award.

(a) *All awards.* (1) All assistance awarded under the Clean Lakes program is subject to the EPA General Grant conditions (subpart C and Appendix A of part 30 of this chapter).

(2) For each clean lakes project the State agrees to pay or arrange the payment of the non-Federal share of the project costs.

(b) *Phase 1.* Phase 1 projects are subject to the following conditions:

(1) The recipient must receive EPA project officer' approval on any changes to satisfy the requirements of paragraph (a)(10) of Appendix A before undertaking any other work under the grant.

(2)(i) Before selecting the best alternative for controlling pollution and improving the lake, as required in paragraph (b)(1) of Appendix A of this regulation, and before undertaking any other work stated under paragraph (b) of Appendix A, the recipient shall submit an interim report to the project officer. The interim report must include a discussion of the various available alternatives and a technical justification for the alternative that the recipient will probably choose. The report must include a summary of the public involvement and the comments that occurred during the development of the alternatives.

(ii) The recipient must obtain EPA project officer approval of the selected alternative before conducting additional work under the project.

(c) *Phase 2.* Phase 2 projects are subject to the following conditions:

(1)(i) The State shall monitor the project to provide data necessary to evaluate the efficiency of the project as jointly agreed to and approved by the EPA project officer. The monitoring program described in paragraph (b)(3) of Appendix A of this regulation as well as any specific measurements that would be necessary to assess specific aspects of the project, must be considered during the development of a monitoring program and schedule. The project recipient shall receive the approval of the EPA project officer for a monitoring program and schedule to satisfy the requirements of Appendix A paragraph (b)(3) before undertaking any other work under the project.

(ii) Phase 2 projects shall be monitored for at least one year after construction or pollution control practices are completed.

(2) The State shall manage and maintain the project so that all pollution control measures supported under the project will be continued during the project period at the same level of efficiency as when they were implemented. The State will provide reports regarding project maintenance as required in the cooperative agreement.

(3) The State shall upgrade its water quality standards to reflect a higher water quality use classification if the higher water quality use was achieved as a result of the project (see 40 CFR 35.1550(c)(2)).

(4) If an approved project allows purchases of equipment for lake maintenance, such as weed harvesters, aeration equipment, and laboratory equipment, the State shall maintain and operate the equipment according to an approved lake maintenance plan for a period specified in the cooperative agreement. In no case shall that period be for less than the time it takes to completely amortize the equipment.

(5) If primary adverse environmental impacts result from implementing approved lake restoration or protection procedures, the State shall include measures to mitigate these adverse impacts at part of the work under the project.

(6) If adverse impacts could result to unrecorded archeological sites, the

State shall stop work or modify work plans to protect these sites in accordance with the National Historic Preservation Act. (EPA may allow additional costs for ensuring proper protection of unrecorded archeological sites in the project area after reevaluating the cost effectiveness of the procedures and approving a request for a cost increase from the recipient.)

(7) If a project involves construction or dredging that requires a section 404 permit for the discharge of dredged or fill material, the recipient shall obtain the necessary section 404 permits before performing any dredge or fill work.

§ 35.1650–4 Payment.

(a) Under § 30.615 of this chapter, EPA generally will make payments through letter of credit. However, the Regional Administrator may place any recipient on advance payment or on cost reimbursement, as necessary.

(b) Phase 2 projects involving construction of facilities or dredging and filling activities shall be paid by reimbursement.

§ 35.1650–5 Allowable costs.

(a) The State will be paid under § 35.1650–4 for the Federal share of all necessary costs within the scope of the approved project and determined to be allowable under 40 CFR 30.705, the provisions of this subpart, and the cooperative agreement.

(b) Costs for restoring lakes used solely for drinking water supplies are not allowable under the Clean Lakes Program.

§ 35.1650–6 Reports.

(a) States with Phase 1 projects shall submit semi-annual progress reports (original and one copy) to the EPA project officer within 30 days after the end of every other standard quarter. Standard quarters end on March 31, June 30, September 30, and December 31. These reports shall include the following:

(1) Work progress relative to the milestone schedule, and difficulties encountered during the previous six months.

(2) A brief discussion of the project findings appropriate to the work conducted during the previous six months.

(3) A report of expenditures in the past six months and those anticipated in the next six months.

(b) *Phase 2.* States with Phase 2 projects shall submit progress reports (original and one copy) according to the schedule established in the cooperative agreement. The frequency of Phase 2 project progress reports shall be determined by the size and complexity of the project, and shall be required no more frequently than quarterly. The Phase 2 progress report shall contain all of the information required for Phase 1 progress reports indicated in paragraph (a) of this section. This report also must include water quality monitoring data and a discussion of the changes in water quality which appear to have resulted from the lake restoration activities implemented during the reporting period.

(c) *Final Report.* States shall prepare a final report for all grants in accordance with § 30.635–2 of this subchapter. Phase 1 reports shall be organized according to the outline of information requirements stated in Appendix A. All water quality data obtained under the grant shall be submitted in the final report. Phase 2 reports shall conform to the format presented in the EPA manual on "Scientific and Technical Publications," May 14, 1974, as revised or updated. The States shall submit the report within 90 days after the project is completed.

(d) *Financial Status Report.* Within 90 days after the end of each budget period, the grantee shall submit to the Regional Administrator an annual report of all expenditures (Federal and non-Federal) which accrued during the budget period. Beginning in the second quarter of any succeeding budget period, payments may be withheld under § 30.615–3 of this chapter until this report is received.

Appendix A—Requirements for Diagnostic-Feasibility Studies and Environmental Evaluations

Phase 1 clean lakes projects shall include in their scope of work at least the following

requirements, preferably in the order presented and under appropriate subheadings. The information required by paragraph (a)(10) and the monitoring procedures stated in paragraph (b)(3) of this Appendix may be modified to conform to specific project requirements to reduce project costs without jeopardizing adequacy of technical information or the integrity of the project. All modifications must be approved by the EPA project officer as specified in §§ 35.1650-3(b)(1) and 35.1650-3(c)(1).

(a) A diagnostic study consisting of:

(1) An identification of the lake to be restored or studied, including the name, the State in which it is located, the location within the State, the general hydrologic relationship to associated upstream and downstream waters and the approved State water quality standards for the lake.

(2) A geological description of the drainage basin including soil types and soil loss to stream courses that are tributary to the lake.

(3) A description of the public access to the lake including the amount and type of public transportation to the access points.

(4) A description of the size and economic structure of the population residing near the lake which would use the improved lake for recreation and other purposes.

(5) A summary of historical lake uses, including recreational uses up to the present time, and how these uses may have changed because of water quality degradation.

(6) An explanation, if a particular segment of the lake user population is or will be more adversely impacted by lake degradation.

(7) A statement regarding the water use of the lake compared to other lakes within a 80 kilometer radius.

(8) An itemized inventory of known point source pollution discharges affecting or which have affected lake water quality over the past 5 years, and the abatement actions for these discharges that have been taken, or are in progress. If corrective action for the pollution sources is contemplated in the future, the time period should be specified.

(9) A description of the land uses in the lake watershed, listing each land use classification as a percentage of the whole and discussing the amount of nonpoint pollutant loading produced by each category.

(10) A discussion and analysis of historical baseline limnological data and one year of current limnological data. The monitoring schedule presented in paragraph (b)(3) of Appendix A must be followed in obtaining the one year of current limnological data. This presentation shall include the present trophic condition of the lake as well as its surface area (hectares), maximum depth (meters), average depth (meters), hydraulic residence time, the area of the watershed draining to the lake (hectares), and the physical, chemical, and biological quality of the lake and important lake tributary waters. Bathymetric maps should be provided. If dredging is expected to be included in the restoration activities, representative bottom sediment core samples shall be collected and analyzed using methods approved by the EPA project officer for phosphorus, nitrogen, heavy metals, other chemicals appropriate to State water quality standards, and persistent synthetic organic chemicals where appropriate. Further, the elutriate must be subjected to test procedures developed by the U.S. Army Corps of Engineers and analyzed for the same constituents. An assessment of the phosphorus (and nitrogen when it is the limiting lake nutrient) inflows and outflows associated with the lake and a hydraulic budget including ground water flow must be included. Vertical temperature and dissolved oxygen data must be included for the lake to determine if the hypolimnion becomes anaerobic and, if so, for how long and over what extent of the bottom. Total and soluble reactive phosphorus (P); and nitrite, nitrate, ammonia and organic nitrogen (N) concentratons must be determined for the lake. Chlorophyll *a* values should be measured for the upper mixing zone. Representative alkalinities should be determined. Algal assay bottle test data or total N to total P ratios should be used to define the growth limiting nutrient. The extent of algal blooms, and the predominant algal genera must be discussed. Algal biomass should be determined through algal genera identification, cell density counts (numbers of cells per milliliter) and converted to cell volume based on factors derived from direct measurements; and reported in biomass of each major genus identified. Secchi disk depth and suspended solids should be measured and reported. The portion of the shoreline and bottom that is impacted by vascular plants (submersed, floating, or emersed higher aquatic vegetation) must be estimated, specifically the lake surface area between 0 and the 10 meter depth contour or twice the Secchi disk transparency depth, whichever is less, and that estimate should include an identification of the predominant species. Where a lake is subject to significant public contact use or is fished for consumptive purposes, monitoring for public health reasons should be part of the monitoring program. Standard bacteriological analyses and fish flesh analyses for organic and heavy metal contamination should be included.

(11) An identification and discussion of the biological resources in the lake, such as fish population, and a discussion of the major known ecological relationships.

(b) A feasibility study consisting of:

(1) An identification and discussion of the alternatives considered for pollution control or lake restoration and an identification and justification of the selected alternative. This should include a discussion of expected water quality improvement, technical feasibility, and estimated costs of each alternative. The discussion of each feasible alternative and the selected lake restoration procedure must include detailed descriptions specifying exactly what activities would be undertaken under each, showing how and where these procedures would be implemented, illustrating the engineering specifications that would be followed including preliminary engineering drawings to show in detail the construction aspects of the project, and presenting a quantitative analysis of the pollution control effectiveness and the lake water quality improvement that is anticipated.

(2) A discussion of the particular benefits expected to result from implementing the project, including new public water uses that may result from the enhanced water quality.

(3) A Phase 2 monitoring program indicating the water quality sampling schedule. A limited monitoring program must be maintained during project implementation, particularly during construction phases or in-lake treatment, to provide sufficient data that will allow the State and the EPA project officer to redirect the project if necessary, to ensure desired objectives are achieved. During pre-project, implementation, and post-project monitoring activities, a single in-lake site should be sampled monthly during the months of September through April and biweekly during May through August. This site must be located in an area that best represents the limnological properties of the lake, preferably the deepest point in the lake. Additional sampling sites may be warranted in cases where lake basin morphometry creates distinctly different hydrologic and limnologic subbasins; or where major lake tributaries adversely affect lake water quality. The sampling schedule may be shifted according to seasonal differences at various latitudes. The biweekly samples must be scheduled to coincide with the period of elevated biological activity. If possible, a set of samples should be collected immediately following spring turnover of the lake. Samples must be collected between 0800 and 1600 hours of each sampling day unless diel studies are part of the monitoring program. Samples must be collected between one-half meter below the surface and one-half meter off the bottom, and must be collected at intervals of every one and one-half meters, or at six equal depth intervals, whichever number of samples is less. Collection and analyses of all samples must be conducted according to EPA approved methods. All of the samples collected must be analyzed for total and soluble reactive phosphorus; nitrite, nitrate, ammonia, and organic nitrogen; pH; temperature; and dissolved oxygen. Representative alkalinities should be determined. Samples collected in the upper mixing zone must be analyzed for chlorophyll *a*. Algal biomass in the upper mixing zone should be determined through algal genera identification, cell density counts (number of cells per milliliter) and converted to cell volume based on factors derived from direct measurements; and reported in terms of biomass of each major genera identified. Secchi disk depth and suspended solids must be measured at each sampling period. The surface area of the lake covered by macrophytes between 0 and the 10 meter depth contour or twice the Secchi disk transparency depth, whichever is less, must be reported. The monitoring program for each clean lakes project must include all the required information mentioned above, in addition to any specific measurements that are found to be necessary to assess certain aspects of the project. Based on the information supplied by the Phase 2 project applicant and the technical evaluation of the proposal, a detailed monitoring program for Phase 2 will be established for each approved project and will be a condition of the cooperative agreement. Phase 2 projects will be monitored for at least one year after construction or pollution control practices are completed to evaluate project effectiveness.

(4) A proposed milestone work schedule for completing the project with a proposed budget and a payment schedule that is related to the milestone.

(5) A detailed description of how non-Federal funds will be obtained for the proposed project.

(6) A description of the relationship of the proposed project to pollution control programs such as the section 201 construction grants program, the section 208 areawide wastewater management program, the Department of Agriculture Soil Conservation Service and Agriculture Stabilization and Conservation Service programs, the Department of Housing and Urban Development block grant program, the Department of Interior Heritage Conservation and Recreation Service programs and any other local, State, regional and Federal programs that may be related to the proposed project. Copies of any pertinent correspondence, contracts, grant applications and permits associated with these programs should be provided to the EPA project officer.

(7) A summary of public participation in developing and assessing the proposed project which is in compliance with part 25 of this chapter. The summary shall describe the matters brought before the public, the measures taken by the reporting agency to

meet its responsibilities under part 25 and related provisions elsewhere in this chapter, the public response, and the agency's response to significant comments. Section 25.8 responsiveness summaries may be used to meet appropriate portions of these requirements to avoid duplication.

(8) A description of the operation and maintenance plan that the State will follow, including the time frame over which this plan will be operated, to ensure that the pollution controls implemented during the project are continued after the project is completed.

(9) Copies of all permits or pending permit applications (including the status of such applications) necessary to satisfy the requirements of section 404 of the Act. If the approved project includes dredging activities or other activities requiring permits, the State must obtain from the U.S. Army Corps of Engineers or other agencies the permits required for the discharge of dredged or fill material under section 404 of the Act or other Federal, State or local requirements. Should additional information be required to obtain these permits, the State shall provide it. Copies of section 404 permit applications and any associated correspondence must be provide to the EPA project officer at the time they are submitted to the U.S. Army Corps of Engineers. After reviewing the 404 permit application, the project officer may provide recommendations for appropriate controls and treatment of supernatant derived from dredged material disposal sites to ensure the maximum effectiveness of lake restoration procedures.

(c) States shall complete and submit an environmental evaluation which considers the questions listed below. In many cases the questions cannot be satisfactorily answered with a mere "Yes" or "No". States are encouraged to address other considerations which they believe apply to their project.

(1) Will the proposed project displace any people?

(2) Will the proposed project deface existing residences or residential areas? What mitigative actions such as landscaping, screening, or buffer zones have been considered? Are they included?

(3) Will the proposed project be likely to lead to a change in established land use patterns, such as increased development pressure near the lake? To what extent and how will this change be controlled through land use planning, zoning, or through other methods?

(4) Will the proposed project adversly affect a significant amount of prime agricultural land or agricultural operations on such land?

(5) Will the proposed project result in a significant adverse effect on parkland, other public land, or lands of recognized scenic value?

(6) Has the State Historical Society or State Historical Preservation Officer been contacted? Has he responded, and if so, what was the nature of that response? Will the proposed project result in a significant adversely effect on lands or structures of historic, architectural, archaeological or cultural value?

(7) Will the proposed project lead to a significant long-range increase in energy demands?

(8) Will the proposed project result in significant and long range adverse changes in ambient air quality or noise levels? Short term?

(9) If the proposed project involves the use of in-lake chemical treatment, what long and short term adverse effects can be expected from that treatment? How will the project recipient mitigate these effects?

(10) Does the proposal contain all the information that EPA requires in order to determine whether the project complies with Executive Order 11988 on floodplains? Is the proposed project located in a floodplain? If so, will the project involve construction of structures in the floodplain? What steps will be taken to reduce the possible effects of flood damage to the project?

(11) If the project involves physically modifying the lake shore or its bed or its watershed, by dredging, for example, what steps will be taken to minimize any immediate and long term adverse effects of such activities? When dredging is employed, where will the dredged material be deposited, what can be expected and what measures will the recipient employ to minimize any significant adverse impacts from its deposition?

(12) Does the project proposal contain all information that EPA requires in order to determine whether the project complies with Executive Order 11990 on wetlands? Will the proposed project have a significant adverse effect on fish and wildlife, or on wetlands or any other wildife habitat, especially those of endangered species? How significant is this impact in relation to the local or regional critical habitat needs? Have actions to mitigate habitat destruction been incorporated into the project? Has the recipient properly consulted with appropriate State and Federal fish, game and wildlife agencies and with the U.S. Fish and Wildlife Service? What were their replies?

(13) Describe any feasible alternatives to the proposed project in terms of environmental impacts, commitment of resources, public interest and costs and why they were not proposed.

(14) Describe other measures not discussed previously that are necessary to mitigate adverse environmental impacts result-

ing from the implementation of the proposed project.

Subpart I—Grants for Construction of Treatment Works

AUTHORITY: Secs. 101(e), 109(b), 201 through 205, 207, 208(d), 210 through 212, 215 through 219, 304(d)(3), 313, 501, 502, 511 and 516(b) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et seq.*

SOURCE: 49 FR 6234, Feb. 17, 1984, unless otherwise noted.

§ 35.2000 Purpose and policy.

(a) The primary purpose of Federal grant assistance available under this subpart is to assist municipalities in meeting enforceable requirements of the Clean Water Act, particularly, applicable National Pollutant Discharge Elimination System (NPDES) permit requirements.

(b) This subpart supplements EPA's Uniform Relocation and Real Property Acquisition Policies Act regulation (part 4 of this chapter), its National Environmental Policy Act (NEPA) regulation (part 6 of this chapter), its public participation regulation (part 25 of this chapter), its intergovernmental review regulation (part 29 of this chapter), its general grant regulation (part 30 of this chapter), its debarment regulation (part 32 of this chapter), and its procurement under assistance regulation (part 33 of this chapter), and establishes requirements for Federal grant assistance for the building of wastewater treatment works. EPA may also find it necessary to publish other requirements applicable to the construction grants program in response to Congressional action and executive orders.

(c) EPA's policy is to delegate administration of the construction grants program on individual projects to State agencies to the maximum extent possible (see subpart F). Throughout this subpart we have used the term Regional Administrator. To the extent that the Regional Administrator delegates review of projects for compliance with the requirements of this subpart to a State agency under a delegation agreement (§ 35.1030), the term Regional Administrator may be read State agency. This paragraph does not affect the rights of citizens, applicants or grantees provided in subpart F.

(d) In accordance with the Federal Grant and Cooperative Agreement Act (Pub. L. 95-224) EPA will, when substantial Federal involvement is anticipated, award assistance under cooperative agreements. Throughout this subpart we have used the terms grant and grantee but those terms may be read cooperative agreement and recipient if appropriate.

(e) From time to time EPA publishes technical and guidance materials on various topics relevant to the construction grants program. Grantees may find this information useful in meeting requirements in this subpart. These publications, including the MCD and FRD series, may be ordered from: EPA, 401 M St. SW, Room 1115 ET, WH 547, Washington, DC 20460. In order to expedite processing of requests, persons wishing to obtain these publications should request a copy of EPA form 7500-21 (the order form listing all available publications), from EPA Headquarters, Municipal Construction Division (WH-547) or from any EPA Regional Office.

§ 35.2005 Definitions.

(a) Words and terms not defined below shall have the meaning given to them in 40 CFR parts 30 and 33.

(b) As used in this subpart, the following words and terms mean:

(1) *Act.* The Clean Water Act (33 U.S.C. 1251 *et seq.*, as amended).

(2) *Ad valorem tax.* A tax based upon the value of real property.

(3) *Allowance.* An amount based on a percentage of the project's allowable building cost, computed in accordance with Appendix B.

(4) *Alternative technology.* Proven wastewater treatment processes and techniques which provide for the reclaiming and reuse of water, productively recycle wastewater constituents or otherwise eliminate the discharge of pollutants, or recover energy. Specifically, alternative technolgy includes land application of effluent and sludge; aquifer recharge; aquaculture; direct reuse (non-potable); horticulture; revegetation of disturbed land; containment ponds;

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sludge composting and drying prior to land application; self-sustaining incineration; and methane recovery.

(5) *Alternative to conventional treatment works for a small community.* For purposes of §§ 35.2020 and 35.2032, alternative technology used by treatment works in small communities include alternative technologies defined in paragraph (b)(4), as well as, individual and onsite systems; small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

(6) *Architectural or engineering services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the grantee is located.

(7) *Best Practicable Waste Treatment Technology (BPWTT).* The cost-effective technology that can treat wastewater, combined sewer overflows and nonexcessive infiltration and inflow in publicly owned or individual wastewater treatment works, to meet the applicable provisions of:

(i) 40 CFR part 133—secondary treatment of wastewater;

(ii) 40 CFR part 125, subpart G—marine discharge waivers;

(iii) 40 CFR 122.44(d)—more stringent water quality standards and State standards; or

(iv) 41 FR 6190 (February 11, 1976)—Alternative Waste Management Techniques for Best Practicable Waste Treatment (treatment and discharge, land application techniques and utilization practices, and reuse).

(8) *Building.* The erection, acquisition, alteration, remodeling, improvement or extension of treatment works.

(9) *Building completion.* The date when all but minor components of a project have been built, all equipment is operational and the project is capable of functioning as designed.

(10) *Collector sewer.* The common lateral sewers, within a publicly owned treatment system, which are primarily installed to receive wastewaters directly from facilities which convey wastewater from individual systems, or from private property, and which include service "Y" connections designed for connection with those facilities including:

(i) Crossover sewers connecting more than one property on one side of a major street, road, or highway to a lateral sewer on the other side when more cost effective than parallel sewers; and

(ii) Except as provided in paragraph (b)(10)(iii) of this section, pumping units and pressurized lines serving individual structures or groups of structures when such units are cost effective and are owned and maintained by the grantee.

(iii) This definition excludes other facilities which convey wastewater from individual structures, from private property to the public lateral sewer, or its equivalent and also excludes facilities associated with alternatives to conventional treatment works in small communities.

(11) *Combined sewer.* A sewer that is designed as a sanitary sewer and a storm sewer.

(12) *Complete waste treatment system.* A complete waste treatment system consists of all the treatment works necessary to meet the requirements of title III of the Act, involving: (i) The transport of wastewater from individual homes or buildings to a plant or facility where treatment of the wastewater is accomplished; (ii) the treatment of the wastewater to remove pollutants; and (iii) the ultimate disposal, including recycling or reuse, of the treated wastewater and residues which result from the treatment process.

(13) *Construction.* Any one or more of the following: Preliminary planning to determine the feasibility of treatment works, engineering, architectural, legal, fiscal, or economic investigations or studies, surveys, designs, plans, working drawings, specifications, procedures, field testing of innovative or alternative wastewater treatment processes and techniques (excluding operation and maintenance) meeting guidelines promulgated under section 304(d)(3) of the Act, or other necessary actions, erection, building, acquisition, alteration, remodeling, im-

provement, or extension of treatment works, or the inspection or supervision of any of the foregoing items.

(14) *Conventional technology.* Wastewater treatment processes and techniques involving the treatment of wastewater at a centralized treatment plant by means of biological or physical/chemical unit processes followed by direct point source discharge to surface waters.

(15) *Enforceable requirements of the Act.* Those conditions or limitations of section 402 or 404 permits which, if violated, could result in the issuance of a compliance order or initiation of a civil or criminal action under section 309 of the Act or applicable State laws. If a permit has not been issued, the term shall include any requirement which, in the Regional Administrator's judgment, would be included in the permit when issued. Where no permit applies, the term shall include any requirement which the Regional Administrator determines is necessary for the best practicable waste treatment technology to meet applicable criteria.

(16) *Excessive infiltration/inflow.* The quantities of infiltration/inflow which can be economically eliminated from a sewer system as determined in a cost-effectiveness analysis that compares the costs for correcting the infiltration/inflow conditions to the total costs for transportation and treatment of the infiltration/inflow. (See §§ 35.2005(b) (28) and (29) and 35.2120.)

(17) *Field testing.* Practical and generally small-scale testing of innovative or alternative technologies directed to verifying performance and/or refining design parameters not sufficiently tested to resolve technical uncertainties which prevent the funding of a promising improvement in innovative or alternative treatment technology.

(18) *Individual systems.* Privately owned alternative wastewater treatment works (including dual waterless/gray water systems) serving one or more principal residences, or small commercial establishments. Normally these are onsite systems with localized treatment and disposal of wastewater, but may be systems utilizing small diameter gravity, pressure or vacuum sewers conveying treated or partially treated wastewater. These systems can also include small diameter gravity sewers carrying raw wastewater to cluster systems.

(19) *Industrial user.* Any nongovernmental, nonresidential user of a publicly owned treatment works which is identified in the Standard Industrial Classification Manual, 1972, Office of Management and Budget, as amended and supplemented, under one of the following divisions:

Division A. Agriculture, Forestry, and Fishing
Division B. Mining
Division D. Manufacturing
Division E. Transportation, Communications, Electric, Gas, and Sanitary Services
Division I. Services

(20) *Infiltration.* Water other than wastewater that enters a sewer system (including sewer service connections and foundation drains) from the ground through such means as defective pipes, pipe joints, connections, or manholes. Infiltration does not include, and is distinguished from, inflow.

(21) *Inflow.* Water other than wastewater that enters a sewer system (including sewer service connections) from sources such as, but not limited to, roof leaders, cellar drains, yard drains, area drains, drains from springs and swampy areas, manhole covers, cross connections between storm sewers and sanitary sewers, catch basins, cooling towers, storm waters, surface runoff, street wash waters, or drainage. Inflow does not include, and is distinguished from, infiltration.

(22) *Initiation of operation.* The date specified by the grantee on which use of the project begins for the purpose for which it was planned, designed, and built.

(23) *Innovative technology.* Developed wastewater treatment processes and techniques which have not been fully proven under the circumstances of their contemplated use and which represent a significant advancement over the state of the art in terms of significant reduction in life cycle cost or significant environmental benefits through the reclaiming and reuse of water, otherwise eliminating the dis-

charge of pollutants, utilizing recycling techniques such as land treatment, more efficient use of energy and resources, improved or new methods of waste treatment management for combined municipal and industrial systems, or the confined disposal of pollutants so that they will not migrate to cause water or other environmental pollution.

(24) *Interceptor sewer.* A sewer which is designed for one or more of the following purposes:

(i) To intercept wastewater from a final point in a collector sewer and convey such wastes directly to a treatment facility or another interceptor.

(ii) To replace an existing wastewater treatment facility and transport the wastes to an adjoining collector sewer or interceptor sewer for conveyance to a treatment plant.

(iii) To transport wastewater from one or more municipal collector sewers to another municipality or to a regional plant for treatment.

(iv) To intercept an existing major discharge of raw or inadequately treated wastewater for transport directly to another interceptor or to a treatment plant.

(25) *Interstate agency.* An agency of two or more States established under an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

(26) *Marine bays and estuaries.* Semi-enclosed coastal waters which have a free connection to the territorial sea.

(27) *Municipality.* A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created under State law, or an Indian tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other waste, or a designated and approved management agency under section 208 of the Act.

(i) This definition includes a special district created under State law such as a water district, sewer district, sanitary district, utility district, drainage district or similar entity or an integrated waste management facility, as defined in section 201(e) of the Act, which has as one of its principal responsibilities the treatment, transport, or disposal of domestic wastewater in a particular geographic area.

(ii) This definition excludes the following:

(A) Any revenue producing entity which has as its principal responsibility an activity other than providing wastewater treatment services to the general public, such as an airport, turnpike, port facility or other municipal utility.

(B) Any special district (such as school district or a park district) which has the responsibility to provide wastewater treatment services in support of its principal activity at specific facilities, unless the special district has the responsibility under State law to provide wastewater treatment services to the community surrounding the special district's facility and no other municipality, with concurrent jurisdiction to serve the community, serves or intends to serve the special district's facility or the surrounding community.

(28) *Nonexcessive infiltration.* The quantity of flow which is less than 120 gallons per capita per day (domestic base flow and infiltration) or the quantity of infiltration which cannot be economically and effectively eliminated from a sewer system as determined in a cost-effectiveness analysis. (See §§ 35.2005(b)(16) and 35.2120.)

(29) *Nonexcessive inflow.* The maximum total flow rate during storm events which does not result in chronic operational problems related to hydraulic overloading of the treatment works or which does not result in a total flow of more than 275 gallons per capita per day (domestic base flow plus infiltration plus inflow). Chronic operational problems may include surcharging, backups, bypasses, and overflows. (See §§ 35.2005(b)(16) and 35.2120).

(30) *Operation and Maintenance.* Activities required to assure the dependable and economical function of treatment works.

(i) *Maintenance.* Preservation of functional integrity and efficiency of equipment and structures. This in-

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cludes preventive maintenance, corrective maintenance and replacement of equipment (See § 35.2005(b)(36)) as needed.)

(ii) *Operation:* Control of the unit processes and equipment which make up the treatment works. This includes financial and personnel management; records, laboratory control, process control, safety and emergency operation planning.

(31) *Principal residence.* For the purposes of § 35.2034, the habitation of a family or household for at least 51 percent of the year. Second homes, vacation or recreation residences are not included in this definition.

(32) *Project.* The activities or tasks the Regional Administrator identifies in the grant agreement for which the grantee may expend, obligate or commit funds.

(33) *Project performance standards.* The performance and operations requirements applicable to a project including the enforceable requirements of the Act and the specifications, including the quantity of excessive infiltration and inflow proposed to be eliminated, which the project is planned and designed to meet.

(34) *Priority water quality areas.* For the purposes of § 35.2015, specific stream segments or bodies of water, as determined by the State, where municipal discharges have resulted in the impairment of a designated use or significant public health risks, and where the reduction of pollution from such discharges will substantially restore surface or groundwater uses.

(35) *Project schedule.* A timetable specifying the dates of key project events including public notices of proposed procurement actions, subagreement awards, issuance of notice to proceed with building, key milestones in the building schedule, completion of building, initiation of operation and certification of the project.

(36) *Replacement.* Obtaining and installing equipment, accessories, or appurtenances which are necessary during the design or useful life, whichever is longer, of the treatment works to maintain the capacity and performance for which such works were designed and constructed.

(37) *Sanitary sewer.* A conduit intended to carry liquid and water-carried wastes from residences, commercial buildings, industrial plants and institutions together with minor quantities of ground, storm and surface waters that are not admitted intentionally.

(38) *Services.* A contractor's labor, time or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

(39) *Small commercial establishments.* For purposes of § 35.2034 private establishments such as restaurants, hotels, stores, filling stations, or recreational facilities and private, nonprofit entities such as churches, schools, hospitals, or charitable organizations with dry weather wastewater flows less than 25,000 gallons per day.

(40) *Small Community.* For purposes of §§ 35.2020(b) and 35.2032, any municipality with a population of 3,500 or less or highly dispersed sections of larger municipalities, as determined by the Regional Administrator.

(41) *State.* A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Marianas. For the purposes of applying for a grant under section 201(g)(1) of the act, a State (including its agencies) is subject to the limitations on revenue producing entities and special districts contained in § 35.2005(b)(27)(ii).

(42) *State agency.* The State agency designated by the Governor having responsibility for administration of the construction grants program under section 205(g) of the Act.

(43) *Step 1.* Facilities planning.

(44) *Step 2.* Preparation of design drawings and specifications.

(45) *Step 3.* Building of a treatment works and related services and supplies.

(46) *Step 2+3.* Design and building of a treatment works and building related services and supplies.

(47) *Step 7.* Design/building of treatment works wherein a grantee awards a single contract for designing and building certain treatment works.

(48) *Storm sewer.* A sewer designed to carry only storm waters, surface run-off, street wash waters, and drainage.

(49) *Treatment works.* Any devices and systems for the storage, treatment, recycling, and reclamation of municipal sewage, domestic sewage, or liquid industrial wastes used to implement section 201 of the Act, or necessary to recycle or reuse water at the most economical cost over the design life of the works. These include intercepting sewers, outfall sewers, sewage collection systems, individual systems, pumping, power, and other equipment and their appurtenances; extensions, improvement, remodeling, additions, and alterations thereof; elements essential to provide a reliable recycled supply such as standby treatment units and clear well facilities; and any works, including acquisition of the land that will be an integral part of the treatment process or is used for ultimate disposal of residues resulting from such treatment (including land for composting sludge, temporary storage of such compost and land used for the storage of treated wastewater in land treatment systems before land application); or any other method or system for preventing, abating, reducing, storing, treating, separating, or disposing of municipal waste or industrial waste, including waste in combined storm water and sanitary sewer systems.

(50) *Treatment works phase or segment.* A treatment works phase or segment may be any substantial portion of a facility and its interceptors described in a facilities plan under § 35.2030, which can be identified as a subagreement or discrete subitem. Multiple subagreements under a project shall not be considered to be segments or phases. Completion of building of a treatment works phase or segment may, but need not in and of itself, result in an operable treatment works.

(51) *Useful life.* The period during which a treatment works operates. (Not "design life" which is the period during which a treatment works is planned and designed to be operated.)

(52) *User charge.* A charge levied on users of a treatment works, or that portion of the ad valorem taxes paid by a user, for the user's proportionate share of the cost of operation and maintenance (including replacement) of such works under sections 204(b)(1)(A) and 201(h)(2) of the Act and this subpart.

(53) *Value engineering.* A specialized cost control technique which uses a systematic and creative approach to identify and to focus on unnecessarily high cost in a project in order to arrive at a cost saving without sacrificing the reliability or efficiency of the project.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45894, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2010 Allotment; reallotment.

(a) Allotments are made on a formula or other basis which Congress specifies for each fiscal year (FY). The allotment for each State and the availability period shall be announced each fiscal year in the FEDERAL REGISTER. This section applies only to funds allotted under section 205 of the Act.

(b) Unless otherwise provided by Congress, all sums allotted to a State under section 205 of the Act shall remain available for obligation until the end of the one year after the close of the fiscal year for which the sums were appropriated. Except as provided in § 35.2020(a), sums not obligated at the end of that period shall be subject to reallotment on the basis of the same ratio as applicable to the then-current fiscal year, adjusted for the States which failed to obligate any of the fiscal year funds being reallotted, but none of the funds reallotted shall be made available to any State which failed to obligate any of the fiscal year funds being reallotted. Any sum made available to a State by reallotment under this section shall be in addition to any funds otherwise allotted to such State for grants under this subpart during any fiscal year and the reallotted funds shall remain available for obligation until the last day of the fiscal year following the fiscal year in which the reallotted funds are issued

by the Comptroller to the Regional Administrator.

(c) Except for funds appropriated for FY 72 and fiscal years prior to 1972, sums which are deobligated and reissued by the Comptroller to the Regional Administrator before their reallotment date shall be available for obligation in the same State and treated in the same manner as the allotment from which such funds were derived.

(d) Except for funds appropriated for FY 72 and fiscal years prior to 1972, deobligated sums which are reissued by the Comptroller to the Regional Administrator after their reallotment date shall be available for obligation in the same State until the last day of the fiscal year following the fiscal year in which the reissuance occurs.

(e) Deobligated FY 72 and prior to 1972 fiscal year funds, except 1964, 1965 and 1966 funds, will be credited to the allowances of the same Region from which such funds are recovered, and the Regional Administrator may determine how these recoveries are credited to the States within the Region.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2012 Capitalization grants.

Amounts allotted to a State under title II may be deposited in that State's water pollution control revolving fund as a capitalization grant in accordance with 40 CFR 35.5020(f) and (g).

[55 FR 27095, June 29, 1990]

§ 35.2015 State priority system and project priority list.

(a) *General.* The Regional Administrator will award grant assistance from annual allotments to projects on a State project priority list developed in accordance with an approved State priority system. The State priority system and list must be designed to achieve optimum water quality management consistent with the goals and requirements of the Act. All projects for building treatment works to be funded by EPA must be included on a State project list, except training facilities funded under section 109(b) of the Act and marine CSO projects funded under section 201(n)(2) of the Act.

(b) *State priority system.* The State priority system describes the methodology used to rank projects that are considered eligible for assistance. The priority system should give high priority to projects in priority water quality areas. The priority system may also include the administrative, management, and public participation procedures required to develop and revise the State project priority list. The priority system includes at least the following elements:

(1) *Criteria.* (i) The priority system shall include at least the following criteria for ranking projects:

(A) The impairment of classified water uses resulting from existing municipal pollutant discharges; and

(B) The extent of surface or ground water use restoration or public health improvement resulting from the reduction in pollution.

(ii) The State may also include other criteria in its priority system for ranking projects, such as the use of innovative or alternative technology, the need to complete a waste treatment system for which a grant for a phase or segment was previously awarded, and the category of need and the existing population affected.

(iii) In ranking phased and segmented projects States must comply with § 35.2108.

(2) *Categories of need.* All projects must fit into at least one of the categories of need described in this paragraph to be eligible for funding, except as provided in paragraphs (b)(2) (iii) and (iv) of this section. States will have sole authority to determine the priority for each category of need.

(i) Before October 1, 1984, these categories of need shall include at least the following:

(A) Secondary treatment (category I);

(B) Treatment more stringent than secondary (category II);

(C) Infiltration/inflow correction (category IIIA);

(D) Major sewer system rehabilitation (category IIIB);

(E) New collector sewers and appurtenances (category IVA);

(F) New interceptors and appurtenances (category IVB);

(G) Correction of combined sewer overflows (category V).

(ii) After September 30, 1984, except as provided in paragraphs (b)(2) (iii) and (iv) of this section, these categories of need shall include only the following:

(A) Secondary treatment or any cost-effective alternative;

(B) Treatment more stringent than secondary or any cost-effective alternative;

(C) New interceptors and appurtenances; and

(D) Infiltration/inflow correction.

(iii) After September 30, 1984, up to 20 percent (as determined by the Governor) of a State's annual allotment may be used for categories of need other than those listed in paragraph (b)(2)(ii) of this section and for any purpose for which grants may be made under sections 319 (h) and (i) of the Act (including any innovative and alternative approaches for the control of nonpoint sources of pollution).

(iv) After September 30, 1984, the Governor may include in the priority system a category for projects needed to correct combined sewer overflows which result in impaired uses in priority water quality areas. Only projects which comply with the requirements of § 35.2024(a) may be included in this category.

(c) *Project priority list.* The State's annual project priority list is an ordered listing of projects for which the State expects Federal financial assistance. The priority list contains two portions: the fundable portion, consisting of those projects anticipated to be funded from funds available for obligation; and the planning portion, consisting of projects anticipated to be funded from future authorized allotments.

(1) The State shall develop the project priority list consistent with the criteria established in the approved priority system. In ranking projects, the State must also consider total funds available, needs and priorities set forth in areawide water quality management plans, and any other factors contained in the State priority system.

(2) The list shall include an estimate of the eligible cost of each project.

(d) *Public participation.* (1) In addition to any requirements in 40 CFR part 25, the State shall hold public hearings as follows:

(i) Before submitting its priority system to the Regional Administrator for approval and before adopting any significant change to an approved priority system; and

(ii) Before submitting its annual project priority list to the Regional Administrator for acceptance and before revising its priority list unless the State agency and the Regional Administrator determine that the revision is not significant.

(iii) If the approved State priority system contains procedures for bypassing projects on the fundable portion of the priority list, such bypasses will not be significant revisions for purposes of this section.

(2) Public hearings may be conducted as directed in the State's continuing planning process document or may be held in conjunction with any regular public meeting of the State agency.

(e) *Regional Administrator review.* The State must submit its priority system, project priority list and revisions of the priority system or priority list to the Regional Administrator for review. The State must also submit each year, by August 31, a new priority list for use in the next fiscal year.

(1) After submission and approval of the initial priority system and submission and acceptance of the project priority lists under paragraph (c) of this section, the State may revise its priority system and list as necessary.

(2) The Regional Administrator shall review the State priority system and any revisions to insure that they are designed to obtain compliance with the criteria established in accordance with paragraphs (b) and (d) of this section and the enforceable requirements of the Act as defined in § 35.2005(b)(15). The Regional Administrator shall complete review of the priority system within 30 days of receipt of the system from the State and will notify the State in writing of approval or disapproval of the priority

system, stating any reasons for disapproval.

(3) The Regional Administrator will review the project priority list and any revisions to insure compliance with the State's approved priority system and the requirements of paragraph (c) of this section. The Regional Administrator will complete review of the project priority list within 30 days of receipt from the State and will notify the State in writing of acceptance or rejection, stating the reasons for the rejection. Any project which is not contained on an accepted current priority list will not receive funding.

(f) *Compliance with the enforceable requirements of the Act.* (1) Except as limited under paragraph (f)(2) of this section, the Regional Administrator, after a public hearing, shall require the removal of a specific project or portion thereof from the State project priority list if the Regional Administrator determines it will not contribute to compliance with the enforceable requirements of the Act.

(2) The Regional Administrator shall not require removal of projects in categories under paragraphs (b)(2)(i) (D) through (G) of this section which do not meet the enforceable requirements of the Act unless the total Federal share of such projects would exceed 25 percent of the State's annual allotment.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27095, June 29, 1990]

§ 35.2020 Reserves.

In developing its priority list the State shall establish the reserves required or authorized under this section. The amount of each mandatory reserve shall be based on the allotment to each State from the annual appropriation under § 35.2010. The State may also establish other reserves which it determines appropriate.

(a) *Reserve for State management assistance grants.* Each State may request that the Regional Administrator reserve, from the State's annual allotment, up to 4 percent of the State's allotment based on the amount authorized to be appropriated, or $400,000, whichever is greater, for State management assistance grants under subpart A of this part. Grants may be made from these funds to cover the costs of administering activities delegated or scheduled to be delegated to a State. Funds reserved for this purpose that are not obligated by the end of the allotment period will be added to the amounts last allotted to a State. These funds shall be immediately available for obligation to projects in the same manner and to the same extent as the last allotment.

(b) *Reserve for alternative systems for small communities.* Each State with 25 percent or more rural population (as determined by the population estimates of the Bureau of Census) shall reserve not less than 4 percent nor more than 7 ½ percent of the State's annual allotment for alternatives to conventional treatment works for small communities. The Governor of any non-rural State may reserve up to 7 ½ percent of the State's allotment for the same purpose.

(c) *Reserve for innovative and alternative technologies.* Each State shall reserve not less than 4 percent nor more than 7½ percent from its annual allotment to increase the Federal share of grant awards under § 35.2032 for projects which use innovative or alternative wastewater treatment processes and techniques. Of this amount not less than one-half of one percent of the State's allotment shall be set aside to increase the Federal share for projects using innovative processes and techniques.

(d) *Reserve for water quality management.* Each State shall reserve not less than $100,000 nor more than 1 percent from its annual allotments, to carry out water quality management planning under § 35.2023, except that in the case of Guam, the Virgin Islands, American Samoa, the Trust Territory of the Pacific Islands and the Commonwealth of the Northern Marianas, a reasonable amount shall be reserved for this purpose.

(e) *Reserve for Advances of Allowance.* Each State shall reserve a reasonable portion of its annual allotment not to exceed 10 percent for advances of allowance under § 35.2025. The Regional Administrator may waive this reserve requirement where a State can demonstrate that such a reserve is not necessary because no

new facilities planning or design work requiring an advance and resulting in Step 3 grant awards is expected to begin during the period of availability of the annual allotment.

(f) *Nonpoint source reserve.* Each State shall reserve 1 percent of its annual allotment or $100,000, whichever is greater, for development and implementation of a nonpoint source management program under section 319 of the Act. Sums reserved by the State under this paragraph that are in excess of $100,000 and that are not used for these purposes, may be used by the State for any other purpose under title II of the Act.

(g) *Marine estuary reserve.* The Administrator shall reserve, before allotment of funds to the States, 1 percent of the funds appropriated under section 207 in fiscal years 1987 and 1988, and 1 ½ percent of the funds appropriated under section 207 in fiscal years 1989 and 1990, to carry out section 205(l) of the Act.

(h) *Indian program reserve.* The Administrator shall reserve, before allotment of funds to the States, one-half of 1 percent of the funds appropriated under section 207 in fiscal years 1987, 1988, 1989 and 1990, for grants for the development of waste treatment management plans and for the construction of sewage treatment works to serve Indian tribes.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2021 Reallotment of reserves.

(a) Mandatory portions of reserves under § 35.2020(b) through (g) shall be reallotted if not obligated during the allotment period (§ 35.2010(b) and (d)). Such reallotted sums are not subject to reserves. The State management assistance reserve under § 35.2020(a) is not subject to reallotment.

(b) States may request the Regional Administrator to release funds in optional reserves or optional portions of required reserves under § 35.2020(b) through (e) for funding projects at any time before the reallotment date. If these optional reserves are not obligated or released and obligated for other purposes before the reallotment date, they shall be subject to reallotment under § 35.2010(b).

(c) Sums deobligated from the mandatory portion of reserves under paragraphs (b) through (e) of § 35.2020 which are reissued by the Comptroller to the Regional Administrator before the initial reallotment date for those funds shall be returned to the same reserve. (See § 35.2010(c)).

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27095, June 29, 1990]

§ 35.2023 Water quality management planning.

(a) From funds reserved under § 35.2020(d) the Regional Administrator shall make grants to the States to carry out water quality management planning including but not limited to:

(1) Identifying the most cost-effective and locally acceptable facility and non-point measures to meet and maintain water quality standards;

(2) Developing an implementation plan to obtain State and local financial and regulatory commitments to implement measures developed under paragraph (a)(1) of this section;

(3) Determining the nature, extent and causes of water quality problems in various areas of the State and interstate region, and reporting on these annually; and

(4) Determining which publicly owned treatment works should be constructed, in which areas and in what sequence, taking into account the relative degree of effluent reduction attained, the relative contributions to water quality of other point or nonpoint sources, and the consideration of alternatives to such construction, and implementing section 303(e) of the Act.

(b) In carrying out planning with grants made under paragraph (a) of this section, a State shall develop jointly with local, regional and interstate entities, a plan for carrying out the program and give funding priority to such entities and designated or undesignated public comprehensive planning organizations to carry out the purposes of this section.

§ 35.2024 Combined sewer overflows.

(a) *Grant assistance from State allotment.* As provided in § 35.2015(b)(2)(iv), after September 30, 1984, upon request from a State, the Administrator may award a grant under section 201(n)(1) of the Act from the State allotment for correction of combined sewer overflows provided that the project is on the project priority list, it addresses impaired uses in priority water quality areas which are due to the impacts of the combined sewer overflows and otherwise meets the requirements of this subpart. The State must demonstrate to the Administrator that the water quality goals of the Act will not be achieved without correcting the combined sewer overflows. The demonstration shall as a minimum prove that significant usage of the water for fishing and swimming will not be possible without the proposed project, and that the project will result in substantial restoration of an existing impaired use.

(b) *Separate fund for combined sewer overflows in marine waters.* (1) After September 30, 1982, the Administrator may award grants under section 201(n)(2) of the Act for addressing impaired uses or public health risks in priority water quality areas in marine bays and estuaries due to the impacts of combined sewer overflows. The Administrator may award such grants provided that the water quality benefits of the proposed project have been demonstrated by the State. The demonstration shall as a minimum prove that significant usage of the water for shellfishing and swimming will not be possible without the proposed project for correction of combined sewer overflows, and the proposed project will result in substantial restoration of an existing impaired use.

(2) The Administrator shall establish priorities for projects with demonstrated water quality benefits based upon the following criteria:

(i) Extent of water use benefits that would result, including swimming and shellfishing;

(ii) Relationship of water quality improvements to project costs; and

(iii) National and regional significance.

(3) If the project is a phase or segment of the proposed treatment works described in the facilities plan, the criteria in paragraph (b)(2) of this section must be applied to the treatment works described in the facilities plan and each segment proposed for funding.

(4) All requirements of this subpart apply to grants awarded under section 201(n)(2) of the Act except §§ 35.2010, 35.2015, 35.2020, 35.2021, 35.2025(b), 35.2042, 35.2103, 35.2109, and 35.2202.

§ 35.2025 Allowance and advance of allowance.

(a) *Allowance.* Step 2+3 and Step 3 grant agreements will include an allowance for facilities planning and design of the project and Step 7 agreements will include an allowance for facility planning in accordance with appendix B of this subpart.

(b) *Advance of allowance to potential grant applicants.* (1) After application by the State (see § 35.2040(d)), the Regional Administrator will award a grant to the State in the amount of the reserve under § 35.2020(e) to advance allowances to potential grant applicants for facilities planning and project design.

(2) The State may request that the right to receive payments under the grant be assigned to specified potential grant applicants.

(3) The State may provide advances of allowance only to small communities, as defined by the State, which would otherwise be unable to complete an application for a grant under § 35.2040 in the judgment of the State.

(4) The advance shall not exceed the Federal share of the estimate of the allowance for such costs which a grantee would receive under paragraph (a) of this section.

(5) In the event a Step 2+3, Step 3 or Step 7 grant is not awarded to a recipient of an advance, the State may seek repayment of the advance on such terms and conditions as it may determine. When the State recovers such advances they shall be added to its most recent grant for advances of allowance.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27095, June 29, 1990]

§ 35.2030 Facilities planning.

(a) *General.* (1) Facilities planning consists of those necessary plans and studies which directly relate to treatment works needed to comply with enforceable requirements of the Act. Facilities planning will investigate the need for proposed facilities. Through a systematic evaluation of alternatives that are feasible in light of the unique demographic, topographic, hydrologic and institutional characteristics of the area, it will demonstrate that, except for innovative and alternative technology under § 35.2032, the selected alternative is cost effective (i.e., is the most economical means of meeting the applicable effluent, water quality and public health requirements over the design life of the facility while recognizing environmental and other non-monetary considerations). For sewered communities with a population of 10,000 or less, consideration must be given to appropriate low cost technologies such as facultative ponds, trickling filters, oxidation ditches, or overland-flow land treatment; and for unsewered portions of communities of 10,000 or less, consideration must be given to onsite systems. The facilities plan will also demonstrate that the selected alternative is implementable from legal, institutional, financial and management standpoints.

(2) Grant assistance may be awarded before certification of the completed facilities plan if:

(i) The Regional Administrator determines that applicable statutory and regulatory requirements (including part 6) have been met; that the facilities planning related to the project has been substantially completed; and that the project for which grant assistance is awarded will not be significantly affected by the completion of the facilities plan and will be a component part of the complete waste treatment system; and

(ii) The applicant agrees to complete the facilities plan on a schedule the State accepts and such schedule is inserted as a special condition of the grant agreement.

(b) *Facilities plan contents.* A completed facilities plan must include:

(1) A description of both the proposed treatment works, and the complete waste treatment system of which it is a part.

(2) A description of the Best Practicable Wastewater Treatment Technology. (See § 35.2005(b)(7).)

(3) A cost-effectiveness analysis of the feasible conventional, innovative and alternative wastewater treatment works, processes and techniques capable of meeting the applicable effluent, water quality and public health requirements over the design life of the facility while recognizing environmental and other non-monetary considerations. The planning period for the cost-effectiveness analysis shall be 20 years. The monetary costs to be considered must include the present worth or equivalent annual value of all capital costs and operation and maintenance costs. The discount rate established by EPA for the construction grants program shall be used in the cost-effectiveness analysis. The population forecasting in the analysis shall be consistent with the current Needs Survey. A cost-effectiveness analysis must include:

(i) An evaluation of alternative flow reduction methods. (If the grant applicant demonstrates that the existing average daily base flow (ADBF) from the area is less than 70 gallons per capita per day (gpcd), or if the Regional Administrator determines the area has an effective existing flow reduction program, additional flow reduction evaluation is not required.)

(ii) A description of the relationship between the capacity of alternatives and the needs to be served, including capacity for future growth expected after the treatment works become operational. This includes letters of intent from significant industrial users and all industries intending to increase their flows or relocate in the area documenting capacity needs and characteristics for existing or projected flows;

(iii) An evaluation of improved effluent quality attainable by upgrading the operation and maintenance and efficiency of existing facilities as an al-

ternative or supplement to construction of new facilities;

(iv) An evaluation of the alternative methods for the reuse or ultimate disposal of treated wastewater and sludge material resulting from the treatment process;

(v) A consideration of systems with revenue generating applications;

(vi) An evaluation of opportunities to reduce use of, or recover energy;

(vii) Cost information on total capital costs, and annual operation and maintenance costs, as well as estimated annual or monthly costs to residential and industrial users.

(4) A demonstration of the non-existence or possible existence of excessive inflitration/inflow in the sewer system. See § 35.2120.

(5) An analysis of the potential open space and recreation opportunities associated with the project.

(6) An adequate evaluation of the environmental impacts of alternatives under part 6 of this chapter.

(7) An evaluation of the water supply implications of the project.

(8) For the selected alternative, a concise description at an appropriate level of detail, of at least the following:

(i) Relevant design parameters;

(ii) Estimated capital construction and operation and maintenance costs, (identifying the Federal, State and local shares), and a description of the manner in which local costs will be financed;

(iii) Estimated cost of future expansion and long-term needs for reconstruction of facilities following their design life;

(iv) Cost impacts on wastewater system users; and

(v) Institutional and management arrangements necessary for successful implementation.

(c) *Submission and review of facilities plan.* Each facilities plan must be submitted to the State for review. EPA recommends that potential grant applicants confer with State reviewers early in the facilities planning process. In addition, a potential grant applicant may request in writing from the State and EPA an early determination under part 6 of this chapter of the appropriateness of a categorical exclusion from NEPA requirements, the scope of the environmental information document or the early preparation of an environmental impact statement.

§ 35.2032 Innovative and alternative technologies.

(a) *Funding for innovative and alternative technologies.* Projects or portions of projects using unit processes or techniques which the Regional Administrator determines to be innovative or alternative technology shall receive increased grants under § 35.2152.

(1) Only funds from the reserve in § 35.2020(c) shall be used to increase these grants.

(2) If the project is an alternative to conventional treatment works for a small community, funds from the reserve in § 35.2020(b) may be used for the 75 percent portion, or any lower Federal share of the grant as determined under § 35.2152.

(b) *Cost-effectiveness preference.* The Regional Administrator may award grant assistance for a treatment works or portion of a treatment works using innovative or alternative technologies if the total present worth cost of the treatment works for which the grant is to be made does not exceed the total present worth cost of the most cost-effective alternative by more than 15 percent.

(1) Privately-owned individual systems (§ 35.2034) are not eligible for this preference.

(2) If the present worth costs of the innovative or alternative unit processes are 50 percent or less of the present worth cost of the treatment works, the cost-effectiveness preference applies only to the innovative or alternative components.

(c) *Modification or replacement of innovative and alternative projects.* The Regional Administrator may award grant assistance to fund 100 percent of the allowable costs of the modification or replacement of any project funded with increased grant funding in accordance with paragraph (a) of this section if he determines that:

(1) The innovative or alternative elements of the project have caused the

project or significant elements of the complete waste treatment system of which the project is a part to fail to meet project performance standards;

(2) The failure has significantly increased operation and maintenance expenditures for the project or the complete waste treatment system of which the project is a part; or requires significant additional capital expenditures for corrective action;

(3) The failure has occurred prior to two years after initiation of operation of the project; and

(4) The failure is not attributable to negligence on the part of any person.

§ 35.2034 Privately owned individual systems.

(a) An eligible applicant may apply for a grant to build privately owned treatment works serving one or more principal residences or small commercial establishments.

(b) In addition to those applicable limitations set forth in §§ 35.2100 through 35.2127 the grant applicant shall:

(1) Demonstrate that the total cost and environmental impact of building the individual system will be less than the cost of a conventional system;

(2) Certify that the principal residence or small commercial establishment was constructed before December 27, 1977, and inhabited or in use on or before that date;

(3) Apply on behalf of a number of individual units to be served in the facilities planning area;

(4) Certify that public ownership of such works is not feasible and list the reasons; and

(5) Certify that such treatment works will be properly operated and maintained and will comply with all other requirements of section 204 of the Act.

§ 35.2035 Rotating biological contractor (RBC) replacement grants.

The Regional Administrator may award a grant for 100 percent of the cost, including planning and design costs, of modification or replacement of RBCs which have failed to meet design performance specifications, provided:

(a) The applicant for a modification/replacement grant demonstrates to the Regional Administrator's satisfaction, by a preponderance of the evidence, that the RBC failure is not due to the negligence of any person, including the treatment works owner, the applicant, its engineers, contractors, equipment manufacturers or suppliers;

(b) The RBC failure has significantly increased the project's capital or operation and maintenance costs;

(c) The modification/replacement project meets all requirements of EPA's construction grant and other applicable regulations, including 40 CFR parts 31, 32 and 35;

(d) The modification/replacement project is included within the fundable range of the State's annual project priority list; and

(e) The State certifies the project for funding from its regular (i.e. non-reserve) allotments and from funds appropriated or otherwise available after February 4, 1987.

[55 FR 27095, June 29, 1990]

§ 35.2036 Design/build project grants.

(a) *Terms and conditions.* The Regional Administrator may award a design/build (Step 7) project grant provided that:

(1) The proposed treatment works has an estimated total cost of $8 million or less;

(2) The proposed treatment works is an aerated lagoon, trickling filter, waste stabilization pond, land application system (wastewater or sludge), slow rate (intermittent) sand filter or subsurface disposal system;

(3) The proposed treatment works will be an operable unit, will meet all requirements of title II of the Act, and will be operated to meet the requirements of any applicable permit;

(4) The grantee obtains bonds from the contractor in an amount the Regional Administrator determines adequate to protect the Federal interest in the treatment works (see 40 CFR 31.36(h));

(5) The grantee will not allow any engineer, engineering firm or contractor which provided facilities planning

or pre-bid services to bid or carry out any part of the design/build work;

(6) Contracts will be firm, fixed price contracts;

(7) The grantee agrees that the grant amount, as amended to reflect the lowest responsive/responsible bid (see paragraph (e) of this section), will not be increased;

(8) The grantee will establish reasonable building start and completion dates;

(9) The grantee agrees that EPA will not pay more than 95 percent of the grant amount until after completion of building and the Regional Administrator's final project approval, based on initiation of operation and acceptance of the facility by the grantee;

(10) The grantee agrees that a recipient of a Step 7 grant is not eligible for any other grant for the project under title II of the Act; and

(11) The grantee accepts other terms and conditions deemed necessary by the Regional Administrator.

(b) *Procurement.* (1) Grantee procurement for developing or supplementing the facilities plan to prepare the pre-bid package, as well as for designing and building the project and performing construction management and contract administration, will be in accordance with EPA procurement requirements at 40 CFR part 31.

(2) The grantee will use the sealed bid (formal advertising) method of procurement to select the design/build contractor.

(3) The grantee may use the same architect or engineer that prepared the facilities plan to provide any or all of the pre-bid, construction management, and contract and/or project administration services provided the initial procurement met EPA requirements (see 40 CFR 31.36(k)).

(c) *Pre-bid package.* Each design/build project grant will provide for the preparation of a pre-bid package that is sufficiently detailed to insure that the bids received for the design/build work are complete, accurate and comparable and will result in a cost-effective, operable facility.

(d) *Grant amount.* The grant amount will be based on an estimate of the design/build project's final cost, including:

(1) An allowance for facilities planning if the grantee did not receive a Step 1 grant (the amount of the allowance is established as a percentage of the estimated design/build cost in accordance with appendix B of this subpart);

(2) An estimated cost of supplementing the facilities plan and other costs necessary to prepare the pre-bid package (see appendix A.I.1(a) of this subpart); and

(3) The estimated cost of the design/build contract.

(e) *Amended grant amount.* (1) After bids are accepted for the design/build contract, and the price of the lowest responsive, responsible bidder is determined, EPA will amend the design/build project grant based on:

(i) The amount of the lowest responsive, responsible bid;

(ii) A lump sum for construction management, contract and project administration services and contingencies;

(iii) Any adjustments to the final allowance for facilities planning if included as required by paragraph (c)(1) of this section (the amount of the final allowance is established as a percentage of the actual building cost in accordance with appendix B of this subpart);

(iv) The actual reasonable and necessary cost of supplementing the facilities plan to prepare the pre-bid package (see paragraph (c)(1) of this section); and

(v) The submission of approvable items required by § 35.2203 of this part.

(2) Changes to Step 7 projects cannot increase the amount of EPA assistance established at the time of the grant amendment.

(f) *Allotment limit for design/build grants.* The Governor may use up to 20 percent of the State's annual allotment for design/build project grants.

[55 FR 27096, June 29, 1990]

§ 35.2040 Grant application.

Applicants for Step 2+3 or Step 3 assistance shall submit applications to the State. In addition to the information required in parts 30 and 33 of this

subchapter, applicants shall provide the following information:

(a) *Step 2+3: Combined design and building of a treatment works and building related services and supplies.* An application (EPA form 5700-32) for Step 2+3 grant assistance shall include:

(1) A facilities plan prepared in accordance with subpart E or I as appropriate;

(2) Certification from the State that there has been adequate public participation based on State and local statutes;

(3) Notification of any advance received under § 35.2025(b);

(4) Evidence of compliance with all application limitations on award (§ 35.2100 through § 35.2127); and

(5) The project schedule.

(b) *Step 3: Building of a treatment works and related services and supplies.* An application (EPA form 5700-32) for Step 3 grant assistance shall include:

(1) A facilities plan prepared in accordance with subpart E or I as appropriate;

(2) Certification from the State that there has been adequate public participation based on State and local statutes;

(3) Notification of any advance received under § 35.2025(b);

(4) Evidence of compliance with all applicable limitations on award (§§ 35.2100 through 35.2127);

(5) Final design drawings and specifications;

(6) The project schedule; and

(7) In the case of an application for Step 3 assistance that is solely for the acquisition of eligible real property, a plat which shows the legal description of the property to be acquired, a preliminary layout of the distribution and drainage systems, and an explanation of the intended method of acquiring the real property (see 40 CFR part 4).

(c) *Training facility project.* An application (EPA form 5700-32) for a grant for construction and support of a training facility, facilities or training programs under section 109(b) of the Act shall include:

(1) A written commitment from the State agency to carry out at such facility a program of training; and

(2) If a facility is to be built, an engineering report including facility design data and cost estimates for design and building.

(d) *Advances of allowance.* State applications for advances of allowance to small communities shall be on EPA form 5700-31, Application for Federal Assistance (short form). The application shall include:

(1) A list of communities that received an advance of allowance and the amount received by each under the previous State grant; and

(2) The basis for the amount requested.

(e) *Field Testing of Innovative and Alternative Technology.* An application (EPA Form 5700-32) for field testing of I/A projects shall include a field testing plan containing:

(1) Identification; including size, of all principal components to be tested;

(2) Location of testing facilities in relationship to full scale design;

(3) Identification of critical design parameters and performance variables that are to be verified as the basis for I/A determinations:

(4) Schedule for construction of field testing facilities and duration of proposed testing;

(5) Capital and O&M cost estimate of field testing facilities with documentation of cost effectiveness of field testing approach; and

(6) Design drawing, process flow diagram, equipment specification and related engineering data and information sufficient to describe the overall design and proposed performance of the field testing facility.

(f) *Marine CSO Fund Project.* An application (EPA Form 5700-32) for marine CSO grant assistance under § 35.2024(b) shall include:

(1) All information required under paragraphs (b) (1), (2), (4), (6), and (7), of this section;

(2) Final design drawings and specifications or a commitment to provide them by a date set by the Regional Administrator; and

(3) The water quality benefits demonstration required under § 35.2024(b)(1).

(g) *Design/build project grant (Step 7).* An application (EPA Form 5700-20)

for a design/build project grant shall include:

(1) All the information required in paragraphs (b)(1), (2) and (4) of this section; and

(2) The estimated building start and completion dates and Federal payment schedule (the start and completion dates may be revised when the design/build bids are accepted and included in the amended grant).

(Approved by the Office of Management and Budget under control number 2040-0027)

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985; 55 FR 27096, June 29, 1990]

§ 35.2042 Review of grant applications.

(a) All States shall review grant applications to ensure that they are complete. When the State determines the proposed project is entitled to priority it shall forward the State priority certification and, except where application review is delegated, the complete application to the regional Administrator for review.

(b)(1) All States delegated authority to manage the construction grants program under section 205(g) of the Act and subpart F of this part shall furnish a written certification to the Regional Administrator, on a project-by-project basis, stating that the applicable Federal requirements within the scope of authority delegated to the State under the delegation agreement have been met. The certification must be supported by documentation specified in the delegation agreement which will be made available to the Regional Administrator upon request. The Regional Administrator shall accept the certification unless he determines the State has failed to establish adequate grounds for the certification or that an applicable requirement has not been met.

(2)(i) When EPA receives a certification covering all delegable preaward requirements, the Regional Administrator shall approve or disapprove the grant within 45 calendar days of receipt of the certification. The Regional Administrator shall state in writing the reasons for any disapproval, and he shall have an additional 45 days to review any subsequent revised submissions. If the Regional Administrator fails to approve or disapprove the grant within 45 days of receipt of the application, the grant shall be deemed approved and the Regional Adminstrator shall issue the grant agreement.

(ii) Grant increase requests are subject to the 45 day provision of this section if the State has been delegated authority over the subject matter of the request.

(c) Applications for assistance for training facilities funded under section 109(b) and for State advances of allowance under section 201(l)(1) of the Act and § 35.2025 will be reviewed in accordance with part 30 of this subchapter.

(Approved by the Office of Management and Budget under control number 2040-0027)

§ 35.2050 Effect of approval or certification of documents.

Review or approval of facilities plans, design drawings and specifications or other documents by or for EPA is for administrative purposes only and does not relieve the grantee of its responsibility to properly plan, design, build and effectively operate and maintain the treatment works described in the grant agreement as required under law, regulations, permits, and good management practices. EPA is not responsible for increased costs resulting from defects in the plans, design drawings and specifications or other subagreement documents.

§ 35.2100 Limitations on award.

(a) *Facilities plan approval.* Before awarding grant assistance for any project the Regional Administrator shall approve the facilities plan and final design drawings and specifications and determine that the applicant and the applicant's project have met all the applicable requirements of §§ 35.2040 and 35.2100 through § 35.2127 except as provided in § 35.2202 for Step 2+3 projects and § 35.2203 for Step 7 projects.

(b) *Agreement on eligible costs.* (1) Concurrent with the approval of a Step 3, Step 2+3 or Step 7 grant, the Regional Administrator and the grant applicant will enter into a written

agreement which will specify the items in the proposed project that are eligible for Federal payments and which shall be incorporated as a special grant condition in the grant award.

(2) Notwithstanding such agreement, the Regional Administrator may:

(i) Modify eligibility determinations that are found to violate applicable Federal statutes and regulations;

(ii) Conduct an audit of the project;

(iii) Withhold or recover Federal funds for costs that are found to be unreasonable, unsupported by adequate documentation or otherwise unallowable under applicable Federal cost principles;

(iv) Withhold or recover Federal funds for costs that are incurred on a project that fails to meet the design specifications or effluent limitations contained in the grant agreement and NPDES permit issued under section 402 of the Act.

[55 FR 27096, June 29, 1990]

§ 35.2101 Advanced treatment.

Projects proposing advanced treatment shall be awarded grant assistance only after the project has been reviewed under EPA's advanced treatment review policy. This review must be completed before submission of any application. EPA recommends that potential grant applicants obtain this review before initiation of design.

§ 35.2102 Water quality management planning.

Before grant assistance can be awarded for any treatment works project, the Regional Administrator shall first determine that the project is:

(a) Included in any water quality management plan being implemented for the area under section 208 of the Act or will be included in any water quality management plan that is being developed for the area and reasonable progress is being made toward the implementation of that plan; and

(b) In conformity with any plan or report implemented or being developed by the State under sections 303(e) and 305(b) of the Act.

[55 FR 27097, June 29, 1990]

§ 35.2103 Priority determination.

The project shall be entitled to priority in accordance with § 35.2015, and the award of grant assistance for the project shall not jeopardize the funding of any project of higher priority under the approved priority system.

§ 35.2104 Funding and other considerations.

(a) The applicant shall;

(1) Agree to pay the non-Federal project costs;

(2) Demonstrate the legal, institutional, managerial, and financial capability to ensure adequate building and operation and maintenance of the treatment works throughout the applicant's jurisdiction including the ability to comply with part 30 of this subchapter. This demonstration must include: An explanation of the roles and responsibilities of the local governments involved; how construction and operation and maintenance of the facilities will be financed; a current estimate of the cost of the facilities; and a calculation of the annual costs per household. It must also include a written certification signed by the applicant that the applicant has analyzed the costs and financial impacts of the proposed facilities, and that it has the capability to finance and manage their building and operation and maintenance in accordance with this regulation;

(3) Certify that it has not violated any Federal, State or local law pertaining to fraud, bribery, graft, kickbacks, collusion, conflict of interest or other unlawful or corrupt practice relating to or in connection with facilities planning or design work on a wastewater treatment works project.

(4) Indicate the level of participation for minority and women's business enterprises during facilities planning and design of the project.

(b) Federal assistance made available by the Farmers Home Administration may be used to provide the non-Federal share of the project's cost.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2105 Debarment and suspension.

The applicant shall indicate whether it used the services of any individual, organization, or unit of government for facilities planning or design work whose name appears on the master list of debarments, suspensions, and voluntary exclusions. See 40 CFR 32.400. If the applicant indicates it has used the services of a debarred individual or firm, EPA will closely examine the facilities plan, design drawings and specifications to determine whether to award a grant. EPA will also determine whether the applicant should be found non-responsible under part 30 of this subchapter or be the subject of possible debarment or suspension under part 32 of this subchapter.

§ 35.2106 Plan of operation.

The applicant shall submit a draft plan of operation that addresses development of: An operation and maintenance manual; an emergency operating program; personnel training; an adequate budget consistent with the user charge system approved under § 35.2140; operational reports; laboratory testing needs; and an operation and maintenance program for the complete waste treatment system.

§ 35.2107 Intermunicipal service agreements.

If the project will serve two or more municipalities, the applicant shall submit the executed intermunicipal agreements, contracts or other legally binding instruments necessary for the financing, building and operation of the proposed treatment works. At a minimum they must include the basis upon which costs are allocated, the formula by which costs are allocated, and the manner in which the cost allocation system will be administered. The Regional Administrator may waive this requirement provided the applicant can demonstrate:

(a) That such an agreement is already in place; or

(b) Evidence of historic service relationships for water supply, wastewater or other services between the affected communities regardless of the existence of formal agreements, and

(c) That the financial strength of the supplier agency is adequate to continue the project, even if one of the proposed customer agencies fails to participate.

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§ 35.2108 Phased or segmented treatment works.

Grant funding may be awarded for a phase or segment of a treatment works, subject to the limitations of § 35.2123, although that phase or segment does not result in compliance with the enforceable requirements of the Act, provided:

(a) The grant agreement requires the recipient to make the treatment works of which the phase or segment is a part operational and comply with the enforceable requirements of the Act according to a schedule specified in the grant agreement regardless of whether grant funding is available for the remaining phases and segments; and

(b) Except in the case of a grant solely for the acquisition of eligible real property, one or more of the following conditions exist:

(1) The Federal share of the cost of building the treatment works would require a disproportionate share of the State's annual allotment relative to other needs or would require a major portion of the State's annual allotment;

(2) The period to complete the building of the treatment works will cover three years or more;

(3) The treatment works must be phased or segmented to meet the requirements of a Federal or State court order; or

(4) The treatment works is being phased or segmented to build only the less-than-secondary facility pending a final decision on the applicant's request for a secondary treatment requirement waiver under section 301(h) of the Act.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2109 Step 2+3.

The Regional Administrator may award a Step 2+3 grant which will provide the Federal share of an allowance under Appendix B and the estimated allowable cost of the project only if:

(a) The population of the applicant municipality is 25,000 or less according to the most recent U.S. Census;

(b) The total Step 3 building cost is estimated to be $8 million or less; and

(c) The project is not for a treatment works phase or segment.

§ 35.2110 Access to individual systems.

Applicants for privately owned individual systems shall provide assurance of access to the systems at all reasonable times for such purposes as inspection, monitoring, building, operation, rehabilitation and replacement.

§ 35.2111 Revised water quality standards.

After December 29, 1984, no grant can be awarded for projects that discharge into stream segments which have not, at least once since December 29, 1981, had their water quality standards reviewed and revised or new standards adopted, as appropriate, under section 303(c) of the Act, unless:

(a) The State has in good faith submitted such water quality standards and the Regional Administrator has failed to act on them within 120 days of receipt;

(b) The grant assistance is for the construction of non-discharging land treatment or containment ponds; or

(c) The grant assistance is a State program grant awarded under section 205(g) or 205(j) of the Act.

[50 FR 45895, Nov. 4, 1935]

§ 35.2112 Marine discharge waiver applicants.

If the applicant is also an applicant for a secondary treatment requirement waiver under section 301(h) of the Act, a plan must be submitted which contains a modified scope of work, a schedule for completion of the less-than-secondary facility and an estimate of costs providing for building the proposed less-than-secondary facilities, including provisions for possible future additions of treatment processes or techniques to meet secondary treatment requirements.

§ 35.2113 Environmental review.

(a) The environmental review required by part 6 of this chapter must be completed before submission of any application. The potential applicant should work with the State and EPA as early as possible in the facilities planning process to determine if the project qualifies for a categorical exclusion from part 6 requirements, or whether a finding of no significant impact or an environmental impact statement is required.

(b) In conjunction with the facilities planning process as described in § 35.2030(c), a potential applicant may request, in writing, that EPA make a formal determination under part 6 of this chapter.

§ 35.2114 Value engineering.

(a) If the project has not received Step 2 grant assistance the applicant shall conduct value engineering if the total estimated cost of building the treatment works is more than $10 million.

(b) The value engineering recommendations shall be implemented to the maximum extent feasible.

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§ 35.2116 Collection system.

Except as provided in § 35.2032(c), if the project involves collection system work, such work:

(a) Shall be for the replacement or major rehabilitation of an existing collection system which was not build with Federal funds awarded on or after October 18, 1972, and shall be necessary to the integrity and performance of the complete waste treatment system; or

(b) Shall be for a new cost-effective collection system in a community in existence on October 18, 1972, which has sufficient existing or planned capacity to adequately treat such collected wastewater and where the bulk (generally two-thirds) of the expected flow (flow from existing plus future residential users) will be from the resi-

dent population on October 18, 1972. The expected flow will be subject to the limitations for interceptors contained in § 35.2123. If assistance is awarded, the grantee shall provide assurances that the existing population will connect to the collection system within a reasonable time after project completion.

§ 35.2118 Preaward costs.

(a) EPA will not award grant assistance for Step 2+3 and Step 3 work performed before award of grant assistance for that project, except:

(1) In emergencies or instances where delay could result in significant cost increases, the Regional Administrator may approve preliminary building work (such as procurement of major equipment requiring long lead times, field testing of innovative and alternative technologies, minor sewer rehabilitation, acquisition of eligible land or an option for the purchase of eligible land or advance building on minor portions of treatment works) after completion of the environmental review as required by § 35.2113.

(2) If the Regional Administrator approves preliminary Step 3 work, such approval is not an actual or implied commitment of grant assistance and the applicant proceeds at its own risk.

(b) Any procurement is subject to the requirements of 40 CFR part 33, and in the case of acquisition of eligible real property, 40 CFR part 4.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2120 Infiltration/Inflow.

(a) *General.* The applicant shall demonstrate to the Regional Administrator's satisfaction that each sewer system discharging into the proposed treatment works project is not or will not be subject to excessive infiltration/inflow. For combined sewers, inflow is not considered excessive in any event.

(b) *Inflow.* If the rainfall induced peak inflow rate results or will result in chronic operational problems during storm events, or the rainfall-induced total flow rate exceeds 275 gpcd during storm events, the applicant shall perform a study of the sewer system to determine the quantity of excessive inflow and to propose a rehabilitation program to eliminate the excessive inflow. All cases in which facilities are planned for the specific storage and/or treatment of inflow shall be subject to a cost-effectiveness analysis.

(c) *Infiltration.* (1) If the flow rate at the existing treatment facility is 120 gallons per capita per day or less during periods of high groundwater, the applicant shall build the project including sufficient capacity to transport and treat any existing infiltration. However, if the applicant believes any specific portion of its sewer system is subject to excessive infiltration, the applicant may confirm its belief in a cost-effectiveness analysis and propose a sewer rehabilitation program to eliminate that specific excessive infiltration.

(2) If the flow rate at the existing treatment facility is more than 120 gallons per capita per day during periods of high groundwater, the applicant shall either:

(i) Perform a study of the sewer system to determine the quantity of excessive infiltration and to propose a sewer rehabilitation program to eliminate the excessive infiltration; or

(ii) If the flow rate is not significantly more than 120 gallons per capita per day, request the Regional Administrator to determine that he may proceed without further study, in which case the allowable project cost will be limited to the cost of a project with a capacity of 120 gallons per capita per day under Appendix A.G.2.a.

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[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45895, Nov. 4, 1985]

§ 35.2122 Approval of user charge system and proposed sewer use ordinance.

If the project is for Step 3 grant assistance, unless it is solely for acquisition of eligible land, the applicant must obtain the Regional Administrator's approval of its user charge

system (§ 35.2140) and proposed (or existing) sewer use ordinance § 35.2130). If the applicant has a sewer use ordinance or user charge system in affect, the applicant shall demonstrate to the Regional Administrator's satisfaction that they meet the requirements of this part and are being enforced.

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§ 35.2123 Reserve capacity.

EPA will limit grant assistance for reserve capacity as follows:

(a) If EPA awarded a grant for a Step 3 interceptor segment before December 29, 1981, EPA may award grants for remaining interceptor segments included in the facilities plan with reserve capacity as planned, up to 40 years.

(b) Except as provided in paragraph (a) of this section, if EPA awards a grant for a Step 3 or Step 3 segment of a primary, secondary, or advanced treatment facility or its interceptors included in the facilities plan before October 1, 1984, the grant for that Step 3 or Step 3 segment, and any remaining segments, may include 20 years reserve capacity.

(c) Except as provided in paragraph (b) of this section, after September 30, 1984, no grant shall be made to provide reserve capacity for a project for secondary treatment or more stringent treatment or new interceptors and appurtenances. Grants for such projects shall be based on capacity necessary to serve existing needs (including existing needs of residential, commercial, industrial, and other users) as determined on the date of the approval of the Step 3 grant. Grant assistance awarded after September 30, 1990 shall be limited to the needs existing on September 30, 1990.

(d) For any application with capacity in excess of that provided by this section:

(1) All incremental costs shall be paid by the applicant. Incremental costs include all costs which would not have been incurred but for the additional excess capacity, i.e., any cost in addition to the most cost-effective alternative with eligible reserve capacity described under paragraphs (a) and (b) of this section.

(2) It must be determined that the actual treatment works to be built meets the requirements of the National Environmental Policy Act and all applicable laws and regulations.

(3) The Regional Administrator shall approve the plans, specifications and estimates for the actual treatment works.

(4) The grantee shall assure the Regional Administrator satisfactorily that it has assessed the costs and financial impacts of the actual treatment works and has the capability to finance and manage their construction and operation.

(5) The grantee must implement a user charge system which applies to the entire service area of the grantee.

(6) The grantee shall execute appropriate grant conditions or releases protecting the Federal Government from any claim for any of the costs of construction due to the additional capacity.

§ 35.2125 Treatment of wastewater from industrial users.

(a) Grant assistance shall not be provided for a project unless the project is included in a complete waste treatment system and the principal purpose of both the project and the system is for the treatment of domestic wastewater of the entire community, area, region or district concerned.

(b) Allowable project costs do not include:

(1) Costs of interceptor or collector sewers constructed exclusively, or almost exclusively, to serve industrial users; or

(2) Costs for control or removal of pollutants in wastewater introduced into the treatment works by industrial users, unless the applicant is required to remove such pollutants introduced from nonindustrial users.

§ 35.2127 Federal facilities.

Grant assistance shall not be provided for costs to transport or treat wastewater produced by a facility that is owned and operated by the Federal government which contributes more than 250,000 gallons per day or five

percent of the design flow of the complete waste treatment system, whichever is less.

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§ 35.2130 Sewer use ordinance.

The sewer use ordinance (see also §§ 35.2122 and 35.2208) or other legally binding document shall prohibit any new connections from inflow sources into the treatment works and require that new sewers and connections to the treatment works are properly designed and constructed. The ordinance or other legally binding document shall also require that all wastewater introduced into the treatment works not contain toxics or other pollutants in amounts or concentrations that endanger public safety and physical integrity of the treatment works; cause violation of effluent or water quality limitations; or preclude the selection of the most cost-effective alternative for wastewater treatment and sludge disposal.

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§ 35.2140 User charge system.

The user charge system (see §§ 35.2122 and 35.2208) must be designed to produce adequate revenues required for operation and maintenance (including replacement). It shall provide that each user which discharges pollutants that cause an increase in the cost of managing the effluent or sludge from the treatment works shall pay for such increased cost. The user charge system shall be based on either actual use under paragraph (a) of this section, ad valorem taxes under paragraph (b) of this section, or a combination of the two.

(a) *User charge system based on actual use.* A grantee's user charge system based on actual use (or estimated use) of wastewater treatment services shall provide that each user (or user class) pays its proportionate share of operation and maintenance (including replacement) costs of treatment works within the grantee's service area, based on the user's proportionate contribution to the total wastewater loading from all users (or user classes).

(b) *User charge system based on ad valorem taxes.* A grantee's user charge system which is based on ad valorem taxes may be approved if:

(1) On December 27, 1977, the grantee had in existence a system of dedicated ad valorem taxes which collected revenues to pay the cost of operation and maintenance of wastewater treatment works within the grantee's service area and the grantee has continued to use that system;

(2) The ad valorem user charge system distributes the operation and maintenance (including replacement) costs for all treatment works in the grantee's jurisdiction to the residential and small non-residential user class (including at the grantee's option non-residential, commercial and industrial users that introduce no more than the equivalent of 25,000 gallons per day of domestic sanitary wastes to the treatment works), in proportion to the use of the treatment works by this class; and

(3) Each member of the industrial user and commercial user class which discharges more than 25,000 gallons per day of sanitary waste pays its share of the costs of operation and maintenance (including replacement) of the treatment works based upon charges for actual use.

(c) *Notification.* Each user charge system must provide that each user be notified, at least annually, in conjunction with a regular bill (or other means acceptable to the Regional Administrator), of the rate and that portion of the user charges or ad valorem taxes which are attributable to wastewater treatment services.

(d) *Financial management system.* Each user charge system must include an adequate financial management system that will accurately account for revenues generated by the system and expenditures for operation and maintenance (including replacement) of the treatment system, based on an adequate budget identifying the basis for determining the annual operation and maintenance costs and the costs of personnel, material, energy and administration.

(e) *Charges for operation and maintenance for extraneous flows.* The user charge system shall provide that the costs of operation and maintenance for all flow not directly attributable to users (i.e., infiltration/inflow) be distributed among all users based upon either of the following:

(1) In the same manner that it distributes the costs for their actual use, or

(2) Under a system which uses one or any combination of the following factors on a reasonable basis:

(i) Flow volume of the users;

(ii) Land area of the users;

(iii) Number of hookups or discharges of the users;

(iv) Property valuation of the users, if the grantee has an approved user charge system based on ad valorem taxes.

(f) After completion of building a project, revenue from the project (e.g., sale of a treatment-related by-product; lease of the land; or sale of crops grown on the land purchased under the grant agreement) shall be used to offset the costs of operation and maintenance. The grantee shall proportionately reduce all user charges.

(g) *Adoption of system.* One or more municipal legislative enactments or other appropriate authority must incorporate the user charge system. If the project accepts wastewater from other municipalities, the subscribers receiving waste treatment services from the grantee shall adopt user charge systems in accordance with this section. These user charge systems shall also be incorporated in appropriate municipal legislative enactments or other appropriate authority of all municipalities contributing wastes to the treatment works.

(h) *Inconsistent agreements.* The user charge system shall take precedence over any terms or conditions of agreements or contracts which are inconsistent with the requirements of section 204(b)(1)(A) of the Act and this section.

(i) *Low income residential user rates.* (1) Grantees may establish lower user charge rates for low income residential users after providing for public notice and hearing. A low income residential user is any residence with a household income below the Federal poverty level as defined in 45 CFR 1060.2 or any residence designated as low income under State law or regulation.

(2) Any lower user charge rate for low income residential users must be defined as a uniform percentage of the user charge rate charged other residential users.

(3) The costs of any user charge reductions afforded a low income residential class must be proportionately absorbed by all other user classes. The total revenue for operation and maintenance (including equipment replacement) of the facilities must not be reduced as a result of establishing a low income residential user class.

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[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2152 Federal share.

(a) *General.* The Federal share for each project shall be based on the sum of the total Step 3 or Step 7 allowable costs and the allowance established in the grant agreement under appendix B. Except as provided elsewhere in this section, the Federal share shall be:

(1) 75 percent for grant assistance awarded before October 1, 1984;

(2) 55 percent for grant assistance awarded after September 30, 1984, except as provided in paragraph (a)(3) of this section; and

(3) Subject to paragraphs (c) and (d) of this section, 75 percent for grant assistance awarded after September 30, 1984 and before October 1, 1990, for sequential phases or segments of a primary, secondary, or advanced treatment facility or its interceptors, or infiltration/inflow correction provided:

(i) The treatment works being phased or segmented is described in a facilities plan approved by the Regional Administrator before October 1, 1984;

(ii) The Step 3 grant for the initial phase or segment of the treatment works described in (a)(3)(i) of this section is awarded prior to October 1, 1984; and

(iii) The phase or segment that receives 75 percent funding is necessary to (A) make a phase or segment previously funded by EPA operational and comply with the enforceable requirements of the Act, or (B) complete the treatment works referenced in (a)(3)(i) of this section provided that all phases or segments previously funded by EPA are operational and comply with the enforceable requirements of the Act.

(b) *Innovative and alternative technology.* In accordance with § 35.2032, the Federal share for eligible treatment works or unit processes and techniques that the Regional Administrator determines meet the definition of innovative or alternative technology shall be 20 percent greater than the Federal share under paragraph (a) or (c) of this section, but in no event shall the total Federal share be greater than 85 percent. This increased Federal share depends on the availability of funds from the reserve under § 35.2020. The proportional State contribution to the non-Federal share of building costs for I/A projects must be the same as or greater than the proportional State contribution (if any) to the non-Federal share of eligible building costs for all treatment works which receive 75 or 55 percent grants or such other Federal share under paragraph (c) of this section in the State.

(c) A project for which an application for grant assistance has been made before October 1, 1984, but which was under judicial injunction at that time prohibiting its construction, shall be eligible for a grant at 75 percent of the cost of its construction.

(d) *Uniform lower Federal share.* (1) Except as provided in § 35.2032 (c) and (d) of this section, the Governor of a State may request the Regional Administrator's approval to revise uniformly throughout the State the Federal share of grant assistance for all future projects. The revised Federal share must apply to all needs categories (see § 35.2015(b)(2)).

(2) After EPA awards grant assistance for a project, the Federal share shall be the same for any grant increase that is within the scope of the project.

(3) The uniform lower Federal share established by the Governor does not apply to projects funded under § 35.2024(b).

(e) *Training facilities.* The Federal share of treatment works required to train and upgrade waste treatment works operations and maintenance personnel may be up to 100 percent of the allowable cost of the project.

(1) Where a grant is made to serve two or more States, the Administrator is authorized to make an additional grant for a supplemental facility in each State. The Federal funds awarded to any State under section 109(b) for all training facilities shall not exceed $500,000.

(2) Any grantee who received a grant under section 109(b) before December 27, 1977, may have the grant increased up to $500,000 by funds made available under the Act, not to exceed 100 percent of the allowable costs.

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§ 35.2200 Grant conditions.

In addition to the EPA General Grant Conditions (part 30 of this subchapter), each treatment works grant shall be subject to the conditions under §§ 35.2202 through 35.2218.

§ 35.2202 Step 2+3 projects.

(a) Prior to initiating action to acquire eligible real property, a Step 2+3 grantee shall submit for Regional Administrator review and written approval the information required under § 35.2040(b)(7).

(b) Before initiating procurement action for the building of the project, a Step 2+3 grantee shall submit for the Regional Administrator's review and written approval the information required under §§ 35.2040(b) (5) and (6), 35.2106, 35.2107, 35.2130 and 35.2140.

§ 35.2203 Step 7 projects.

(a) Prior to initiating action to acquire real property, a Step 7 grantee shall submit for Regional Administra-

tor review and written approval the information required under § 35.2040(b)(7).

(b) Before approving a Step 7 grant amendment under § 25.2036, the Regional Administrator shall determine that the applicant and its project have met the requirements of §§ 35.2040(b)(6) and (g), 35.2106, 35.2107, and 35.2122.

[55 FR 27097, June 29, 1990]

§ 35.2204 Project changes.

(a) Minor changes in the project work that are consistent with the objectives of the project and within the scope of the grant agreement do not require the execution of a formal grant amendment before the grantee's implementation of the change. However, the amount of the funding provided by the grant agreement may only be increased by a formal grant amendment.

(b) The grantee must receive from the Regional Administrator a formal grant amendment before implementing changes which:

(1) Alter the project performance standards;

(2) Alter the type of wastewater treatment provided by the project;

(3) Significantly delay or accelerate the project schedule;

(4) Substantially alter the facilities plan, design drawings and specifications, or the location, size, capacity, or quality of any major part of the project; or

(5) Otherwise require a formal grant amendment under part 30 of this subchapter.

(c) Notwithstanding paragraph (a) of this section, changes to Step 7 projects cannot increase the amount of EPA assistance established at the time of the grant amendment.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2205 Maximum allowable project cost.

(a) *Grants awarded on or after the effective date of this regulation.* Except as provided in paragraph (c) of this section, for Step 2+3 or Step 3 grants awarded on or after the effective date of this regulation, the maximum allowable project cost will be the sum of:

(1) The allowable cost of the following:

(i) The initial award amount of all project subagreements between the grantee and its contractors;

(ii) The initial amounts approved for force account work to be performed on the project;

(iii) The purchase price of eligible real property; and

(iv) The initial amount approved for project costs not included under paragraphs (a)(1)(i) through (a)(1)(iii) of this section, excluding any amounts approved for an allowance under § 35.2025 and for contingencies; and

(2) Five percent of the sum of the amounts included under paragraphs (a)(1)(i) through (a)(1)(iv) of this section.

(b) *Grants awarded before the effective date of the regulation.* Except as provided in paragraph (c) of this section, for Step 2+3 or Step 3 grants awarded before the effective date of this regulation, the maximum allowable increase in the cost for work covered by each subagreement finally advertised or, where there will be no advertisement, each subagreement awarded on or after the effective date of this regulation will be five percent of the initial award amount of the subagreement.

(c) *Differing site conditions.* In determining whether the maximum allowable project cost or increase in subagreement cost will be exceeded, costs of equitable adjustments for differing site conditions will be exempt, provided the requirements of 40 CFR part 35, subpart I, Appendix A, paragraph A.1.g. and all other applicable laws and regulations have been met.

[50 FR 46649, Nov. 12, 1985]

§ 35.2206 Operation and maintenance.

(a) The grantee must assure economical and effective operation and maintenance (including replacement) of the treatment works.

(b) Except as provided in paragraphs (c) (1) and (2) of this section, the Regional Administrator shall not pay more than 50 percent of the Federal share of any project unless the grant-

ee has furnished and the Regional Administrator has approved the final plan of operation required by § 35.2106, and shall not pay more than 90 percent of the Federal share of any project unless the grantee has furnished and the Regional Administrator has approved an operation and maintenance manual.

(c)(1) In projects where segmenting of a proposed treatment works has occurred, the Regional Administrator shall not pay more than 90 percent of the Federal share of the total allowable costs of the proposed treatment works until the grantee has furnished and the Regional Administrator has approved an operation and maintenance manual.

(2) In projects where a component is placed in operation before completion of the entire project, the Regional Administrator shall not make any additional payment on that project until a final operation and maintenance manual for the operating component is furnished and approved.

(Approved by the Office of Management and Budget under control number 2040-0027)

§ 35.2208 Adoption of sewer use ordinance and user charge system.

The grantee shall adopt its sewer use ordinance and implement its user charge system developed under §§ 35.2130 and 35.2140 before the treatment works is placed in operation. Further, the grantee shall implement the user charge system and sewer use ordinance for the useful life of the treatment works.

§ 35.2210 Land acquisition.

The grantee shall not acquire real property determined allowable for grant assistance until the Regional Administrator has determined that applicable provisions of 40 CFR part 4 have been met.

§ 35.2211 Field testing for Innovative and Alternative Technology Report.

The grantee shall submit a report containing the procedure, cost, results and conclusions of any field testing. The report shall be submitted to the Regional Administrator in accordance with a schedule to be specified in the grant agreement.

(Approved by the Office of Management and Budget under control number 2040-0027)

§ 35.2212 Project initiation.

(a) The grantee shall expeditiously initiate and complete the project, in accordance with the project schedule contained in the grant application and agreement. Failure to promptly initiate and complete a project may result in the imposition of sanctions under part 30 of this chapter.

(b) The grantee shall initiate procurement action for building the project promptly after award of a Step 3 grant or, after receiving written approval of the information required under § 35.2202 under a Step 2+3 grant or, for a Step 7 project, after completing the facilities plan and the preparation of a pre-bid package that is sufficiently detailed to insure that the bids received form the design/build work will be complete, accurate, comparable and will result in a cost-effective operable facility. Public notice of proposed procurement action should be made promptly after Step 3 award or after final approvals for a Step 2+3 grant under § 35.2202, or after completing the pre-bid package for the Step 7 award. The grantee shall award the subagreement(s) and issue notice(s) to proceed, where required, for building all significant elements of the project within twelve months of the Step 3 award or final Step 2+3 approvals.

(c) Failure to promptly award all subagreement(s) for building the project will result in a limitation on allowable costs. (See Appendixes A, A.2.e.).

(d) The grantee shall notify the Regional Administrator immediately upon award of the subagreement(s) for building all significant elements of the project (see 40 CFR 33.211).

(Approved by the Office of Management and Budget under control number 2040-0027)

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27097, June 29, 1990]

§ 35.2214 Grantee responsibilities.

(a) The grantee shall complete the project in accordance with the grant agreement including: The facilities plan that establishes the need for the project; the design drawings and specifications; the plan of operation under § 35.2106 that identifies the basis to determine annual operating costs; the financial management system under § 35.2140(d) that adequately accounts for revenues and expenditures; the user charge system under § 35.2140 that will generate sufficient revenue to operate and maintain the treatment works; the project schedule; and all other applicable regulations. The grantee shall maintain and operate the project to meet project performance standards including the enforceable requirements of the Act for the design life.

(b) The grantee shall provide the architectural and engineering services and other services necessary to fulfill the obligation in paragraph (a) of this section.

§ 35.2216 Notice of building completion and final inspection.

The grantee shall notify the Regional Administrator when the building of the project is complete. Final inspection shall be made by the Regional Administrator after receipt of the notice of building completion.

(Approved by the Office of Management and Budget under control number 2040-0027)

§ 35.2218 Project performance.

(a) The grantee shall notify the Regional Administrator in writing of the actual date of initiation of operation.

(b) Subject to the provisions of 40 CFR part 33, the grantee shall select the engineer or engineering firm principally responsible for either supervising construction or providing architectural and engineering services during construction as the prime engineer to provide the following services during the first year following the initiation of operation:

(1) Direct the operation of the project and revise the operation and maintenance manual as necessary to accommodate actual operating experience;

(2) Train or provide for training of operating personnel and prepare curricula and training material for operating personnel; and

(3) Advise the grantee whether the project is meeting the project performance standards.

(c) On the date one year after the initiation of operation of the project, the grantee shall certify to the Regional Administrator whether the project meets the project performance standards. If the Regional Administrator or the grantee concludes that the project does not meet the project performance standards, the grantee shall submit the following:

(1) A corrective action report which includes an analysis of the cause of the project's failure to meet the performance standards (including the quantity of infiltration/inflow proposed to be eliminated), and an estimate of the nature, scope and cost of the corrective action necessary to bring the project into compliance;

(2) The schedule for undertaking in a timely manner the corrective action necessary to bring the project into compliance; and

(3) The scheduled date for certifying to the Regional Administrator that the project is meeting the project performance standards.

(d) Except as provided in § 35.2032(c) the grantee shall take corrective action necessary to bring a project into compliance with the project performance standards at its own expense. This limitation on Federal funding for corrective actions does not apply to training funds under section 104(g)(1) of the Act.

(e) Nothing in this section:

(1) Prohibits a grantee from requiring more assurances, guarantees, or indemnity or other contractual requirements from any party performing project work; or

(2) Affects EPA's right to take remedial action, including enforcement, against a grantee that fails to carry out its obligations under § 35.2214.

(Approved by the Office of Management and Budget under control number 2040-0027)

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

§ 35.2250 Determination of allowable costs.

The Regional Administrator will determine the allowable costs of the project based on applicable provisions of laws and regulations, the scope of the approved project, § 30.705 of this subchapter, and Appendix A of this subpart.

§ 35.2260 Advance purchase of eligible land.

In the case of grant assistance awarded solely for the acquisition of eligible land, the following provisions are deferred until the award of the ensuing Step 3 assistance for the building of facilities: §§ 35.2105, 35.2130, 35.2140, 35.2206 and 35.2208.

§ 35.2262 Funding of field testing.

In the case of grant assistance for field testing of innovative or alternative wastewater process and techniques, the following provisions are deferred until the award of assistance for building the approved facilities: §§ 35.2105, 35.2106, 35.2122, 35.2130, 35.2140, 35.2206, and 35.2208.

§ 35.2300 Grant payments.

Except as provided in § 35.2206, the Regional Administrator shall pay the Federal share of the allowance under § 35.2025 and the allowable project costs incurred to date and currently due and payable by the grantee, as certified in the grantee's most recent payment request.

(a) *Adjustment.* The Regional Administrator may at any time review and audit requests for payment and payments and make appropriate adjustments as provided in part 30 of this chapter.

(b) *Refunds, rebates and credits.* The Federal share of any refunds, rebates, credits, or other amounts (including any interest) that accrue to or are received by the grantee for the project, and that are properly allocable to costs for which the grantee has been paid under a grant, must be credited to the current State allotment or paid to the United States. Examples include rebates for prompt payment and sales tax refunds. Reasonable expenses incurred by the grantee securing such refunds, rebates, credits, or other amounts shall be allowable under the grant when approved by the Regional Administrator.

(c) *Release.* By its acceptance of final payment, the grantee releases and discharges the United States, its officers, agents, and employees from all liabilities, obligations, and claims arising out of the project work or under the grant, subject only to exceptions previously specified in writing between the Regional Administrator and the grantee.

(d) *Payment of costs incurred under the Uniform Relocation Assistance and Real Property Acquisition Policies Act.* Notwithstanding the provisions of the introductory paragraph of this section, if the Regional Administrator determines it is necessary for the expeditious completion of a project, he may make advance payment after grant award for the Federal share of the eligible cost of any payment of relocation assistance under § 4.502(c) of this chapter by the grantee. The requirements in part 30 of this subchapter apply to any advances of funds for assistance payments.

(e) *Payment under grants to States for advances of allowance*—(1) *Advance payment to State.* Notwithstanding the provisions of the introductory paragraph of this section, the Regional Administrator, under a State grant for advances of allowance (see § 35.2025), may make payments on an advance or letter-of-credit payment method in accordance with the requirements under part 30 of this chapter. The State and the Regional Administrator shall agree to the payment terms.

(2) *Assignment.* If the State chooses to assign its payments to a potential grant applicant, it shall execute an agreement with the potential grant applicant authorizing direct payment from EPA and establishing appropriate terms for payment. The State shall provide a copy of the agreement to EPA.

(f) *Design/build projects.* For design/build projects, the Regional Administrator shall not pay more than 95 percent of the grant amount until

completion of building and the RA's final project approval (see § 35.2036(a)(6)).

(Approved by the Office of Management and Budget under control number 2040-0027)

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

§ 35.2350 Subagreement enforcement.

(a) *Regional Administrator authority.* At the grantee's request the Regional Administrator may provide technical and legal assistance in the administration and enforcement of any subagreement related to treatment works for which an EPA grant was made and to intervene in any civil action involving the enforcement of such subagreements, including subagreement disputes which are the subject of either arbitration or court action.

(b) *Privity of subagreement.* The Regional Administrator's technical or legal involvement in any subagreement dispute will not make EPA a party to any subagreement entered into by the grantee.

(c) *Grantee responsibilities.* The provision of technical or legal assistance under this section in no way releases the grantee from its obligations under § 35.2214, or affects EPA's right to take remedial action, including enforcement, against a grantee that fails to carry out those obligations.

APPENDIX A—DETERMINATION OF ALLOWABLE COSTS

(a) *Purpose.* The information in this appendix represents Agency policies and procedures for determining the allowability of project costs based on the Clean Water Act, EPA policy, appropriate Federal cost principles under part 30 of this subchapter and reasonableness.

(b) *Applicability.* This cost information applies to grant assistance awarded on or after the effective date of this regulation. Project cost determinations under this subpart are not limited to the items listed in this appendix. Additional cost determinations based on applicable law and regulations must of course be made on a project-by-project basis. Those cost items not previously included in program requirements are not mandatory for decisions under grants awarded before the effective date. They are only to be used as guidance in those cases.

A. Costs Related to Subagreements

1. Allowable costs related to subagreements include:

a. The costs of subagreements for building the project.

b. The costs of complying with the procurement requirements of part 33 of this subchapter, other than the costs of self-certification under § 33.110.

c. The cost of legal and engineering services incurred by grantees in deciding procurement protests and defending their decisions in protest appeals under subpart G of 40 CFR part 33.

d. The costs for establishing or using minority and women's business liaison services.

e. The costs of services incurred during the building of a project to ensure that it is built in conformance with the design drawings and specifications.

f. The costs (including legal, technical, and administrative costs) of assessing the merits of or negotiating the settlement of a claim by or against a grantee under a subagreement provided:

(1) The claim arises from work within the scope of the grant;

(2) A formal grant amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the grantee; and

(4) The Regional Administrator determines that there is a significant Federal interest in the issues involved in the claim.

g. Change orders and the costs of meritorious contractor claims for increased costs under subagreements as follows:

(1) Change orders and the costs of meritorious contractor claims provided the costs are:

(i) Within the scope of the project;

(ii) Not caused by the grantee's mismanagement; and

(iii) Not caused by the grantee's vicarious liability for the improper actions of others.

(2) Provided the requirements of paragraph g(1) are met, the following are examples of allowable change orders and contractor claim costs:

(i) Building costs resulting from defects in the plans, design drawings and specifications, or other subagreement documents only to the extent that the costs would have been incurred if the subagreement documents on which the bids were based had been free of the defects, and excluding the costs of any rework, delay, acceleration, or disruption caused by such defects;

(ii) Costs of equitable adjustments under Clause 4, Differing Site Conditions, of the model subagreement clauses required under § 33.1030 of this Subchapter.

(3) Settlements, arbitration awards, and court judgments which resolve contractor claims shall be reviewed by the grant award official and shall be allowable only to the extent that they meet the requirements of paragraph g(1), are reasonable, and do not attempt to pass on to EPA the cost of events that were the responsibility of the grantee, the contractor, or others.

h. The costs of the services of the prime engineer required by § 35.2218 during the first year following initiation of operation of the project.

i. The cost of development of a plan of operation including an operation and maintenance manual required by § 35.2106.

j. Start-up services for onsite training of operating personnel in operation and control of specific treatment processes, laboratory procedures, and maintenance and records management.

k. The specific and unique costs of field testing an innovative or alternative process or technique, which may include equipment leasing costs, personnel costs, and utility costs necessary for constructing, conducting, and reporting the results of the field test.

2. Unallowable costs related to subagreements include:

a. The costs of architectural or engineering services incurred in preparing a facilities plan and the design drawings and specifications for a project. This provision does not apply to planning and design costs incurred in the modification or replacement of an innovative or alternative project funded under § 35.2032(c).

b. Except as provided in 1.g. above, architectural or engineering services or other services necessary to correct defects in a facilities plan, design drawings and specifications, or other subagreement documents.

c. The costs (including legal, technical and administrative) of defending against a contractor claim for increased costs under a subagreement or of prosecuting a claim to enforce any subagreement unless:

(1) The claim arises from work within the scope of the grant;

(2) A formal grant amendment is executed specifically covering the costs before they are incurred;

(3) The claim cannot be settled without arbitration or litigation;

(4) The claim does not result from the grantee's mismanagement;

(5) The Regional Administrator determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the grantee's responsibility for the improper action of others.

d. Bonus payments, not legally required, for completion of building before a contractual completion date.

e. All incremental costs due to the awa of any subagreements for building signi cant elements of the project more than months after the Step 3 grant award final Step 2+3 approvals unless specified the project schedule approved by the R gional Administrator at the time of gra award.

B. Mitigation

1. Allowable costs include:

a. Costs necessary to mitigate only direc adverse, physical impacts resulting fro building of the treatment works.

b. The costs of site screening necessary t comply with NEPA related studies and fa cilities plans, or necessary to screen adja cent properties.

c. The cost of groundwater monitoring fa cilities necessary to determine the possibili ty of groundwater deterioration, depletio or modification resulting from building th project.

2. Unallowable costs include:

a. The costs of solutions to aesthetic prob lems, including design details which require expensive building techniques and architec tural features and hardware, that are unrea sonable or substantially higher in cost tha approvable alternatives and that neither en hance the function or appearance of the treatment works nor reflect regional archi tectural tradition.

b. The cost of land acquired for the miti gation of adverse environmental effects identified pursuant to an environmenta review under NEPA.

C. Privately or Publicly Owned Small and Onsite Systems

1. Allowable costs for small and onsite sys tems serving residences and small commer cial establishments inhabited on or before December 27, 1977, include a. through e. below. Alternatively, the two-thirds rule in 40 CFR § 35.2116(b) may be used to deter mine allowable residential flows to be served by publicly owned small and alternative wastewater systems, including a. through e. below:

a. The cost of major rehabilitation, up grading, enlarging and installing small and onsite systems, but in the case of privately owned systems, only for principal resi dences.

b. Conveyance pipes from property line to offsite treatment unit which serves a cluster of buildings.

c. Treatment and treatment residue dis posal portions of toilets with composting tanks, oil flush mechanisms, or similar in-house devices.

d. Treatment or pumping units from the incoming flange when located on private

property and conveyance pipes, if any, to the collector sewer.

e. The cost of restoring individual system building sites to their original condition.

2. Unallowable costs for small and onsite systems include:

a. Modification to physical structure of homes or commercial establishments.

b. Conveyance pipes from the house to the treatment unit located on user's property or from the house to the property line if the treatment unit is not located on that user's property.

c. Wastewater generating fixtures such as commodes, sinks, tubs, and drains.

D. Real Property

1. Allowable costs for land and rights-of-way include:

a. The cost (including associated legal, administrative and engineering costs) of land acquired in fee simple or by lease or easement under grants awarded after October 17, 1972, that will be an integral part of the treatment process or that will be used for the ultimate disposal of residues resulting from such treatment provided the Regional Administrator approves it in the grant agreement. These costs include:

(1) The cost of a reasonable amount of land, considering irregularities in application patterns, and the need for buffer areas, berms, and dikes;

(2) The cost of land acquired for a soil absorption system for a group of two or more homes;

(3) The cost of land acquired for composting or temporary storage of compost residues which result from wastewater treatment;

(4) The cost of land acquired for storage of treated wastewater in land treatment systems before land application. The total land area for construction of a pond for both treatment and storage of wastewater is allowable if the volume necessary for storage is greater then the volume necessary for treatment. Otherwise, the allowable cost will be determined by the ratio of the storage volume to the total volume of the pond.

b. The cost of complying with the requirements of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (42 U.S.C. 4621 *et seq.*, 4651 *et seq.*), under part 4 of this chapter for land necessary for the building of treatment works.

c. The cost of contracting with another public agency or qualified private contractor for part or all of the required acquisition and/or relocation services.

d. The cost associated with the preparation of the treatment works site before, during and, to the extent agreed on in the grant agreement, after building. These costs include:

(1) The cost of demolition of existing structures on the treatment works site (including rights-of-way) if building cannot be undertaken without such demolition;

(2) The cost (considering such factors as betterment, cost of contracting and useful life) of removal, relocation or replacement of utilities, provided the grantee is legally obligated to pay under state or local law; and

(3) The cost of restoring streets and rights-of-way to their original condition. The need for such restoration must result directly from the construction and is generally limited to repaving the width of trench.

e. The cost of acquiring all or part of an existing publicly or privately owned wastewater treatment works provided all the following criteria are met:

(1) The acquisition, in and of itself, considered apart from any upgrade, expansion or rehabilitation, provides new pollution control benefits;

(2) The acquired treatment works was not built with previous Federal or State financial assistance;

(3) The primary purpose of the acquisition is *not* the reduction, elimination, or redistribution of public or private debt; and

(4) The acquisition does not circumvent the requirements of the Act, these regulations, or other Federal, State or local requirements.

2. Unallowable costs for land and rights-of-way include:

a. The costs of acquisition (including associated legal, administrative and engineering etc.) of sewer rights-of-way, waste treatment plant sites (including small system sites), sanitary landfill sites and sludge disposal areas except as provided in paragraphs 1. a. and b. of this section.

b. Any amount paid by the grantee for eligible land in excess of just compensation, based on the appraised value, the grantee's record of negotiation or any condemnation proceeding, as determined by the Regional Administrator.

c. Removal, relocation or replacement of utilities located on land by privilege, such as franchise.

E. Equipment, Materials and Supplies

1. Allowable costs of equipment, materials and supplies include:

a. The cost of a reasonable inventory of laboratory chemicals and supplies necessary to initiate plant operations and laboratory items necessary to conduct tests required for plant operation.

b. The costs for purchase and/or transportation of biological seeding materials required for expeditiously initiating the treatment process operation.

c. Cost of shop equipment installed at the treatment works necessary to the operation of the works.

d. The costs of necessary safety equipment, provided the equipment meets applicable Federal, State, local or industry safety requirements.

e. A portion of the costs of collection system maintenance equipment. The portion of allowable costs shall be the total equipment cost less the cost attributable to the equipment's anticipated use on existing collection sewers not funded on the grant. This calculation shall be based on: (1) The portion of the total collection system paid for by the grant, (2) a demonstrable frequency of need, and (3) the need for the equipment to preclude the discharge or bypassing of untreated wastewater.

f. The cost of mobile equipment necessary for the operation of the overall wastewater treatment facility, transmission of wastewater or sludge, or for the maintenance of equipment. These items include:

(1) Portable stand-by generators;

(2) Large portable emergency pumps to provide "pump-around" capability in the event of pump station failure or pipeline breaks; and

(3) Sludge or septage tankers, trailers, and other vehicles having as their sole purpose the transportation of liquid or dewatered wastes from the collector point (including individual or on-site systems) to the treatment facility or disposal site.

g. Replacement parts identified and approved in advance by the Regional Administrator as necessary to assure uninterrupted operation of the facility, provided they are critical parts or major systems components which are:

(1) Not immediately available and/or whose procurement involves an extended "lead-time;"

(2) Identified as critical by the equipment supplier(s); or

(3) Critical but not included in the inventory provided by the equipment supplier(s).

2. Unallowable costs of equipment, materials and supplies include:

a. The costs of equipment or material procured in violation of the procurement requirements of 40 CFR part 33.

b. The cost of furnishings including draperies, furniture and office equipment.

c. The cost of ordinary site and building maintenance equipment such as lawnmowers and snowblowers.

d. The cost of vehicles for the transportation of the grantees' employees.

e. Items of routine "programmed" maintenance such as ordinary piping, air filters, couplings, hose, bolts, etc.

F. Industrial and Federal Users

1. Except as provided in paragraph F.2.a., allowable costs for treatment works serving industrial and Federal facilities include development of a municipal pretreatment program approvable under part 403 of this chapter, and purchase of monitoring equipment and construction of facilities to be used by the municipal treatment works in the pretreatment program.

2. Unallowable costs for treatment works serving industrial and Federal facilities include:

a. The cost of developing an approvable municipal pretreatment program when performed solely for the purpose of seeking an allowance for removal of pollutants under part 403 of this chapter.

b. The cost of monitoring equipment used by industry for sampling and analysis of industrial discharges to municipal treatment works.

c. All incremental costs for sludge management incurred as a result of the grantee providing removal credits to industrial users under 40 CFR 403.7 beyond those sludge management costs that would otherwise be incurred in the absence of such removal credits.

G. Infiltration/Inflow

1. Allowable costs include:

a. The cost of treatment works capacity adequate to transport and treat nonexcessive infiltration/inflow under § 35.2120.

b. The costs of sewer system rehabilitation necessary to eliminate excessive infiltration/inflow as determined in a sewer system study under § 35.2120.

2. Unallowable costs include:

a. When the Regional Administrator determines that the flow rate is not significantly more than 120 gallons per capita per day under § 35.2120(c)(2)(ii), the incremental cost of treatment works capacity which is more than 120 gallons per capita per day.

H. Miscellaneous Costs

1. Allowable costs include:

a. The costs of salaries, benefits and expendable materials the grantee incurs for the project.

b. Unless otherwise specified in this regulation, the costs of meeting specific Federal statutory procedures.

c. Costs for necessary travel directly related to accomplishment of project objectives. Travel not directly related to a specific project, such as travel to professional meetings, symposia, technology transfer seminars, lectures, etc., may be recovered only under an indirect cost agreement.

d. The costs of additions to a treatment works that was assisted under the Federal Water Pollution Control Act of 1956 (Pub. L. 84-660), or its amendments, and that fails to meet its project performance standards provided:

(1) The project is identified on the State priority list as a project for additions to

treatment works that has received previous Federal funds;

(2) The grant application for the additions includes an analysis of why the treatment works cannot meet its project performance standards; and

(3) The additions could have been included in the original grant award and:

(a) Are the result of one of the following:

(i) A change in the project performance standards required by EPA or the State;

(ii) A written understanding between the Regional Administrator and grantee prior to or included in the original grant award;

(iii) A written direction by the Regional Administrator to delay building part of the treatment works; or

(iv) A major change in the treatment works' design criteria that the grantee cannot control; or,

(b) Meet all the following conditions:

(i) If the original grant award was made after December 28, 1981, the treatment works has not completed its first full year of operation;

(ii) The additions are not caused by the grantee's mismanagement or the improper actions of others;

(iii) The costs of rework, delay, acceleration or disruption that are a result of building the additions are not included in the grant; and

(iv) The grant does not include an allowance for facilities planning or design of the additions.

(4) This provision applies to failures that occur either before or after the initiation of operation. This provision does not cover a treatment works that fails at the end of its design life.

e. Costs of royalties for the use of or rights in a patented process or product with the prior approval of the Regional Administrator.

f. Costs allocable to the water pollution control purpose of multiple purpose projects as determined by applying the Alternative Justifiable Expenditure (AJE) method described in the *CG* series. Multiple purpose projects that combine wastewater treatment with recreation do not need to use the AJE method, but can be funded at the level of the most cost-effective single-purpose alternative.

g. Costs of grantee employees attending training workshops/seminars that are necessary to provide instruction in administrative, fiscal or contracting procedures required to complete the construction of the treatment works, if approved in advance by the Regional Administrator.

2. Unallowable costs include:

a. Ordinary operating expenses of the grantee including salaries and expenses of elected and appointed officials and preparation of routine financial reports and studies.

b. Preparation of applications and permits required by Federal, State or local regulations or procedures.

c. Administrative, engineering and legal activities associated with the establishment of special departments, agencies, commissions, regions, districts or other units of government.

d. Approval, preparation, issuance and sale of bonds or other forms of indebtedness required to finance the project and the interest on them.

e. The costs of replacing, through reconstruction or substitution, a treatment works that was assisted under the Federal Water Pollution Control Act of 1956 (Pub. L. 84-660), or its amendments, and that fails to meet its project performance standards. This provision applies to failures that occur either before or after the initiation of operation. This provision does not apply to an innovative and alternative treatment works eligible for funding under § 35.2032(c) or a treatment works that fails at the end of its design life or to a failed rotating biological contactor eligible for funding under § 35.2035.

f. Personal injury compensation or damages arising out of the project.

g. Fines and penalties due to violations of, or failure to comply with, Federal, State or local laws, regulations or procedures.

h. Costs outside the scope of the approved project.

i. Costs for which grant payment has been or will be received from another Federal agency.

j. Costs of treatment works for control of pollutant discharges from a separate storm sewer system.

k. The cost of treatment works that would provide capacity for new habitation or other establishments to be located on environmentally sensitive land such as wetlands or floodplains.

l. The costs of preparing a corrective action report required by § 35.2218(c).

I. Design/Build Project Grants

1. Allowable costs include:

a. The costs of supplementing the facilities plan to prepare the pre-bid package including the cost of preliminary boring and site plans, concept and layout drawings, schematic, general material and major equipment lists and specifications, instructions to builders, general and special conditions, project performance standards and permit limits, applicable State or other design standards, any requirements to go into bid analyses, and other contract documents, schedules, forms and certificates.

b. The costs for building the project, including:

(1) Project costs based on the lowest responsive, responsible competitive design/build project bid.

(2) Construction management services including detailed plans and specifications review and approval, change order review and approval, resident inspection, shop drawing approval and preparation of an O & M manual and of user charge and sewer use ordinance systems.

(3) Any adjustments to reflect the actual reasonable and necessary costs for preparing the pre-bid package.

(4) Post-construction activities required bvy project performance certification requirements.

(5) Contract and project administration activities including the review of contractor vouchers and payment requests, preparation of monitoring reports, grant administration and accounting services, routine legal costs, cost of eligible real property.

(6) Contingencies.

2. Unallowable costs include:

a. All costs in excess of the maximum agreed Federal share.

b. Costs of facilities planning where the grantee has received a Step 1 grant.

[49 FR 6234, Feb. 17, 1984, as amended at 50 FR 45896, Nov. 4, 1985; 55 FR 27098, June 29, 1990]

Appendix B—Allowance for Facilities Planning and Design

1. This appendix provides the method EPA will use to determine both the estimated and the final allowance under § 35.2025 for facilities planning and design. The Step 2+3, Step 3 and Step 7 grant agreements will include an estimate of the allowance.

2. The Federal share of the allowance is determined by applying the applicable grant percentage in § 35.2152 to the allowance.

3. The allowance is not intended to reimburse the grantee for costs actually incurred for facilities planning or design. Rather, the allowance is intended to assist in defraying those costs. Under this procedure, questions of equity (i.e., reimbursement on a dollar-for-dollar basis) will not be appropriate.

4. The estimated and final allowance will be determined in accordance with this appendix and Tables 1, 2 and 3. Table 2 is to be used in the event the grantee received a grant for facilities planning. Table 3 is to be used to determine the facilities planning allowance for a Step 7 grant if the grantee did not receive a Step 1 grant. The amount of the allowance is computed by applying the resulting allowance percentage to the initial allowable building cost.

5. The initial allowable building cost is the initial allowable cost of erecting, altering, remodeling, improving, or extending a treatment works, whether accomplished through subagreement or force account. Specifically, the initial allowable building cost is the allowable cost of the following:

a. The initial award amount of all prime subagreements for building the project.

b. The initial amounts approved for force account work performed in lieu of awarding a subagreement for building the project.

c. The purchase price of eligible real property.

6. The estimated allowance is to be based on the estimate of the initial allowable building cost.

7. The final allowance will be determined one time only for each project, based on the initial allowable building cost, and will not be adjusted for subsequent cost increases or decreases.

8. For a Step 3 or Step 7 project, the grantee may request payment of 50 percent of the Federal share of the estimated allowance immediately after grant award. Final payment of the Federal share of the allowance may be requested in the first payment after the grantee has awarded all prime subagreements for building the project, received the Regional Administrator's approval for force account work, and completed the acquisition of all eligible real property.

9. For a Step 2+3 project, if the grantee has not received a grant for facilities planning, the grantee may request payment of 30 percent of the Federal share of the estimated allowance immediately after the grant award. Half of the remaining estimated allowance may be requested when design of the project is 50 percent complete. If the grantee has received a grant for facilities planning, the grantee may request half of the Federal share of the estimated allowance when design of the project is 50 percent complete. Final payment of the Federal share of the allowance may be requested in the first payment after the grantee has awarded all prime subagreements for building the project, received the Regional Administrator's approval for force account work, and completed the acquisition of all eligible real property.

10. The allowance does not include architect or engineering services provided during the building of the project, e.g., reviewing bids, checking shop drawings, reviewing change orders, making periodic visits to job sites, etc. Architect or engineering services during the building of the project are allowable costs subject to this regulation and 41 CFR part 33.

11. The State will determine the amount and conditions of any advance under § 35.2025(b), not to exceed the Federal share of the estimated allowance.

12. EPA will reduce the Federal share of the allowance by the amount of any advances the grantee received under § 35.2025(b).

TABLE 1—ALLOWANCE FOR FACILITIES PLANNING AND DESIGN

Building cost	Allowance as a percentage of building cost*
$100,000 or less	14.4945
120,000	14.1146
150,000	13.6631
175,000	13.3597
200,000	13.1023
250,000	12.6832
300,000	12.3507
350,000	12.0764
400,000	11.8438
500,000	11.4649
600,000	11.1644
700,000	10.9165
800,000	10.7062
900,000	10.5240
1,000,000	10.3637
1,200,000	10.0920
1,500,000	9.7692
1,750,000	9.5523
2,000,000	9.3682
2,500,000	9.0686
3,000,000	8.8309
3,500,000	8.6348
4,000,000	8.4684
5,000,000	8.1975
6,000,000	7.9827
7,000,000	7.8054
8,000,000	7.6550
9,000,000	7.5248
10,000,000	7.4101
12,000,000	7.2159
15,000,000	6.9851
17,500,000	6.8300
20,000,000	6.6984
25,000,000	6.4841
30,000,000	6.3142
35,000,000	6.1739
40,000,000	6.0550
50,000,000	5.8613
60,000,000	5.7077
70,000,000	5.5809
80,000,000	5.4734
90,000,000	5.3803
100,000,000	5.2983
120,000,000	5.1594
150,000,000	4.9944
175,000,000	4.8835
200,000,000	4.7894

NOTE: The allowance does not reimburse for costs incurred. Accordingly, the allowance Tables shall not be used to determine the compensation for facilities planning or design services. The compensation for facilities planning or design services should be based upon the nature, scope and complexity of the services required by the community.
*Interpolate between values.

TABLE 2—ALLOWANCE FOR DESIGN ONLY

Building cost	Allowance as a percentage of building cost*
$100,000 or less	8.5683
120,000	8.3808
150,000	8.1570

TABLE 2—ALLOWANCE FOR DESIGN ONLY—Continued

Building cost	Allowance as a percentage of building cost*
175,000	8.0059
200,000	7.8772
250,000	7.6668
300,000	7.4991
350,000	7.3602
400,000	7.2419
500,000	7.0485
600,000	6.8943
700,000	6.7666
800,000	6.6578
900,000	6.5634
1,000,000	6.4300
1,200,000	6.3383
1,500,000	6.1690
1,750,000	6.0547
2,000,000	5.9574
2,500,000	5.7983
3,000,000	5.6714
3,500,000	5.5664
4,000,000	5.4769
5,000,000	5.3306
6,000,000	5.2140
7,000,000	5.1174
8,000,000	5.0352
9,000,000	4.9637
10,000,000	4.9007
12,000,000	4.7935
15,000,000	4.6655
17,500,000	4.5790
20,000,000	4.5054
25,000,000	4.3851
30,000,000	4.2892
35,000,000	4.2097
40,000,000	4.1421
50,000,000	4.0314
60,000,000	3.9432
70,000,000	3.8702
80,000,000	3.8080
90,000,000	3.7540
100,000,000	3.7063
120,000,000	3.6252
150,000,000	3.5284
175,000,000	3.4630
200,000,000	3.4074

NOTE: The allowance does not reimburse for costs incurred. Accordingly, the allowance Tables shall not be used to determine the compensation for facilities planning or design services. The compensation for facilities planning or design services should be based upon the nature, scope and complexity of the services required by the community.
*Interpolate between values.

TABLE 3. —ALLOWANCE FOR FACILITIES PLANNING FOR DESIGN/BUILD PROJECTS

Building cost (dollars)	Allowance as a percentage of building cost*
100,000 or less	5.9262
120,000	5.7337
150,000	5.5061
175,000	5.3538
200,000	5.2250
250,000	5.0163
300,000	4.8516

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TABLE 3. —ALLOWANCE FOR FACILITIES PLANNING FOR DESIGN/BUILD PROJECTS—Continued

Building cost (dollars)	Allowance as a percentage of building cost*
350,000	4.7162
400,000	4.6019
500,000	4.4164
600,000	4.2701
700,000	4.1499
800,000	4.0483
900,000	3.9606
1,000,000	3.8837
1,200,000	3.7538
1,500,000	3.6003
1,750,000	3.4976
2,000,000	3.4109
2,500,000	3.2703
3,000,000	3.1595
3,500,000	3.0684
4,000,000	2.9915
5,000,000	2.8669
6,000,000	2.7686
7,000,000	2.6880
8,000,000	2.6198

NOTE: Building cost is the sum of the allowable cost of (1) the initial award amount of the prime subagreement for building and designing the project; and (2) the purchase price of eligible real property.
*Interpolate between values.

[49 FR 6234, Feb. 17, 1984, as amended at 55 FR 27098, June 29, 1990]

Subpart J—Construction Grants Program Delegation to States

AUTHORITY: Sections 205(g) and 518(e) of the Clean Water Act, as amended, 33 U.S.C. 1251 *et. seq.*

SOURCE: 48 FR 37818, Aug. 19, 1983, unless otherwise noted.

§ 35.3000 Purpose.

(a) This regulation establishes policies and procedures for the development, management, and EPA overview of State administration of the wastewater treatment works construction grants program under section 205(g) of the Clean Water Act, as amended. The delegation agreement between EPA and the State is a precondition for construction management assistance under section 205(g). Program requirements for other assistance agreements authorized by section 205(g) for activities under sections 402 and 404 and section 208(b)(4) are provided in part 130. Administration of all section 205(g) assistance agreements follows the procedures established in subpart A of this part.

(b) A State, for purposes of receiving delegation of construction grant program responsibilities under this subpart, shall include a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Trust Territories of the Pacific Islands (Palau), the Commonwealth of the Northern Marianas, and any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation, provided that the Tribe satisfies the following criteria:

(1) The Indian Tribe has a governing body carrying out substantial governmental duties and powers. The Tribe must submit a narrative statement to the Regional Administrator describing the form of the Tribal government, describing the types of essential governmental functions currently performed and identifying the source of the authority to perform these functions.

(2) The functions to be exercised by the Indian Tribe pertain to the management and protection of water resources which are held by an Indian Tribe, held by the United States in trust for Indians, held by a member of an Indian Tribe if such property is subject to a trust restriction on alienation, or otherwise within the borders of an Indian reservation. Assertions by the Indian Tribe with respect to this criterion will be provided by EPA to adjacent governmental entities in accordance with 40 CFR 130.15.

(3) The Indian Tribe is reasonably expected to be capable, in the Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purposes of the Clean Water Act and applicable regulations.

(c) Where a Tribe has previously qualified for treatment as a State under a Clean Water Act or Safe Drinking Water Act program, the Tribe need only provide the required information which had not been submitted in a previous treatment as a State application.

[48 FR 37818, Aug. 19, 1983, as amended at 55 FR 27098, June 29, 1990]

§ 35.3005 Policy.

(a) EPA's policy is to delegate management of the wastewater treatment works construction grant program to the maximum extent possible consistent with the objectives of the Act, prudent fiscal management, and EPA's overall national responsibility for the program. The policy is premised on an on-going partnership between EPA and the States that includes consultation with the States in formulation of policy and guidance by EPA. EPA expects States to undertake full delegation of all project level activities, including preliminary determinations of non-delegable requirements. The objective of delegation is to eliminate duplication of Federal and State effort in the management of the construction grant program, to increase State participation in the construction grant program, and to improve operating efficiency.

(b) Program delegation is to be accomplished through a formal delegation agreement between the Regional Administrator and the State. The delegation agreement will specify the functions which the State will perform and procedures for State certification to EPA.

(c) EPA will overview the performance of the program under delegation to ensure that progress is being made toward meeting the construction grant program objectives and that the State is continuing to employ administrative, fiscal, and program controls to guard against fraud, misuse, and mismanagement of public funds. Overview will also include review of the State management process to ensure it is efficient, effective and assures timely State reviews.

§ 35.3010 Delegation agreement.

(a) Before execution of the delegation agreement, the Regional Administrator must determine that the unit of the State agency designated to implement the agreement is capable of carrying out the delegated functions. The Regional Administrator will evaluate those aspects of the unit which directly affect the State's capability to implement the agreement.

(b) In the delegation agreement, the State agency will assure the Regional Administrator that it will execute its responsibilities under the delegation agreement in conformance with all applicable Federal laws, regulations, orders, and policies.

(c) The delegation agreement will:

(1) Designate the organizational unit within the State responsible for the implementation of the delegation agreement;

(2) List the functions delegated and functions to be delegated, with a schedule for their assumption by the State;

(3) Identify procedures to be followed and records to be kept by the State and EPA in carrying out each delegated function;

(4) Identify the staffing, hiring, training, and funding necessary to carry out the delegated functions;

(5) Estimate program costs by year for the term of the delegation agreement;

(6) Identify an accounting system, acceptable to the Regional Administrator, which will properly identify and relate State costs to the conduct of delegated functions; and

(7) Identify the form and content of the system for EPA overview of State performance consistent with the requirements in § 35.3025 of this subpart, including the frequency, method, and extent of monitoring, evaluation, and reporting.

(d) The term of the delegation agreement shall generally be five years. As subsequent construction management assistance is awarded, the delegation agreement may be amended to maintain a five-year period.

(e) The delegation agreement will be revised, as necessary, to reflect substantial program or procedural changes, as determined by the Regional Administrator.

(Approved by the Office of Management and Budget under control number 2000-0417)

§ 35.3015 Extent of State responsibilities.

(a) Except as provided in paragraph (c) of this section, the Regional Administrator may delegate to the State agency authority to review and certify all construction grant documents required before and after grant award and to perform all construction grant review and management activities necessary to administer the construction grants program.

(b) The State may also act as the manager of waste treatment construction grant projects for small communities. The State, with the approval of the community, may serve as the community contracting agent and undertake responsibilities such as negotiating subagreements, providing technical assistance, and assisting the community in exercising its resident engineering responsibility. In this capacity, the State is in the same position as a private entity and cannot require a small community to hold the State harmless from negligent acts or omissions. The State may also execute an agreement with any organization within the State government, other than the State agency, which is capable of performing these services. The terms of the agreement to provide these services to small communities must be approved by the Regional Administrator before execution of the agreement.

(c) The Regional Administrator shall retain overall responsibility for the construction grant program and exercise direct authority for the following:

(1) Construction grant assistance awards, grant amendments, payments, and terminations;

(2) Projects where an overriding Federal interest requires greater Federal involvement;

(3) Final determinations under Federal statutes and Executive Orders (e.g., the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*), except for sections 201, 203, 204, and 212 of the Clean Water Act;

(4) Final resolution of construction grant audit exceptions; and

(5) Procurement determinations listed under 40 CFR 33.001(g).

§ 35.3020 Certification procedures.

(a) The State will furnish a written certification to the Regional Administrator for each construction grant project application submitted to EPA for award. The certification must state that all Federal requirements, within the scope of authority delegated to the State under the delegation agreement, have been met. This certification must be supported by documentation specified in the delegation agreement. The documentation must be made available to the Regional Administrator upon request.

(b) Certification that a construction grant project application complies with all delegable pre-award requirements consists of certification of compliance with the following sections of subpart I of this part: § 35.2030 (Facilities planning); § 35.2040 (a) and (b) (Grant application); § 35.2042 (Review of grant applications); and §§ 35.2100 (Limitations on award) through and including 35.2125, except for § 35.2101 (Advanced treatment reviews for projects with incremental capital advanced treatment costs of over $3 million), § 35.2112 (Marine waiver discharge applicants), and § 35.2113 (final decisions under the National Environmental Policy Act).

§ 35.3025 Overview of State performance under delegation.

The Regional Administrator will review the performance of a delegated State through an annual overview program, developed in accordance with procedures agreed to in the delegation agreement (§ 35.3010(c)(7)). The purpose of the overview program is to ensure that both the delegated State and EPA efficiently and effectively execute the fiscal and program responsibilities under the Clean Water Act and related legislation. The overview program is comprised of three steps:

(a) *Developing a plan for overview.* The plan for overview specifies priority objectives, key measures of performance, and monitoring and evaluation activities (including State reporting to EPA) for the upcoming year. EPA and the State should agree to a plan for overview in advance of the upcoming year.

(1) Priority objectives will include both program and management objectives. In developing the State priority objectives, the national priorities identified by the Administrator on an annual basis must, at a minimum, be addressed and applied as appropriate to each State. In addition, the Regional Administrator and the State may identify other objectives unique to the situation in the State.

(2) For each priority objective, the plan for overview will specify key measures of performance (both quantitative and qualitative), identify which measures will require the negotiation of outputs, and enumerate the specific monitoring and evaluation activities and methods planned for the upcoming year.

(b) *Negotiating annual outputs.* Annually, the Region and delegated State will negotiate and agree upon outputs, where required by the plan for overview, to cover priority objectives for the upcoming year. This negotiation should also result in development of the work program required for the section 205(g) assistance application, pursuant to subpart A, § 35.130 of this part. Where the assistance application covers a budget period beyond the annual overview program period, the assistance award may be made for the full budget period, contingent on future negotiation of annual outputs under this paragraph for subsequent years of the budget period.

(c) *Monitoring and evaluating program performance.* Monitoring and evaluation of program performance (including State reporting) is based on the plan for overview agreed to in advance, and should be appropriate to the delegation situation existing between the Region and State. It should take into account past performance of the State and the extent of State experience in administering the delegated functions. An on-site evaluation will occur at least annually and will cover, at a minimum, negotiated annual outputs, performance expected in the delegation agreement and, where applicable, evaluation of performance under the assistance agreement as provided in 40 CFR 35.150. The evaluation will cover performance of both the Region and the State. Upon completion of the evaluation, the delegation agreement may be revised, if necessary, to reflect changes resulting from the evaluation. The Regional Administrator may terminate or annul any section 205(g) financial assistance for cause in accordance with the procedures in subpart A, § 35.150, and part 30.

(Approved by the Office of Management and Budget under control number 2000-0417)

§ 35.3030 Right of review of State decision.

(a) Any construction grant application or grantee who has been adversely affected by a State's action or omission may request Regional review of such action or omission, but must first submit a petition for review to the State agency that made the initial decision. The State agency will make a final decision in accordance with procedures set forth in the delegation agreement. The State must provide, in writing, normally within 45 days of the date it receives the petition, the basis for its decision regarding the disputed action or omission. The final State decision must be labeled as such and, if adverse to the applicant or grantee, must include notice of the right to request Regional review of the State decision under this section. A State's failure to address the disputed action or omission in a timely fashion, or in writing, will not preclude Regional review.

(b) Requests for Regional review must include:

(1) A copy of any written State decision.

(2) A statement of the amount in dispute,

(3) A description of the issues involved, and

(4) A concise statement of the objections to the State decision.

The request must be filed by registered mail, return receipt requested, within thirty days of the date of the State decision or within a reasonable time if the State fails to respond in writing to the request for review.

(c) The Region shall determine whether the State's review is comparable to a dispute decision official's

(DDO) review pursuant to 40 CFR part 30, subpart L. If the State's review is comparable, Regional review of the State's decision will be conducted by the Regional Administrator. If the State's review is not comparable, the DDO will review the State's decision and issue a written decision. Review of either a Regional Administrator or DDO decision may be requested pursuant to subpart L.

(Approved by the Office of Management and Budget under control number 2040-0095)

[50 FR 45896, Nov. 4, 1985]

§ 35.3035 Public participation.

(a) Public participation during the development, review, approval, and substantial revision of the delegation agreement will be in accordance with the requirements of section 101(e) of the Act, part 25 of this chapter, and this subpart.

(b) The Regional Administrator or the State, as mutually agreed, will make the draft delegation agreement, any proposed substantial amendment to the delegation agreement, and the proposed annual overview program, available to the public for comment, and provide notice of availability, sufficiently in advance of execution to allow for timely comment.

(c) If, based on comments received, the Regional Administrator or State determines that significant interest exists, the State and EPA will consult with interested and affected groups and citizens prior to execution of the delegation agreement, substantial amendment, or annual overview program. If the Regional Administrator or State determines that significant interest and desire for a public meeting exist, the Region or State will hold one or more public meetings at least 30 days prior to execution.

Subpart K—State Water Pollution Control Revolving Funds

AUTHORITY: Sections 205(m), 501(a) and title VI of the Clean Water Act, as amended, 33 U.S.C. 1285(m), 33 U.S.C. 1361(a), 33 U.S.C. 1381-1387.

SOURCE: 55 FR 10178, Mar. 19, 1990 (interim), unless otherwise noted.

§ 35.3100 Policy and purpose.

(a) The Agency intends to implement the State water pollution control revolving fund program in a manner that preserves for States a high degree of flexibility for operating their revolving funds in accordance with each State's unique needs and circumstances. The purpose of these regulations is to advance the general intent of title VI of the Clean Water Act, which is to ensure that each State's program is designed and operated to continue providing assistance for water pollution control activities in perpetuity.

(b) These regulations reflect statutory and program requirements that have been previously published in the Initial Guidance for State Revolving Funds, which was signed by the Assistant Administrator for Water on January 28, 1988, and the supplementary memorandum to the Initial Guidance for State Revolving Funds, which was signed by the Assistant Administrator for Water on September 30, 1988. Copies of both documents can be obtained by writing the Office of Municipal Pollution Control (WH-546), Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

(c) These regulations supplement title VI by codifying all major program requirements, applicable to the SRF program. EPA will not impose additional major program requirements without an opportunity for affected parties to comment. The process for amending this regulation to incorporate these requirements will begin within three months of their issuance.

§ 35.3105 Definitions.

Words and terms that are not defined below and that are used in this rule shall have the same meaning they are given in 40 CFR part 31 and 40 CFR part 35, subpart I.

(a) *Act.* The Federal Water Pollution Control Act, more commonly known as the Clean Water Act (Pub. L. 92-500), as amended by the Water Quality Act of 1987 (Pub. L. 100-4). 33 U.S.C. 1251 *et seq.*

(b) *Binding Commitment.* A legal obligation by the State to a local recip-

ient that defines the terms for assistance under the SRF.

(c) *Capitalization Grant.* The assistance agreement by which the EPA obligates and awards funds allotted to a State for purposes of capitalizing that State's revolving fund.

(d) *Cash draw.* The transfer of cash under a letter of credit (LOC) from the Federal Treasury into the State's SRF.

(e) *Disbursement.* The transfer of cash from an SRF to an assistance recipient.

(f) *Equivalency projects.* Those section 212 wastewater treatment projects constructed in whole or in part before October 1, 1994, with funds "directly made available by" the capitalization grant. These projects must comply with the requirements of section 602(b)(6) of the Act.

(g) *Funds "directly made available by" capitalization grants.* Funds equaling the amount of the grant.

(h) *Payment.* An action by the EPA to increase the amount of capitalization grant funds available for cash draw from an LOC.

(i) *SRF.* State water pollution control revolving fund.

§ 35.3110 Fund establishment.

(a) *Generally.* Before the Regional Administrator (RA) may award a capitalization grant, the State must establish an SRF that complies with section 603 of the Act and this rule.

(b) *SRF accounts.* The SRF can be established within a multiple-purpose State financing program. However, the SRF must be a separate account or series of accounts that is dedicated solely to providing loans and other forms of financial assistance, but not grants.

(c) *SRF administration.* The SRF must be administered by an instrumentality of the State that is empowered to manage the Fund in accordance with the requirements of the Act. Where more than one agency of the State is involved in administering the activities of the State's program, the functions and the relationships of those agencies must be established to the satisfaction of the RA.

(d) *Documentation of the establishment of an SRF program.* (1) As part of its initial application for the capitalization grant, the State must furnish the RA with documentation of the establishment of an SRF and designation of the State instrumentality that will administer the SRF in accordance with the Act.

(2) With each capitalization grant application, the State's Attorney General (AG), or someone designated by the AG, must sign or concur in a certification that the State legislation establishing the SRF and the powers it confers are consistent with State law, and that the State may legally bind itself to the terms of the capitalization grant agreement.

(3) Where waiting for the AG's signature or concurrence would by itself significantly delay awarding the first grant (i.e., there are no other issues holding up the award), the head or chief legal officer of the State agency which has direct responsibility for administering the SRF program may sign the certification at the time of the capitalization grant award, provided the capitalization grant agreement contains a special condition requiring the State to submit the AG/designee's concurrence to EPA within a reasonable time, not to exceed 120 days, after the grant is awarded.

(e) *Allotment.* (1) Appropriations for fiscal years 1987 through 1990 under both title II and title VI programs will be allotted in accordance with the formula contained in section 205(c)(3) of the Act.

(2) Title VI funds are available for the Agency to obligate to the State during the fiscal year in which they are allotted and during the following fiscal year. The amount of any title VI allotment not obligated to the State at the end of this period of availability will be reallotted for title VI purposes in accordance with 40 CFR 35.2010.

(3) A State that does not receive grants that obligate all the funds allotted to it under title VI in the first year of its availability will not receive reallotted funds from that appropriation.

(4) Notwithstanding 40 CFR 35.910 and 40 CFR 35.2010(a), deobligations and reallotments of title II funds may be transferred to a title VI capitalization grant regardless of either the

year in which the title II funds were originally allotted or the year in which they are deobligated or reallotted.

(f) *Transfer of title II allotments.* A State may exercise the option to transfer a portion of its title II allotment for deposit, through a capitalization grant, into an established water pollution control revolving fund, under section 205(m) of the Act.

(1) If the State elects this option, the Governor of the State must submit a Notice of Intent to the RA specifying the amount of the title II allotment the State intends to use for title VI purposes during the fiscal year for which it is submitted. The Notice may also identify anticipated, unobligated title II funds from the prior fiscal year, and request transfer of those funds as well.

(2) Each Notice of Intent must be submitted on or before July 3 of the year preceding the Federal fiscal year in which those funds are available. If a State fails to file a Notice of Intent on or before the prescribed date, then the State may not transfer title II allotments into an SRF in the upcoming fiscal year. A timely Notice of Intent may be later withdrawn or amended.

(3) When the capitalization grant is awarded, funds requested under section 205(m) of the Act will be obligated under title VI for the activities of the SRF. If a Notice of Intent anticipates transfer of funds under the authority of section 205(m), but those funds are not so obligated by the end of the two year period of availability, they will be subject to reallotment as construction grant funds.

(g) *Reserves and transferred allotments.* (1) Funds reserved under section 205(g) of the Act can be used to develop SRF programs. However, before any of these funds may be used for purposes of the SRF, the State must establish to the satisfaction of the RA that adequate funds, up to the section 205(g) maximum, will be available from any source to administer the construction grants program.

(2) Funds reserved under sections 205(j)(1) and 205(j)(5) of the Act must be calculated based on the State's full title II allotment, and cannot be transferred to the SRF.

(3) Funds reserved under sections 201(l)(2), 205(h), and 205(i) of the Act must also be calculated based upon the State's full title II allotment. However, these reserves may be transferred into an SRF.

(4) The State must reserve from each fiscal year's title VI allotment the greater of one percent of its allotment or $100,000 to carry out planning under sections 205(j) and 303(e) of the Act.

(Approved by the Office of Management and Budget under control number 2040-0118)

§ 35.3115 Eligible activities of the SRF.

Funds in the SRF shall not be used to provide grants. SRF balances must be available in perpetuity and must be used solely to provide loans and other authorized forms of financial assistance:

(a) To municipalities, intermunicipal, interstate, or State agencies for the construction of publicly owned wastewater treatment works as these are defined in section 212 of the Act and that appear on the State's priority list developed pursuant to section 216 of the Act; and

(b) For implementation of a nonpoint source pollution control management program under section 319 of the Act; and

(c) For development and implementation of an estuary conservation and management plan under section 320 of the Act.

§ 35.3120 Authorized types of assistance.

The SRF may provide seven general types of financial assistance.

(a) *Loans.* The SRF may award loans at or below market interest rates, or for zero interest.

(1) Loans may be awarded only if:

(i) All principal and interest payments on loans are credited directly to the SRF;

(ii) The annual repayment of principal and payment of interest begins not later than one year after project completion;

(iii) The loan is fully amortized not later than twenty years after project completion; and

(iv) Each loan recipient establishes one or more dedicated sources of revenue for repayment of the loan.

(2) Where construction of a treatment works has been phased or segmented, loan repayment requirements apply to the completion of individual phases or segments.

(b) *Refinancing existing debt obligations.* The SRF may buy or refinance local debt obligations at or below market rates, where the initial debt was incurred after March 7, 1985, and building began after that date.

(1) Projects otherwise eligible for refinancing under this section on which building began:

(i) Before January 28, 1988 (the effective date of the Initial Guidance for State Revolving Funds) must meet the requirements of title VI to be fully eligible.

(ii) After January 28, 1988, but before the effective date of this rule, must meet the requirements of title VI and of the Initial Guidance for State Revolving Funds to be fully eligible.

(iii) After March 19, 1990 must meet the requirements of this rule to be fully eligible.

(2) Where the original debt for a project was in the form of a multi-purpose bond incurred for purposes in addition to wastewater treatment facility construction, an SRF may provide refinancing only for eligible purposes, and not for the entire debt.

(c) *Guarantee or purchase insurance for local debt obligations.* The SRF may guarantee local debt obligations where such action would improve credit market access or reduce interest rates. The SRF may also purchase or provide bond insurance to guarantee debt service payment.

(d) *Guarantee SRF debt obligations.* The SRF may be used as security or as a source of revenue for the payment of principal and interest on revenue or general obligation bonds issued by the State provided that the net proceeds of the sale of such bonds are deposited in the SRF.

(e) *Loan guarantees for "sub-State revolving funds."* The SRF may provide loan guarantees for similar revolving funds established by municipal or intermunicipal agencies, to finance activities eligible under title VI.

(f) *Earn interest on fund accounts.* The SRF may earn interest on Fund accounts.

(g) *SRF administrative expenses.* (1) Money in the SRF may be used for the reasonable costs of administering the SRF, provided that the amount does not exceed 4 percent of all grant awards received by the SRF. Expenses of the SRF in excess of the amount permitted under this section must be paid for from sources outside the SRF.

(2) Allowable administrative costs include all reasonable costs incurred for management of the SRF program and for management of projects receiving financial assistance from the SRF. Reasonable costs unique to the SRF, such as costs of servicing loans and issuing debt, SRF program start-up costs, financial management, and legal consulting fees, and reimbursement costs for support services from other State agencies are also allowable.

(3) Unallowable administrative costs include the costs of administering the construction grant program under section 205(g), permit programs under sections 402 and 404 and Statewide wastewater management planning programs under section 208(b)(4).

(4) Expenses incurred issuing bonds guaranteed by the SRF, including the costs of insuring the issue, may be absorbed by the proceeds of the bonds, and need not be charged against the 4 percent administrative costs ceiling. The net proceeds of those issues must be deposited in the Fund.

§ 35.3125 Limitations on SRF assistance.

(a) *Prevention of double benefit.* If the SRF makes a loan in part to finance the cost of facility planning and preparation of plans, specifications, and estimates for the building of treatment works and the recipient subsequently receives a grant under section 201(g) for the building of treatment works and an allowance under section 201(l)(1), the SRF shall ensure that the recipient will promptly repay the loan to the extent of the allowance.

(b) *Assistance for the non-Federal share.* (1) The SRF shall not provide a loan for the non-Federal share of the cost of a treatment works project for which the recipient is receiving assist-

ance from the EPA under any other authority.

(2) The SRF may provide authorized financial assistance other than a loan for the non-Federal share of a treatment works project receiving EPA assistance if the Governor or the Governor's designee determines that such assistance is necessary to allow the project to proceed.

(3) The SRF may provide loans for subsequent phases, segments, or stages of wastewater treatment works that previously received grant assistance for earlier phases, segments, or stages of the same treatment works.

(4) A community that receives a title II construction grant after the community has begun building with its own financing, may receive SRF assistance to refinance the pre-grant work, in accordance with the requirements for refinancing set forth under § 35.3120(b) of this part.

(c) *Publicly owned portions.* The SRF may provide assistance for only the publicly owned portion of the treatment works.

(d) *Private operation.* Contractual arrangements for the private operation of a publicly owned treatment works will not affect the eligibility of the treatment works for SRF financing.

(e) *Water quality management planning.* The SRF may provide assistance only to projects that are consistent with any plans developed under sections 205(j), 208, 303(e), 319 and 320 of the Act.

§ 35.3130 The capitalization grant agreement.

(a) *Contents.* The capitalization grant agreement must contain or incorporate by reference the State's application, Intended Use Plan, agreed upon payment schedule, State environmental review process and certifications or demonstrations of other agreement requirements and, where used, the SRF Operating Agreement.

(b) *Operating agreement.* At the option of the State, the organizational and administrative framework and those procedures of the SRF program that are not expected to change annually may be described in an Operating Agreement (OA). The OA must be incorporated by reference in the grant agreement.

(c) *Application requirements.* The State must certify in its application that it has the legal, managerial, technical, and operational capabilities to administer the program.

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§ 35.3135 Specific capitalization grant agreement requirements.

(a) *Agreement to accept payments.* The State must agree to accept grant payments in accordance with the negotiated payment schedule.

(b) *Provide a State match.* The State must agree to deposit into its SRF an amount equaling at least 20 percent of the amount of each grant payment.

(1) The State match must be deposited on or before the date on which the State receives each payment from the grant award. The State may maintain its match in an LOC or other financial arrangement similar to the Federal LOC, provided that the State's proportional share is converted to cash when the Federal LOC is drawn upon.

(2) Bonds issued by the State for the match may be retired from the interest earned by the SRF (including interest on SRF loans) if the net proceeds from the State issued bonds are deposited in the fund. Loan principal must be repaid to the SRF and cannot be used to retire State issued bonds.

(3) The State must identify the source of the matching amount in the capitalization grant application and must establish to the RA's satisfaction that the source is not Federal money unless specifically authorized to be used for such purposes under the statute making the funds available.

(4) If the State provides a match in excess of the required amount, the excess balance may be banked toward subsequent match requirements.

(5) If the State has deposited State monies in a dedicated revolving fund after March 7, 1985 and prior to receiving a capitalization grant, the State may credit these monies toward the match requirement:

(i) If the monies were deposited in an SRF that subsequently received

capitalization grant and, if the deposit was expended, it was expended in accordance with title VI;

(ii) If the monies were deposited in a separate fund that has not received a capitalization grant, they were expended in accordance with title VI and an amount equal to all repayments of principal and payments of interest from these loans will be deposited in the Federally capitalized fund; or

(iii) If the monies were deposited in a separate fund and used as a reserve consistent with title VI, and an amount equal to the reserve is transferred to the Federally capitalized fund as its function is satisfied.

(c) *Binding commitments.* The State must make binding commitments in an amount equal to 120 percent of each quarterly grant payment within one year after the receipt of each quarterly grant payment.

(1) Binding commitments may be for any of the types of assistance provided for in sections 40 CFR 35.3120(a), (b), (c), (e) or (f) and for Fund administration under 40 CFR 35.3120(g).

(2) If the State commits more than the required 120 percent, EPA will recognize the cumulative value of the binding commitments, and the excess balance may be banked towards the binding commitment requirements of subsequent quarters.

(3) If the State does not make binding commitments equaling 120 percent of the quarterly grant payment within one year after it receives the payment, the RA may withhold future quarterly grant payments, and require adjustments to the payment schedule before releasing further payments.

(d) *Expeditious and timely expenditure.* The State must agree to expend all funds in the SRF in an expeditious and timely manner.

(e) *First use of funds.* (1) The State must agree to first use funds in the SRF equaling the amount of the grant, all repayments of principal and payments of interest on the initial loans from the grant, and the state match to address any major and minor publicly owned treatment works (POTW) that the Region and the State have previously identified as part of the National Municipal Policy list for the State.

(2) These funds may be used to fund the cost-effective reserve capacity of these projects.

(3) In order for a State to use these funds for other section 212 POTWs or for nonpoint source (section 319) or estuary (section 320) activities, the State must certify that the POTWs identified in § 35.3135(e)(1) are either:

(i) In compliance; or

(ii) On an enforceable schedule; or

(iii) Have an enforcement action filed; or

(iv) Have a funding commitment during or prior to the first year covered by the Intended Use Plan.

(4) Other funds in the SRF may be used at any time for the construction of any treatment works on the State's priority list or for activities under sections 319 and 320 of the Act.

(f) *Compliance with title II requirements.* (1) The State must agree that equivalency projects will comply with sections 201(b), 201(g)(1), 201(g)(2), 201(g)(3), 201(g)(5), 201(g)(6), 201(n)(1), 201(o), 204(a)(1), 204(a)(2), 204(b)(1), 204(d)(2), 211, 218, 511(c)(1), and 513 of the Act.

(2) The State must comply only with the statutory requirements. The State may develop its own procedures for implementing the statutory provisions. The RA will accept State procedures provided that the procedures will adequately assure compliance with the statutory requirements, considered in the context of the SRF program.

(3) Where the State funds equivalency projects for more than the capitalization grant amount, EPA will recognize the cumulative value of the eligible costs of the equivalency projects, and the excess balance may be banked toward subsequent year equivalency requirements.

(4) Only those eligible costs actually funded with loans or other authorized assistance from the SRF may be credited toward satisfaction of the equivalency requirement, and only in the amount of that assistance.

(g) *State laws and procedures.* The State must agree to commit or expend each quarterly capitalization grant payment in accordance with the State's own laws and procedures re-

garding the commitment or expenditure of revenues.

(h) *State accounting and auditing procedures.* (1) The State must agree to establish fiscal controls and accounting procedures that are sufficient to assure proper accounting for payments received by the SRF, disbursements made by the SRF, and SRF balances at the beginning and end of the accounting period.

(2) The State must also agree to use accounting, audit, and fiscal procedures conforming to generally accepted government accounting standards as these are promulgated by the Governmental Accounting Standards Board. Generally accepted government auditing standards are usually defined as, but not limited to, those contained in the U.S. General Accounting Office (GAO) publication "Government Auditing Standards" (1988 revision).

(i) *Recipient accounting and auditing procedures.* The State must agree to require recipients of SRF assistance to maintain project accounts in accordance with generally accepted government accounting standards as these are promulgated by the Government Accounting Standards Board. These accounts must be maintained as separate accounts.

(j) *Annual report.* The State must agree to make an Annual Report to the RA on the actual use of the funds, in accordance with section 606(d) of the Act.

§ 35.3140 Environmental review requirements.

(a) *Generally.* The State must agree to conduct reviews of the potential environmental impacts of all section 212 construction projects receiving assistance from the SRF, including nonpoint source pollution control (section 319) and estuary protection (section 320) projects that are also section 212 projects.

(b) *NEPA-like State environmental review process.* Equivalency projects must undergo a State environmental review process (SERP) that conforms generally to the National Environmental Policy Act (NEPA). The State may elect to apply the procedures at 40 CFR part 6, subpart E and related subparts, or apply its own "NEPA-like" SERP for conducting environmental reviews, provided that the following elements are met.

(1) *Legal foundation.* The State must have the legal authority to conduct environmental reviews of section 212 construction projects receiving SRF assistance. Such authority and supporting documentation must specify:

(i) The mechanisms to implement mitigation measures to ensure that a project is environmentally sound;

(ii) The legal remedies available to the public to challenge environmental review determinations and enforcement actions;

(iii) The State agency primarily responsible for conducting environmental reviews;

(iv) The extent to which environmental review responsibilities will be delegated to local recipients and will be subject to oversight by the primary State agency.

(2) *Interdisciplinary approach.* The State must employ an interdisciplinary approach for identifying and mitigating adverse environmental effects including, but not limited to, those associated with other applicable Federal environmental authorities.

(3) *Decision documentation.* The State must fully document the information, processes and premises that influence decisions to:

(i) Proceed with a project contained in a finding of no significant impact (FNSI) following documentation in an environmental assessment (EA);

(ii) Proceed or not proceed with a project contained in a record of decision (ROD) following preparation of a full environmental impact statement (EIS);

(iii) Reaffirm or modify a decision contained in a previously issued categorical exclusion (CE), EA/FNSI or EIS/ROD following a mandatory 5 year environmental reevaluation of a proposed project; and

(iv) If a State elects to implement processes for either partitioning an environmental review or CE from environmental review, the State must similarly document these processes in its proposed SERP.

(4) *Public notice and participation.* (i) The State must provide public notice when a CE is issued or rescinded, a FNSI is issued but before it becomes effective, a decision issued 5 years earlier is reaffirmed or revised, and prior to initiating an EIS.

(ii) Except with respect to a public notice of a categorical exclusion or reaffirmation of a previous decision, a formal public comment period must be provided during which no action on a project will be allowed.

(iii) A public hearing or meeting must be held for all projects except for those having little or no environmental effect.

(5) *Alternatives Consideration.* The State must have evaluation criteria and processes which allow for:

(i) Comparative evaluation among alternatives including the beneficial and adverse consequences on the existing environment, the future environment and individual sensitive environmental issues that are identified by project management or through public participation; and

(ii) Devising appropriate near-term and long-range measures to avoid, minimize or mitigate adverse impacts.

(c) *Alternative State environmental review process.* The State may elect to apply an alternative SERP to non-equivalency section 212 construction projects assisted by the SRF, provided that such process:

(1) Is supported by a legal foundation which establishes the State's authority to review section 212 construction projects;

(2) Responds to other environmental objectives of the State;

(3) Provides for comparative evaluations among alternatives and account for beneficial and adverse consequences to the existing and future environment;

(4) Adequately documents the information, processes and premises that influence an environmental determination; and

(5) Provides for notice to the public of proposed projects and for the opportunity to comment on alternatives and to examine environmental review documents. For projects determined by the State to be controversial, a public hearing must be held.

(d) *EPA approval process.* The RA must review and approve any State "NEPA-like" and alternative procedures to ensure that the requirements for both have been met. The RA will conduct these reviews on the basis of the criteria for evaluating NEPA-like reviews contained in Appendix A to this part.

(e) *Modifications to approved SERPs.* Significant changes to State environmental review procedures must be approved by the RA.

§ 35.3145 Application of other Federal authorities.

(a) *Generally.* The State must agree to comply and to require all recipients of funds "directly made available by" capitalization grants to comply with applicable Federal authorities.

(b) *Informing EPA.* The State must inform EPA when consultation or coordination by EPA with other Federal agencies is necessary to resolve issues regarding compliance with those requirements.

(c) *Civil Rights laws.* All programs, projects and activities of the State capitalization grant recipient must be in compliance with the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000d et seq., section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794 and section 13 of the Federal Water Pollution Control Act Amendments of 1972, Public Law 92-500.

(d) *MBE/WBE requirements.* Requirements for the participation of minority and women owned businesses (MBE/WBEs) will apply to assistance in an amount equaling the grant. To attain compliance with MBE/WBE requirements, the RA will negotiate an overall "fair share" objective with the State for MBE/WBE participation on these SRF funded activities. A fair share objective should be based on the amount of the capitalization grant award or other State established goals. The State may accomplish its fair share objective by requiring certain equivalency projects to undertake affirmative steps that will include the following:

(1) Including small, minority and women's businesses on solicitation lists;

(2) Assuring that small, minority and women's businesses are solicited whenever they are potential sources;

(3) Dividing total requirements, when economically feasible, into small tasks or quantities to permit maximum participation by small, minority and women's businesses;

(4) Establishing delivery schedules, when the requirements of the work permit, which will encourage participation by small, minority and women's businesses;

(5) Using the services of the Small Business Administration and the Office of Minority Business Enterprise of the U.S. Department of Commerce, as appropriate; and

(6) If the contractor awards subagreements, requiring the contractor to take the affirmative steps in paragraphs (d)(1) through (d)(5) of this section.

(e) *MBE/WBE Reporting requirements* The State must submit an MBE/WBE Utilization Report (EPA Form SF 334) within 30 days after the end of each Federal fiscal quarter during which the State or its subrecipients award any subagreements.

§ 35.3150 Intended Use Plan (IUP).

(a) *Purpose.* The State must prepare a plan identifying the intended uses of the funds in the SRF and describing how those uses support the goals of the SRF. This Intended Use Plan (IUP) must be prepared annually and must be subjected to public comment and review before being submitted to EPA. EPA must receive the IUP prior to the award of the capitalization grant.

(b) *Contents*—(1) *List of Projects.* (i) The IUP must contain a list of publicly owned treatment works projects on the State's project priority list developed pursuant to section 216 of the Act, to be constructed with SRF assistance. This list must include: the name of the community; permit number or other applicable enforceable requirement, if available; the type of financial assistance; and the projected amount of eligible assistance.

(ii) The IUP must also contain a li of the nonpoint source and nationa estuary protection activities under sec tions 319 and 320 of the Act that th State expects to fund from its SRF.

(iii) The IUP must provide informa tion in a format and manner that i consistent with the needs of the Re gional Offices.

(2) Short and long term goals. The IUP must describe the long and short term goals and objectives of the State's water pollution control revolving fund.

(3) Information on the SRF activities to be supported. The IUP must include information on the types of activities including eligible categories of costs to receive assistance, types of assistance to be provided, and SRF policies on setting the terms for the various types of assistance provided by the fund.

(4) Assurances and specific proposals. The IUP must provide assurances and specific proposals on the manner by which the State intends to meet the requirements of the following sections of this part: § 35.3135(c); § 35.3135(d); § 35.3135(e); § 35.3135(f); and § 35.3140.

(5) Criteria and method for distribution of funds.

(i) The IUP must describe the criteria and method established for the distribution of the SRF funds and the distribution of the funds available to the SRF among the various types of assistance the State will offer.

(ii) The IUP must describe the criteria and method the State will use to select section 212 treatment work project priority list and projects or programs to be funded as eligible activities for nonpoint sources and estuary protection management programs.

(c) *Amending the IUP.* The IUP project list may be changed during the year under provisions established in the IUP as long as the projects have been previously identified through the public participation process.

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§ 35.3155 Payments.

(a) *Payment schedule.* The State must include with each application for a capitalization grant a draft payment schedule based on the State's projection of binding commitments in its IUP. The payment schedule and the specific criteria establishing the conditions under which the State may draw cash from its LOC shall be jointly established by the Agency and the State and included in the capitalization grant agreement. Changes to the payment schedule, which may be negotiated during the year, will be effected through an amendment to the grant agreement.

(b) *Estimated disbursements.* With the first application for a capitalization grant, the State shall submit a schedule that reflects, by quarters, the estimated disbursements from that grant for the year following the grant award date. At the end of the third quarter of each Federal fiscal year thereafter, the State must provide the Agency with a schedule of estimated disbursements for the following Federal fiscal year. The State must advise the Agency when significant changes from the schedule of estimated disbursements are anticipated. This schedule must be developed in conformity with the procedures applicable to cash draws in § 35.3160 and must be at a level of detail sufficient to allow the Agency and the State to jointly develop and maintain a forecast of cash draws.

(c) *Timing of payments.* Payments to the LOC from a particular grant will begin in the quarter in which the grant is awarded and will end no later than the earlier of eight quarters after the capitalization grant is awarded or twelve quarters after advices of allowances are issued to the Regions.

(d) *General payment and cash draw rules.* (1) Except as described in § 35.3160(e) and § 35.3160(g), payments will be based on the State's schedule of binding commitments.

(2) The SRF or assistance recipient must first incur a cost, but not necessarily disburse funds for that cost, on an activity for which the State has entered into a binding commitment, in order to draw cash.

(3) Cash draws will be available only up to the amount of payments made.

(4) For loans or for refinancing or purchasing of municipal debt, planning, design and associated pre-building costs that are within the scope of a project built after March 7, 1985, may be included in the assistance agreement regardless of when they were incurred, provided these costs are in conformity with title VI of the Act. The State may draw cash for these incurred pre-building costs immediately upon executing an assistance agreement.

(5) A State may draw cash from the LOC equal to the proportional Federal share at which time the State will provide its proportional share. The Federal proportional share will be 83⅓ percent of incurred costs and the State's proportional share will be 16⅔ percent of the incurred costs, except as described below.

(i) Where the State provides funds in excess of the required 20 percent match, the proportional Federal share drawn from the LOC will be the ratio of Federal funds in the capitalization grant to the sum of the capitalization grant and the State funds. Alternatively, the State may identify a group of activities approximately equal to 120 percent of the grant amount, and draw cash from the LOC for 83⅓ percent of the incurred costs of the identified activities.

(ii) The Federal proportional share may exceed 83⅓ percent where a State is given credit for its match amount as a result of funding activities in prior years (but after March 7, 1985), or for banking excess match in the SRF in prior years and disbursing these amounts prior to drawing cash. If the entire amount of the State's required match has been disbursed in advance, the Federal proportional share would be 100 percent.

§ 35.3160 Cash draw rules.

(a) *Loans.* The State may draw cash from the LOC when the SRF receives a request from a loan recipient, based on incurred costs, including prebuilding and building costs.

(b) *Refinance or purchase of municipal debt.* (1) Cash draw for completed

construction. Except as indicated in paragraph (b)(2) of this section, cash draws shall be made at a rate no greater than equal amounts over the maximum number of quarters that payments can be made, pursuant to § 35.3155(c), and up to the portion of the LOC committed to the refinancing or purchase of the local debt. Cash draws for incurred building costs will generally be treated as refinanced costs.

(2) The State may immediately draw cash for up to five percent of each fiscal year's capitalization grant or two million dollars, whichever is greater, to refinance or purchase local debt.

(3) Projects or portions of projects not constructed. The State may draw cash based on incurred construction costs, as set forth in § 35.3160(a).

(4) Incremental disbursement bonds. For the purchase of incremental disbursement bonds from local governments, cash draws will be based on a schedule that coincides with the rate at which construction related costs are expected to be incurred for the project.

(c) *Purchase of insurance.* The State may draw cash to purchase insurance as premiums are due.

(d) *Guarantees and security for bonds.* (1) Cash draw in the event of default. In the event of an imminent default in debt service payments on the guaranteed/secured debt, the State can draw cash immediately up to the total amount of the LOC committed to the guarantee/security. If a balance remains in the guarantee portion of the LOC reserve after the default is covered, the State must negotiate a revised schedule for the remaining amount of the guarantee/security.

(2) Cash draw in the absence of default. (i) The State can draw cash up to the amount of the LOC dedicated for the guarantee or security in accordance with a schedule based on the national title II annual outlay rate (Yr 1: 7%; Yr 2: 35%; Yr 3: 26%; Yr 4: 20%; Yr 5: 12%), or actual construction cost. In the latter case, the amount of the cash draw would be the actual construction costs multiplied by the Federal share of the reserve multiplied by the ratio of the reserve to either the amount guaranteed or the proceeds of the bond issue.

(ii) In addition, in the case of a security the State can identify a group of projects whose value equals approximately the total of that portion of the LOC and the State match dedicated as a security. The State can then draw cash based on the incurred construction costs of the selected projects only, multiplied by the ratio of the Federal portion of the security to the entire security.

(3) *Aggressive leveraging exception.* Where the cash draw rules discussed in § 35.3160(d) would significantly frustrate a State's program, the Agency may permit an exception to these cash draw rules and provide for a more accelerated cash draw, where the State can demonstrate that:

(i) There are eligible projects ready to proceed in the immediate future with enough costs to justify the amount of the secured bond issue;

(ii) The absence of cash on an accelerated basis will substantially delay these projects;

(iii) If accelerated cash draws are allowed, the SRF will provide substantially more assistance; and

(iv) The long term viability of the State program to meet water quality needs will be protected.

(4) *Cash draw limitation.* When the LOC is used for securing State issued bonds, cash draws cannot be made at a rate greater than equal amounts over the maximum number of quarters that payments can be made, pursuant to § 35.3155(c). Exceptions to this limitation are in cases of default (see § 35.3160(d)(1)) and where cash draws are based on construction costs for all projects, as in § 35.3160(d)(2)(i).

(e) *Administrative expenses.* (1) Payments. One payment will be made at the time of the grant, based on the portion of the LOC estimated to be used for administrative expenses.

(2) Cash draw. The State can draw cash based on a schedule that coincides with the rate at which administrative expenses will be incurred, up to that portion of the LOC dedicated to administrative expenses.

(f) *Withholding payments.* If a State fails to take corrective action in accordance with section 605 of the Act,

the Agency shall withhold payments to the SRF. Once a payment has been made by the Agency, that payment and cash draws from that payment will not be subject to withholding because of a State's failure to take corrective action.

§ 35.3165 Reports and audits.

(a) *Annual report.* The State must provide an Annual Report to the RA beginning the first fiscal year after it receives payments under title VI. The State should submit this report to the RA according to the schedule established in the grant agreement.

(b) *Matters to establish in the annual report.* In addition to the requirements in section 606(d) of the Act, in its annual report the State must establish that it has: (1) Reviewed all SRF funded section 212 projects in accordance with the approved environmental review procedures;

(2) Deposited its match on or before the date on which each quarterly grant payment was made;

(3) Assured compliance with the requirements of § 35.3135(f);

(4) Made binding commitments to provide assistance equal to 120 percent of the amount of each grant payment within one year after receiving the grant payment pursuant to § 35.3135(c);

(5) Expended all funds in an expeditious and timely manner pursuant to § 35.3135(d); and

(6) First used all funds as a result of capitalization grants to assure maintenance of progress toward compliance with the enforceable requirements of the Act pursuant to § 35.3135(e).

(c) *Annual review.* (1) Purpose. The purpose of the annual review is to assess the success of the State's performance of activities identified in the IUP and Annual Report, and to determine compliance with the terms of the capitalization grant agreement. The RA will complete the annual review according to the schedule established in the grant agreement.

(2) Records access. After reasonable notice by the RA, the State or assistance recipient must make available to the EPA such records as the RA reasonably requires to review and determine State compliance with the requirements of title VI. The RA may conduct onsite visits as needed to provide adequate programmatic review.

(d) *Annual audit.* (1) At least once a year the RA (through the Office of the Inspector General) will conduct, or require the State to have independently conducted, a financial and compliance audit of the SRF and the operations of the SRF. If the State is required to have an independently conducted audit performed, the State may designate an independent auditor of the State to carry out the audit or may contractually procure the service.

(2) The auditor can be a certified public accountant, a public accountant licensed on or before December 31, 1970, or a governmental auditor who meets the qualification standards (Government Auditing Standards). In addition, the auditor must meet the independence standard as enumerated by the General Accounting Office and American Institute of Certified Public Accountants. The Office of the Inspector General may arrange for an EPA audit if the State fails to conduct the audit or if the State's review is otherwise unsatisfactory.

(3) The audit report required under section 606(b) must contain an opinion on the financial statements of the SRF and its internal controls, and a report on compliance with title VI.

(4) The audit report must be completed within one year of the end of the appropriate accounting period and submitted to the Office of the Inspector General within 30 days of completion. In cases of State conducted audits, the State will be notified within 90 days as to the acceptability of the audit report and its findings. Audits may be done in conjunction with the Single Audit Act.

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§ 35.3170 Corrective action.

(a) *Causes.* If the RA determines that the State has not complied with requirements under title VI, the RA will notify the State of such noncompliance and prescribe the necessary corrective action. Failure to satisfy the

terms of the capitalization grant agreement, including unmet conditions or assurances or invalid certifications, is grounds for a finding of noncompliance. In addition, if the State does not manage the SRF in a financially sound manner (e.g. allows consistent and substantial failures of loan repayments), the RA may take corrective action as provided under this section.

(b) *RA's course of action.* In making a determination of noncompliance with the capitalization grant agreement and devising the corrective action, the RA will identify the nature and cause of the problems. The State's corrective action must remedy the specific instance of noncompliance and adjust program management to avoid noncompliance in the future.

(c) *Consequences for failure to take corrective action.* If within 60 days of receipt of the noncompliance notice, a State fails to take the necessary actions to obtain the results required by the RA, or to provide an acceptable plan to achieve the results required, the RA shall withhold payments to the SRF until the State has taken acceptable actions. If the State fails to take the necessary corrective action deemed adequate by the RA within twelve months of receipt of the original notice, any withheld payments shall be deobligated and reallotted to other States.

(d) *Releasing payments.* Once the State has taken the corrective action deemed necessary and adequate by the RA, the withheld payments will be released and scheduled payments will recommence.

APPENDIX A—CRITERIA FOR EVALUATING A STATE'S PROPOSED NEPA-LIKE PROCESS

The following criteria will be used by the RA to evaluate a proposed SERP.

(A) *Legal foundation.* Adequate documentation of the legal authority, including legislation, regulations or executive orders and/or Attorney General certification that authority exists.

(B) *Interdisciplinary approach.* The availability of expertise either in-house or otherwise accessible to the State Agency.

(C) *Decision documentation.* A description of a documentation process adequate to explain the basis for decisions to the public.

(D) *Public notice and participation.* A description of the process, including routes of publication (e.g., local newspapers and project mailing list), and use of established State legal notification systems for notices of intent, and criteria for determining whether a public hearing is required. The adequacy of a rationale where the comment period differs from that under NEPA and is inconsistent with other State review periods.

(E) *Consider alternatives.* The extent to which the SERP will adequately consider:

(1) Designation of a study area comparable to the final system;

(2) A range of feasible alternatives, including the no action alternative;

(3) Direct and indirect impacts;

(4) Present and future conditions;

(5) Land use and other social parameters including recreation and open-space considerations;

(6) Consistency with population projections used to develop State implementation plans under the Clean Air Act;

(7) Cumulative impacts including anticipated community growth (residential, commercial, institutional and industrial) within the project study area; and

(8) Other anticipated public works projects including coordination with such projects.

Subpart L—[Reserved]

Subpart M—Grants for Technical Assistance

AUTHORITY: 42 U.S.C. 9617(e); Sec. 9(g), E.O. 12580.

SOURCE: 53 FR 9748, Mar. 24, 1988, unless otherwise noted.

§ 35.4000 Authority.

This regulation is issued under section 117(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), as amended, 42 U.S.C. 9617(e).

§ 35.4005 Purpose.

This regulation codifies policies and procedures for technical assistance grants awarded by EPA to groups of individuals. This regulation establishes the procedures for accepting and evaluating applications, and for awarding and managing technical assistance grants. These provisions supplement the EPA general assistance regulations and procedures at 40 CFR part 30 and are applicable to all appli-

cants/recipients of technical assistance grants.

§ 35.4010 Definitions.

As used in this regulation, the following words and terms shall have the meaning set forth below:

Affected means subject to an actual or potential health, economic or environmental threat arising from a release or a threatened release at a facility listed on the National Priorities List (NPL) or proposed for listing under the National Oil and Hazardous Substances Pollution Contingency Plan (NCP) where a response action under CERCLA has begun. Examples of *affected* parties include individuals who live in areas adjacent to NPL facilities, who depend on water sources endangered by releases of hazardous substances at the facility, or whose economic interests are directly threatened or harmed.

Applicant means any group of individuals that files an appplication for a technical assistance grant.

Application means a completed formal written request for a technical assistance grant that is submitted to the Agency on EPA Form 5700–33—State and Local Nonconstruction Program, or to a State on its appropriate form.

Award means the technical assistance grant agreement signed by both EPA and the recipient.

Award Official means the official delegated the authority to sign grant agreements.

Budget means the financial plan for the spending of all Federal and matching funds (including in-kind contributions) for a technical assistance grant project as proposed by the applicant, and negotiated with and approved by the Award Official.

Budget period means the length of time specified in a grant agreement during which the recipient may spend or obligate Federal funds. The budget period may not exceed 3 years. A technical assistance grant project period may be comprised of several budget periods.

Cash contribution means actual non-Federal dollars, or Federal dollars if expressly authorized by statute to do so, that a recipient spends for goods and services and real or personal property used to satisfy the matching funds requirement.

Contractor means any party (i.e., technical advisor) to whom a recipient awards a subagreement.

EPA means the Environmental Protection Agency. Where a State administers the Technical Assistance Grant Program, the term *EPA* may mean a State agency.

Federal facility means a facility that is owned or operated by a department, agency, or instrumentality of the United States.

Grant agreement means the legal docume that transfers money, or anything of value, to a recipient to accomplish the purpose of the technical assistance grant project. It specifies budget and project periods, the Federal share of eligible project costs, a description of the work to be accomplished, and any special conditions.

In-kind contribution means the value of a non-cash contribution used to meet a recipient's matching funds requirement in accordance with 40 CFR 30.307(b). An in-kind contribution may consist of charges for equipment or the value of goods and services necessary to and directly benefiting the EPA-funded project.

Matching funds means the portion of allowable project costs that a recipient contributes toward completing the technical assistance grant project using non-Federal funds or Federal funds if expressly authorized by statute. The match may include in-kind as well as cash contributions.

Operable unit means a response action taken as one part of an overall site response. A number of operable units may occur in the course of a site response.

Potentially Responsible Party (PRP) means any individual(s) or company(ies) (such as owners, operators, transporters, or generators) potentially responsible under sections 106 or 107 of CERCLA for the contamination problems at a Superfund site.

Recipient means any group of individuals that has been awarded a technical assistance grant.

Recipient's project manager means the person legally authorized to obli-

gate the organization to the terms and conditions of EPA's regulations and the grant agreement, and designated by the recipient to serve as its principal contact with EPA.

Response Action means all activities undertaken to address the problems created by hazardous substances at a National Priorities List site.

Start of Response Action means the point in time when there is a guarantee or set-aside of funding either by EPA, other Federal agencies, States, or PRPs in order to begin response activities at a site. The document which reflects the set-aside of, or formally guarantees, funding during the coming fiscal year, is EPA's annual Superfund Comprehensive Accomplishments Plan (SCAP).

Subagreement means a written agreement between the technical assistance grant recipient and another party (a contractor other than a public agency) for services or supplies necessary to complete the technical assistance grant project. Subagreements include contracts and subcontracts for personal and professional services or supplies necessary to complete the technical assistance grant project, and agreements with consultants, and purchase orders.

§ 35.4015 Administration of the Program.

(a) Upon publication of this regulation, the Agency will begin accepting applications for and awarding technical assistance grants in consultation with the States.

(b) The Technical Assistance Grant Program will be available at an NPL site where a State response action is scheduled to begin or is underway and a CERCLA-funded cooperative or other written agreement exists between the Agency and the State.

(c) States wishing to administer the Technical Assistance Grant Program must inform the appropriate EPA Regional administrator. If a State elects to administer the program, it must do so in conformity with this regulation. Where States administer the program, EPA will have an oversight role.

(d) A State that chooses to administer the Technical Assistance Grant Program will receive technical assistance funds plus administrative costs from the Agency under a cooperative agreement. A State will receive $10,000 for administrative costs for the first technical assistance grant. For each subsequent technical assistance grant, the State will receive an amount equal to 8 percent of the technical assistance grant. Using the criteria established under this regulation, the State may select a qualified recipient and provide assistance in either of two ways:

(1) A State will pass through technical assistance funds to a recipient group by way of a subgrant, and reimburse the recipient group for its expenditures as provided at § 30.4080 of this regulation. A State that elects this option is also responsible for monitoring the subgrant to ensure that recipients comply with its terms and with 40 CFR parts 30 and 33; or

(2) If a recipient group agrees, a State will use technical assistance grant funds to obtain the services of a technical advisor and provide those services to a grant recipient in lieu of cash. The recipient group may work closely with the State in advertising, reviewing bids and recommending a technical advisor, and managing the technical advisor. The State will make the final selection of the technical advisor. A State that elects this option becomes directly responsible for awarding the technical assistance contracts, submitting financial and progress reports, and for disbursing all technical assistance grant funds in compliance with applicable EPA regulations and requirements.

§ 35.4020 Responsibility requirements.

(a) An applicant must meet the minimum administrative and management capability requirements set forth at 40 CFR 30.301. Thus, each applicant must demonstrate that it has established reliable procedures or has plans for establishing reliable procedures for recordkeeping and financial accountability related to the management of the technical assistance grant. These procedures must be in effect before the recipient incurs any costs. If EPA concludes that the applicant is not capable of meeting the responsibility requirements, the application will be rejected.

(b) Each recipient of a technical assistance grant must be incorporated as a non-profit organization for the purpose of addressing the Superfund site for which the grant is provided in order to receive a grant, except as provided in paragraph (c) of this section. At the time of award, a recipient must either be incorporated or must demonstrate to EPA that the group has filed the necessary documents for incorporation with the appropriate State agency. No later than the time of the first request for reimbursement for costs incurred, a recipient must submit proof that the group has been incorporated by the State.

(c) Unless a consolidation agreement makes site-specific incorporation necessary, a previously incorporated group that includes all the individuals and groups that joined in applying for the technical assistance grant shall not be required to incorporate for the specific purpose of representing affected individuals at the site provided that the group can demonstrate that it has a substantial history of involvement at the site.

[53 FR 9748, Mar. 24, 1988, as amended at 54 FR 49851, Dec. 1, 1989]

§ 35.4025 Eligible applicants.

Eligible applicants, except as provided in § 35.4030, are any group of individuals that may be affected by a release or a threatened release at any facility that (a) is listed on the National Priorities List (NPL) under the National Contingency Plan (NCP) is proposed for listing and a response action has begun.

§ 35.4030 Ineligible applicants.

(a) Groups and organizations which are ineligible to receive or to be represented in groups receiving technical assistance grants are:

(1) Potentially responsible parties (PRPs);

(2) Corporations that are not incorporated for the specific purpose of representing affected individuals at the site except as provided in § 35.4020(c);

(3) Academic institutions;

(4) Political subdivisions (e.g., townships and municipalities); and

(5) Groups established and/or sustained by governmental entities (including emergency planning committees and some citizen advisory groups).

(b) This section shall not preclude any individual affected by a Superfund site from participating in a recipient group in his or her capacity as an individual.

[53 FR 9748, Mar. 24, 1988, as amended at 54 FR 49851, Dec. 1, 1989]

§ 35.4035 Evaluation criteria.

EPA will award a technical assistance grant only after it has determined that all eligibility and responsibility requirements listed in §§ 35.4020, 35.4025, and 35.4030 are met, and after review of the applicant's qualifications in the narrative section of the grant application. Each applicant will be required to provide information on how it meets the eligibility criteria in the grant application. If the Agency is administering the technical assistance grant program, the "Applicant Qualifications" section is Part IV of EPA Form 5700.33, "State and Local Nonconstruction Programs." The following factors will be evaluated and weighted as indicated:

(a) The presence of an actual or potential health threat posed to group members by the site. This criterion can be met by establishing a demonstrable threat to members' health or a reasonable belief that the site poses a substantial threat to their health. (30 points);

(b) The applicant best represents groups and individuals affected by the site (20 points);

(c) The identification of how the group plans to use the services of a technical advisor throughout the Superfund response action (20 points);

(d) The demonstrated intention and ability of the applicant to inform others in the community of the information provided by the technical advisor (20 points); and

(e) The presence of an actual or potential economic threat or threat of an impaired use or enjoyment of the environment to group members that is caused by the site. This criterion can be met by establishing a demonstrable economic or environmental threat to

group members or a reasonable belief that the site poses a substantial economic or environmental threat. (10 points).

§ 35.4040 Notification process.

(a) Groups wishing to apply for a technical assistance grant shall first submit a letter of intent to EPA. EPA will respond in writing to a letter of intent.

(b) Upon receipt of the first letter of intent, EPA will undertake certain activities depending on the schedule for work at the site:

(1) If commencement of the remedial investigation or a removal action is not underway or scheduled to begin, EPA will advise the group in writing that grant applications for the site are not yet being accepted. EPA may informally notify other interested groups that it has received a letter of intent; or

(2) If a response action is already underway or scheduled to begin, EPA will conduct one or more of the following activities—mailings, meetings, and public notices—to provide formal notice to other interested parties that a grant for the site soon may be awarded. These formal notification activities will generally be conducted far enough in advance of the start of the response action to allow time for groups to consolidate, apply for and receive a grant award, and procure a technical advisor before work commences at the site.

(c) Other potential applicants will have 30 days to contact the original applicant to form a coalition. If the community groups are unable to form a coalition, they must notify EPA, within the 30 days. EPA will then accept separate applications from all interested groups for an additional 30-day period. EPA may consider written requests for extensions of this time. If there is a qualified applicant, a grant will be awarded from among the competing applications based on the evaluation criteria described in § 35.4035 of this regulation. The schedule for response activities at a site will not be affected by the technical assistance grant application process.

(d) A formal grant application from a group which has not first submitted a letter of intent to EPA will be considered a letter of intent for the purposes of this subsection.

§ 35.4045 Submission of application.

(a) After an applicant submits a letter of intent, it must submit to the Agency its request for a technical assistance grant on EPA Form 5700-33 "State and Local Nonconstruction Programs." Each applicant must submit the original and two copies of the application to the Agency. At least one application must have the original signature (i.e., not a photocopy of the signature) of the Recipient's Project Manager. If the State is administering the program, an applicant must submit a request for a technical assistance grant to a State on the appropriate State form;

(b) An applicant must submit a proposed budget clearly showing the proposed expenditure of funds, how it will provide the cash and/or in-kind contributions to meet the "match" requirement, and how the funds and other resources, including the "match," will be used to complete the technical assistance grant project;

(c) An applicant must submit to the Agency or the State on the appropriate form a short narrative justification to show compliance with the evaluation criteria in § 35.4035. Instructions for filing an application with the Agency are contained in the application kit and explained in EPA's "Citizens' Guidance Manual for the Technical Assistance Grant Program." Application kits are available from EPA Regional Offices upon request.

Instructions for filing an application with a State will be provided by the State.

§ 35.4050 Timing of award.

An award of a technical assistance grant will be made no earlier than the start of the response action. Grants to qualified applicants could be delayed depending upon the availability of funds for the Superfund program.

§ 35.4055 Ineligible activities.

(a) The following activities are ineligible for assistance under this program:

(1) Litigation or underwriting legal actions such as paying for attorney fees or paying for the time of the technical advisor to assist an attorney in preparing a legal action or preparing for and serving as an expert witness at any legal proceeding regarding or affecting the site;

(2) Political activity and lobbying in accordance with 40 CFR 30.601 which incorporates OMB Circular A-122;

(3) Other activities inconsistent with the cost principles stated in OMB Circular A-122, "Cost Principles for Non-Profit Organizations";

(4) Tuition or other expenses for recipient group members or technical advisors to attend training, seminars or courses;

(5) Any activities or expenditures for recipient group members' travel;

(6) Generation of new primary data such as well drilling and testing, including split sampling; and

(7) Reopening final Agency decisions such as the Records of Decision or conducting disputes with the Agency in accordance with its dispute resolution procedures set forth at 40 CFR part 30, subpart L.

[53 FR 9748, Mar. 24, 1988, as amended at 54 FR 49851, Dec. 1, 1989]

§ 35.4060 Eligible activities.

Technical assistance grants may be used to obtain technical assistance in interpreting information with regard to the nature of the hazard, remedial investigation and feasibility study, record of decision, remedial design, selection and construction of remedial action, operation and maintenance, or a significant removal action at a facility that is (a) listed on the NPL or (b) proposed for listing and at which a response action has begun. Technical assistance grants shall be used to fund activities that will contribute to the public's ability to participate in the decisionmaking process by improving the public's understanding of overall conditions and activities.

§ 35.4065 Technical advisor's qualifications.

(a) A technical advisor must possess the following credentials:

(1) Demonstrated knowledge of hazardous or toxic waste issues;

(2) Academic training in a relevant discipline (e.g., biochemistry, toxicology, environmental sciences, engineering); and

(3) Ability to translate technical information into terms understandable to lay persons.

(b) A technical advisor should possess the following credentials:

(1) Experience working on hazardous or toxic waste problems;

(2) Experience in making technical presentations;

(3) Demonstrated writing skills; and

(4) Previous experience working with citizens' or community groups or other groups of individuals.

§ 35.4070 Sanctions.

If EPA determines that the recipient has failed to comply with any terms of the grant agreement, EPA will initiate an appropriate measure as set forth at 40 CFR part 30, subpart I.

§ 35.4075 Pre-award costs.

(a) Grant funds may not be used to pay costs incurred prior to award of the technical assistance grant, except as provided in paragraph (b) of this section.

(b) Necessary and reasonable costs of incorporation, if incurred for the sole purpose of complying with this regulation, will be eligible pre-award costs and may be charged to the technical assistance grant or count toward the matching funds requirement described in § 35.4085(a)(2).

§ 35.4080 Method of payment.

All grant recipients shall be reimbursed for grant-related eligible, allocable, allowable, necessary, and reasonable costs up to the amount of the technical assistance grant which have been incurred and which the recipients are currently and legally obligated to pay. Recipients may submit quarterly requests for reimbursement to the Agency on SF 270—Request for Advance or Reimbursement, or the appropriate State form if the State is administering the technical assistance grant program. Costs incurred greater than $500 may be submitted monthly.

§ 35.4085 Grant limitations.

Technical assistance grants will be awarded subject to the following limitations:

(a) The recipient must contribute 20 percent of the total costs of the technical assistance grant project, except as provided in § 35.4095(b) of this regulation.

(1) Absent specific statutory authority, no Federal funds may be included in the matching share.

(2) To meet the matching funds requirement, the recipient may use cash and/or in-kind contributions.

(b) The technical assistance grant award will not exceed $50,000 for a single grant recipient, except as provided in § 35.4090(a) of this regulation.

(c) Not more than one technical assistance grant may be awarded for any eligible site.

(d) Unless a waiver is granted, the technical assistance grant award of $50,000 will cover the entire Superfund cleanup process.

[53 FR 9748, Mar. 24, 1988, as amended at 54 FR 49851, Dec. 1, 1989]

§ 35.4090 Waivers.

(a) Waivers of the $50,000 limit may be granted only in the case of a single application covering multiple sites. In order to reduce the administrative burden to a recipient, the limitation that a single recipient cannot receive more than $50,000 may be waived by the Agency where there are several eligible sites in close geographic proximity to each other (e.g., 3 sites × $50,000=grant of $150,000).

(b) Waivers of the matching funds requirement will be granted only when it is established that the grant recipient cannot meet the matching funds requirement. The Agency may waive all or part of the recipient's matching funds requirement only after a finding by the Agency that:

(1) There is a need for a waiver because providing the "match" would constitute an unusual financial hardship,

(2) A good faith effort at raising the "match," including obtaining in-kind services, has failed, and

(3) The waiver is necessary to facilitate public participation in the selection of remedial action at the facility.

(c) Where a recipient who has obtained a grant subsequently obtains a waiver of the matching funds requirement, the grant agreement must be amended. (See 40 CFR part 30, subpart G.)

(d) No waivers will be granted by the Agency once the Record of Decision (ROD) has been issued at the last operable unit at the site.

[53 FR 9748, Mar. 24, 1988, as amended at 54 FR 49852, Dec. 1, 1989]

§ 35.4095 Subagreement review.

Each applicant must inform EPA of any proposed subagreement between the recipient and the technical advisor and must provide EPA the opportunity to review the subagreement before it is awarded.

§ 35.4100 Disputes.

(a) If the Agency administers the Technical Assistance Grant Program, the Agency shall review disputes between Agency officials and the applicant or recipient in accordance with its dispute resolution procedures set forth at 40 CFR part 30, subpart L.

(b) If the State administers the Technical Assistance Grant Program, any applicant or recipient who has been adversely affected by a State's action or omission may request Agency review of such action or omission, but must first submit a petition for review to the State agency that made the initial decision. The State must provide, in writing, normally within 45 days of the date it receives the petition, the basis for its decision regarding the disputed action or omission. The final State decision must be labeled as such and, if adverse to the applicant or recipient, must include notice of the right to request Agency review of the State decision under this section. A State's failure to address the disputed action or omission in a timely fashion, or in writing, will not preclude Agency review.

(1) Requests for Agency review must include:

(i) A copy of any written State decision.

(ii) A statement of the amount in dispute.

(iii) A description of the issues involved, and

(iv) A concise statement of the objections to the State decision.

(2) The request must be filed by registered mail, return receipt requested, within 30 days of the date of the State decision or within a reasonable time if the State fails to respond in writing to the request for review.

(c) The Agency shall determine whether the State's review is comparable to a dispute decision official's (DDO) review pursuant to 40 CFR part 30, subpart L. If the State's review is comparable, the Regional Administrator will conduct the Agency's review of the State's decision. If the State's review is not comparable, an Agency DDO will review the State's decision and issue a written decision. If the Agency DDO issues a decision, the applicant or recipient may request a Regional Administrator's review of the decision. The applicant or recipient may request an EPA Assistant Administrator review of a Regional Administrator's decision pursuant to subpart L.

§ 35.4105 Audits.

(a) *Records and audit—recipient.* (1) Each recipient shall keep and preserve full written financial records accurately disclosing the amount and the disposition of any funds, whether in cash or in-kind, applied to the technical assistance grant project, and shall comply with the terms and conditions of the grant agreement.

(2) Such records shall be retained for three years from the date of the final Financial Status Report, or until any audit, litigation, cost-recovery, and/or any disputes initiated before the end of the three-year retention period are settled, whichever is longer. A recipient must obtain EPA's prior written approval to destroy records after the record retention period.

(b) *Records and audit—contractor(s).* (1) The recipient shall require its contractor(s) to keep and preserve detailed records in connection with the subagreement, reflecting acquisitions, work progress, reports, expenditures, and commitments and indicating their relationship to established costs and schedules.

(2) The recipient shall require its contractor(s) to keep such full written financial records to adequately establish compliance with the terms and conditions of the subagreement. Such records shall be retained for three years from closeout of the subagreement, unless audit, litigation, cost-recovery, and/or any disputes are initiated before the end of the three-year retention period. The recipient shall require its contractor(s) to obtain its prior written approval before the contractor(s) destroys any records after the record retention period. The recipient shall not give such approval without first obtaining EPA's approval.

(Approved by the Office of Management and Budget under control numbers 2030-0020 and 2050-0083)

§ 35.4110 Reports.

(a) *Progress reports.* Each recipient shall submit quarterly progress reports to EPA for the technical assistance grant project 45 days after the end of each calendar quarter. Progress reports shall fully describe in chart or narrative format the progress achieved in relationship to the approved schedule, budget, and the technical assistance grant project milestones. Special problems encountered must be explained.

(b) *Financial status report.* Each recipient shall submit to EPA a financial status report annually, within 90 days after the anniversary date of the start of the technical assistance grant project, and within 90 days after the end of the grant budget period and project. A recipient shall submit to the Agency a financial status report on SF-269 or on the appropriate State form if the State is administering the Technical Assistance Grant Program.

(c) *Final report.* Each recipient shall submit to EPA a draft of the final report for review no later than 90 days prior to the end of the technical assistance grant project and a final report within 90 days of the end of the project. The report shall document technical assistance grant project activities over the entire period of grant support and shall describe the recipient's achievements with respect to

stated technical assistance grant project purposes and objectives.

(Approved by the Office of Management and Budget under control numbers 2030-0020 and 2050-0083)

§ 35.4115 Availability of information.

Each recipient shall ensure that all final written products developed by a contractor for the recipient under its grant are disseminated by providing copies of such documents to EPA for the local Superfund information repository.

§ 35.4120 Budget period.

The budget period may not exceed three years. A technical assistance grant project period may be comprised of more than one three-year budget period.

§ 35.4125 Federal facilities.

EPA will determine the eligibility of any group of individuals who may be affected by a release or a threatened release at a Federal facility for a technical assistance grant under this regulation.

§ 35.4130 Conflict of interest and disclosure requirements.

(a) The recipient shall require each prospective contractor on any subagreement to provide, with its bid or proposal:

(1) Information on its financial and business relationship with all PRPs at the site, and with their parent companies, subsidiaries, affiliates, subcontractors, and current clients or attorneys and agents (this disclosure requirement encompasses past and anticipated financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(2) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(3) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and shall exclude any prospective contractor if the recipient determines the prospective contractor's conflict of interest is significant and cannot be avoided or otherwise resolved.

(b) Contractors and subcontractors may not be technical advisors to recipient groups at the same NPL site for which they are doing work for the Federal or State government or any other entity.

Subpart N—[Reserved]

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AUTHORITY: 42 U.S.C. 9601 *et seq.*

SOURCE: 55 FR 23008, June 5, 1990, unless otherwise noted.

EFFECTIVE DATE NOTE: At 55 FR 23007, June 5, 1990, subpart O to part 35 was revised, effective July 5, 1990. For the convenience of the user, the superseded text follows the new text.

GENERAL

§ 35.6000 Authority.

This regulation is issued under section 104 of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (42 U.S.C. 9601 *et seq.*, Pub. L. 96-510, December 11, 1980, otherwise referred to as "CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99-499, October 17, 1986; 100 Stat. 1613, otherwise referred to as "SARA").

All references to CERCLA within this regulation are meant to indicate CERCLA, as amended by SARA.

§ 35.6005 Purpose and scope.

(a) This regulation codifies recipient requirements for administering CERCLA-funded Cooperative Agreements. This regulation also codifies requirements for administering Superfund State Contracts (SSCs) for non-State-lead remedial responses undertaken pursuant to section 104 of CERCLA.

(b) The requirements in this regulation do not apply to Technical Assistance Grants (TAGs) or to CERCLA research and development grants, including the Superfund Innovative Technology Evaluation (SITE) Demonstration Program.

(c) 40 CFR part 31, "Uniform Administrative Requirements for Grants

and Cooperative Agreements to State and Local Governments," establishes consistency and uniformity among Federal agencies in the administration of grants and Cooperative Agreements to State, local, and Indian Tribal governments. For CERCLA-funded Cooperative Agreements, this subpart supplements the requirements contained in part 31 for States, political subdivisions thereof, and Indian Tribes. This regulation references those sections of part 31 that are applicable to CERCLA-funded Cooperative Agreements.

(d) Superfund monies for remedial actions cannot be used by recipients for Federal facility cleanup activities. When a cleanup is undertaken by another Federal entity, the State, political subdivision or Indian Tribe can pursue funding for its involvement in response activities from the appropriate Federal entity.

§ 35.6010 Eligibility.

This regulation applies to States, political subdivisions and Indian Tribes. Indian Tribes are only eligible to receive Superfund Cooperative Agreements or Superfund State Contracts when they are Federally recognized, and when they meet the criteria set forth in § 300.515(b) of the NCP. Although section 126 of CERCLA provides that the governing body of an Indian Tribe shall be afforded substantially the same treatment as a State, in this subpart Indian Tribes are not included in the definition of State in order to clarify those requirements with which Indian Tribes must comply and those with which they need not comply.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the meanings set forth below:

(1) *Activity.* A set of CERCLA-funded tasks that makes up a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include Core Program, pre-remedial (i.e. preliminary assessments and site inspections), support agency, remedial investigation/feasibility studies, remedial design, remedial action, removal, and enforcement activities.

(2) *Allowable costs.* Those project costs that are: Eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the Cooperative Agreement and/or Superfund State Contract.

(3) *Architectural or engineering (A/E) services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

(4) *Award official.* The EPA official with the authority to execute Cooperative Agreements and Superfund State Contracts (SSCs) and to take other actions authorized by EPA Orders.

(5) *Budget period.* The length of time EPA specifies in a Cooperative Agreement during which the recipient may expend or obligate Federal funds.

(6) *CERCLA.* The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9601–9657, Pub. L. 96–510, Dec. 11, 1980), as amended by the Superfund Amendments and Reauthorization Act of 1986 (Pub. L. 99–499, Oct. 17, 1986; 100 Stat. 1613).

(7) *Change order.* A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from, or revision of, a contract, usually initiated at the contractor's request.

(8) *Claim.* A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

(9) *Closeout.* The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the Cooperative Agreement and/or Superfund State Contract.

(10) *Community Relations Plan (CRP).* A management and planning tool outlining the specific community

relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

(11) *Construction.* Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

(12) *Contract.* A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

(13) *Contractor.* Any party to whom a recipient awards a contract.

(14) *Cooperative Agreement.* A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

(15) *Core Program Cooperative Agreement.* A Cooperative Agreement that provides funds to a State or Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to support a State's ability to participate in the CERCLA response program.

(16) *Cost analysis.* The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

(17) *Cost share.* The portion of allowable project costs that a recipient contributes toward completing its project (i.e., non-Federal share, matching share).

(18) *Equipment.* Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(19) *Excess property.* Any property under the control of a Federal agency that is not required for immediate or foreseeable needs and thus is a candidate for disposal.

(20) *Fair market value.* The amount at which property would change hands between a willing buyer and a willing seller, neither being under a compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

(21) *Health and safety plan.* A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological hazards of the site. The health and safety plan outlines:

(i) Site hazards;

(ii) Work areas and site control procedures;

(iii) Air surveillance procedures;

(iv) Levels of protection;

(v) Decontamination and site emergency plans;

(vi) Arrangements for weather-related problems; and

(vii) Responsibilities for implementing the health and safety plan.

(22) *In-kind contribution.* The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

(23) *Indian Tribe.* As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(24) *Intergovernmental Agreement.* Any written agreement between units of government under which one public agency performs duties for or in concert with another public agency using EPA assistance. This includes subsets and interagency agreements.

(25) *Lead agency.* The Federal agency, State agency, political subdivision, or Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

(26) *Minority Business Enterprise (MBE).* A business which is:

(i) Certified as socially and economically disadvantaged by the Small Business Administration;

(ii) Certified as a minority business enterprise by a State or Federal agency; or

(iii) An independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(A) Black American;

(B) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(C) Native American (American Indian, Eskimo, Aleut, native Hawaiian); or

(D) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(27) *National Priorities List (NPL).* EPA's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under Superfund. A site must be on the NPL to receive money from the Trust Fund for remedial action. The list is based primarily on the score a site receives from the Hazard Ranking System.

(28) *Operable unit.* A discrete action, as described in the Cooperative Agreement or SSC, that comprises an incremental step toward comprehensively addressing site problems. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

(29) *Operation and maintenance (O&M).* Measures required to maintain the effectiveness of response actions.

(30) *Personal property.* Property other than real property. It includes both supplies and equipment.

(31) *Political subdivision.* The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

(32) *Potentially Responsible Party (PRP).* Any individual(s), or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazardous Substance sites. PRPs may include individual(s), or company(ies) identified as having owned, operated, or in some other manner contributed wastes to Hazardous Substance sites.

(33) *Price analysis.* The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

(34) *Profit.* The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

(35) *Project.* The activities or tasks EPA identifies in the Cooperative Agreement and/or Superfund State Contract.

(36) *Project manager.* The recipient official designated in the Cooperative Agreement or SSC as the program contact with EPA.

(37) *Project officer.* The EPA official designated in the Cooperative Agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

(38) *Project period.* The length of time EPA specifies in the Cooperative Agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

(39) *Quality Assurance Project Plan.* A written document, associated with remedial site sampling, which presents

in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities and procedures designed to achieve the data quality objectives of a specific project(s) or continuing operation(s).

(40) *Real property.* Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

(41) *Recipient.* Any State, political subdivision thereof, or Indian Tribe which has been awarded and has accepted an EPA Cooperative Agreement.

(42) *Services.* A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

(43) *Small business.* A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

(44) *State.* The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

(45) *Statement of Work (SOW).* The portion of the Cooperative Agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

(46) *Subcontractor.* Any first tier party that has a contract with the recipient's prime contractor.

(47) *Superfund State Contract (SSC).* A joint, legally binding agreement between EPA and another party(s) to obtain the necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f).

(48) *Supplies.* All tangible personal property other than equipment as defined in this subpart.

(49) *Support agency.* The agen that furnishes necessary data to th lead agency, reviews response data an documents, and provides other assis ance to the lead agency.

(50) *Task.* An element of a Super fund response activity identified in th Statement of Work of a Superfund Co operative Agreement or a Superfun State Contract.

(51) *Title.* The valid claim to prope ty which denotes ownership and th rights of ownership, including th rights of possession, control, and di posal of property.

(52) *Unit acquisition cost.* The ne invoice unit price of the property in cluding the cost of modifications, a tachments, accessories, or auxiliar apparatus necessary to make the prop erty usable for the purpose for whic it was acquired. Other charges, such a the cost of installation, transportation taxes, duty, or protective in-transit in surance, shall be included or exclude from the unit acquisition cost in ac cordance with the recipient's regula accounting practices.

(53) *Value engineering.* A systemati and creative analysis of each contrac term or task to ensure that its essen tial function is provided at the overal lowest cost.

(54) *Women's Business Enterpris (WBE).* A business which is certified a a Women's Business Enterprise by a State or Federal agency, or which meets the following definition. A Women's Business Enterprise is an in dependent business concern which i at least 51 percent owned by a woman or women who also control and oper ate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws.

(b) Those terms not defined in this section shall have the meanings set forth in section 101 of CERCLA, 40 CFR part 31 and 40 CFR part 300 (the National Contingency Plan).

§ 35.6020 Other statutory provisions.

The recipient must comply with the Federal laws described in 40 CFR 31.13, Principal Environmental Statutory Provisions; Pub. L. 98-473, as in

plemented in the Department of Interior, Bureau of Indian Affairs, regulation at 25 CFR part 20; 25 CFR part 20 and with other applicable statutory provisions.

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for an official deviation from the non-statutory provisions of this regulation. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

Pre-Remedial Response Cooperative Agreements

§ 35.6050 Eligibility for pre-remedial Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for pre-remedial response Cooperative Agreements.

§ 35.6055 State-lead pre-remedial Cooperative Agreements.

(a) To receive a State-lead pre-remedial Cooperative Agreement, the applicant must submit an "Application for Federal Assistance" (SF-424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(1) *Budget sheets* (SF-424A);

(2) *A Project narrative statement,* including the following:

(i) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the project officer has approved the site;

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA;

(iii) *A schedule of deliverables.*

(3) *Drug-Free Workplace Certification.* The applicant must certify (40 CFR part 32, subpart F) that it is in compliance with the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D), which requires applicants to certify in writing that they will provide a drug-free workplace. The applicant must follow the requirements contained in the OMB notice entitled "Government-wide Implementation of the Drug-Free Workplace Act of 1988" published January 31, 1989.

(4) *Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700-49).* The applicant must certify that it is in compliance with Executive Order 12549 and 40 CFR part 32.

(5) *Procurement Certification.* The applicant must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700-48) and submit the form to EPA with its application.

(6) *Anti-Lobbying Certification.* The applicant must certify (40 CFR part 34, appendix A) that no appropriated funds will be expended to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with any Federal award in excess of $100,000, in accordance with section 319 of Pub. L. 101-121. The applicant must follow the requirements in the Interim Final Rule entitled, "New Restrictions on Lobbying" published on February 26, 1990.

(b) *Pre-remedial Cooperative Agreement requirements.* The recipient must comply with all terms and conditions in the Cooperative Agreement, and with the following requirements:

(1) *Health and safety plan.* (i) Before beginning field work, the recipient must have a health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the re-

cipient is an Indian Tribe which is exempt from OSHA requirements.

(2) *Quality assurance.* (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Political subdivision-lead pre-remedial Cooperative Agreements.

(a) If the Award Official determines that a political subdivision's lead involvement in pre-remedial activities would be more efficient, economical and appropriate than that of a State, based on the number of sites to be addressed and the political subdivision's history of program involvement, a pre-remedial Cooperative Agreement may be awarded under this section.

(b) The political subdivision must comply with all of the requirements described in § 35.6055 of this subpart.

(c) The Award Official may require a three-party Superfund State Contract for pre-remedial activities.

(d) If the preliminary assessment/site investigation (PA/SI) shows that listing the site on the NPL is necessary, the political subdivision must enter into a three-party Superfund State Contract before any remedial activities begin.

§ 35.6070 Indian Tribe-lead pre-remedial Cooperative Agreements.

The Indian Tribe must comply with all of the requirements described in § 35.6055 of this subpart, except for the intergovernmental review requirements included in the "Application for Federal Assistance" (SF–424).

Remedial Response Cooperative Agreements

§ 35.6100 Eligibility for remedial Cooperative Agreements.

States, Indian Tribes, and political subdivisions may apply for remedial response Cooperative Agreements.

§ 35.6105 State-lead remedial Cooperative Agreements.

To receive a State-lead remedial Cooperative Agreement, the applicant must submit the following items to EPA:

(a) *Application form,* as described in § 35.6055(a) of this subpart, accompanied by the following:

(1) *Budget sheets* (SF–424A) displaying costs by site, activity and operable unit, as applicable;

(2) *A Project narrative statement,* including the following:

(i) *A site description,* including a discussion of the location of each site, the physical characteristics of each site (site geology and proximity to drinking water supplies), the nature of the release (contaminant type and affected media), past response actions at each site, and response actions still required at each site;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task, and a standard task to ensure that a sign is posted at the site providing the appropriate contacts for obtaining information on activities being conducted at the site, and for reporting suspected criminal activities;

(iii) *A statement designating a lead site project manager* among appropriate State offices. This statement must demonstrate that the lead State agency has conducted coordinated planning of response activities with other State agencies. The statement must identify the name and position of those individuals who will be responsible for coordinating the State offices;

(iv) *A site-specific Community Relations Plan* or an assurance that field work will not begin until one is in place. The Regional community relations coordinator must approve the Community Relations Plan before the recipient begins field work. The recipi-

ent must comply with the community relations requirements described in EPA policy and guidance, and in the National Contingency Plan (NCP);

(v) *A site-specific health and safety plan,* or an assurance that the applicant will have a final plan before starting field work. Unless specifically waived by the award official, the applicant must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. The site-specific health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is an Indian Tribe exempt from OSHA requirements;

(vi) *Quality assurance*—(A) *General.* If the project involves environmentally related measurements or data generation, the recipient must comply with the requirements regarding quality assurance described in 40 CFR 31.45.

(B) *Quality assurance plan.* The applicant must have a separate quality assurance project plan and/or sampling plan for each site to be covered by the Cooperative Agreement. The applicant must submit the quality assurance project plan and sampling plan, which incorporates results of any site investigation performed at that site, to EPA with its Cooperative Agreement application. However, at the option of the EPA award official with program concurrence, the applicant may submit with its application a schedule for developing the detailed site-specific quality assurance plan (generally 45 days before beginning field work). Field work may not begin until EPA approves the site-specific quality assurance plan.

(C) *Split sampling.* The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

(vii) *A schedule of deliverables* to be prepared during response activities.

(3) *Drug-Free Workplace Certification.* The applicant must certify (40 CFR part 32, subpart F) that it is in compliance with the Drug-Free Workplace Act of 1988 (Pub. L. 100-690, title V, subtitle D), which requires applicants to certify in writing that they will provide a drug-free workplace.

(4) *Certification Regarding Debarment, Suspension, and Other Responsibility Matters (EPA Form 5700-49).* The applicant must certify that it is in compliance with Executive Order 12549 and 40 CFR part 32.

(5) *Procurement Certification.* The applicant must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700-48) and submit the form to EPA with its application.

(6) *Anti-Lobbying Certification.* The applicant must certify (40 CFR part 34, appendix A) that no appropriated funds will be expended to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, in connection with any Federal award in excess of $100,000, in accordance with section 319 of Pub. L. 101-121. The applicant must follow the requirements in the Interim Final Rule entitled, "New Restrictions on Lobbying" published on February 26, 1990.

(b) *CERCLA Assurances.* Before a Cooperative Agreement for remedial action can be awarded, the State must provide EPA with written assurances as specified below.

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance (O&M) of implemented CERCLA-funded remedial actions for the expected life of each such action. In addition, even if a political subdivision is designated as being responsible for O&M, the State must guarantee that it will assume any or all O&M activities in the event of default by the political subdivision.

(2) *Cost sharing.* The State must provide assurances for cost sharing as follows:

(i) *Ten percent.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 per-

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cent of the cost of the remedial action, if CERCLA-funded.

(ii) *Fifty percent.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Twenty-year waste capacity.* The State must assure EPA of the availability of hazardous waste treatment or disposal facilities within and/or outside the State that comply with subtitle C of the Solid Waste Disposal Act and that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated within the State during the 20-year period following the date of the response agreement. A remedial response action cannot be funded unless this assurance is provided consistent with § 300.510 of the NCP. EPA will determine whether the State's assurance is adequate.

(4) *Off-site storage, treatment, or disposal.* If off-site storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with subtitle C of the Solid Waste Disposal Act and is acceptable to EPA. The lead agency of the State must provide the notification required at § 35.6120, if applicable.

(5) *Real property acquisition.* If EPA determines in the remedy selection process that an interest in real property must be acquired in order to conduct a response action, such acquisition may be funded under a Cooperative Agreement. If the State, or a political subdivision thereof, is unable to acquire the real property interest, the State must assure EPA that it will accept transfer of such interest, including any interest in real property that is acquired to ensure the reliability of institutional controls restricting the use of that property. The State must provide this assurance even if it intends to transfer this interest to a third party. (See § 35.6400 of this subpart for additional information on real property acquisition requirements.)

§ 35.6110 Indian Tribe-lead remedial Cooperative Agreements.

(a) *Application requirements.* The Indian Tribe must comply with all of the requirements described in § 35.6105(a) and, if appropriate, § 35.6105(b)(5) of this subpart. Indian Tribes are not required to comply with the intergovernmental review requirements included in the "Application for Federal Assistance" (SF-424). Consistent with the NCP (§ 300.510(e)(2)) this rule does not address whether Indian Tribes are States for the purpose of CERCLA section 104(c)(9).

(b) *Cooperative Agreement requirements.* (1) The Indian Tribe must comply with all terms and conditions in the Cooperative Agreement.

(2) If EPA determines as part of the remedy selection process that an interest in real property must be acquired in order to conduct the site-specific response action, the Indian Tribe will be required, to the extent of its legal authority, to assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds, including any interest in property that is acquired to ensure the reliability of institutional controls restricting the use of that property. (See § 35.6400 of this subpart regarding information on property title and interest requirements.)

(3) If it is designated the lead for remedial action, the Indian Tribe must provide the notification required at § 35.6120, substituting the term "Indian Tribe" for the term "State" in that section, and "out-of-jurisdiction" for "out-of-State."

§ 35.6115 Political subdivision-lead remedial Cooperative Agreements.

(a) *General.* If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume the lead responsibility for the remedial activity, or a portion thereof, at a site. The State and political subdivision must enter into a three-party Superfund State Contract (SSC) with EPA before

a political subdivision can enter into a Cooperative Agreement.

(b) *Three-party Superfund State Contract requirements.* The three-party SSC must specify the responsibilities of the signatories. By signing the SSC, the State and the political subdivision agree to follow the appropriate administrative requirements regarding SSCs described in §§ 35.6805, 35.6815, and 35.6820 of this subpart. Furthermore, EPA, the State, and the political subdivision agree that the SSC:

(1) Specifies the substantial and meaningful involvement of the State as required by section 121(f)(1) of CERCLA, as amended; and

(2) Includes the State's CERCLA section 104 assurances, if the political subdivision is designated the lead for remedial action.

(c) *Political subdivision Cooperative Agreement requirements.*—(1) *Application requirements.* To receive a remedial Cooperative Agreement, the political subdivision must prepare an application which includes the documentation described in § 35.6105 (a)(1) through (a)(6).

(2) *Cooperative Agreement requirements.* The political subdivision must comply with all terms and conditions in the Cooperative Agreement. If it is designated the lead for remedial action, the political subdivision must provide the notification required at § 35.6120, substituting the term "political subdivision" for the term "State" in that section.

§ 35.6120 Notification of the out-of-State or out-of-Indian Tribal jurisdiction transfer of CERCLA wastes.

(a) The recipient must provide written notification of off-site shipments of CERCLA waste from a site to an out-of-State or out-of-Indian Tribal jurisdiction waste management facility to:

(1) The appropriate State environmental official for the State in which the waste management facility is located; and/or

(2) The appropriate Indian Tribal official who has jurisdictional authority in the area where the waste management facility is located; and

(3) The EPA Award Official.

(b) The notification of off-site shipments does not apply when the total volume of all such shipments from the site does not exceed 10 cubic yards.

(c) The notification must be in writing and must provide the following information, where available:

(1) The name and location of the facility to which the CERCLA waste is to be shipped;

(2) The type and quantity of CERCLA waste to be shipped;

(3) The expected schedule for the shipments of the CERCLA waste; and

(4) The method of transportation of the CERCLA waste.

(d) The recipient must notify the State or Indian Tribal government in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the CERCLA waste to another facility within the same receiving State, or to a facility in another State.

(e) The recipient must provide relevant information on the off-site shipments, including the information in paragraph (c) above, as soon as possible after the award of the contract and, where practicable, before the CERCLA waste is actually shipped.

Enforcement Cooperative Agreements

§ 35.6145 Eligibility for enforcement Cooperative Agreements.

Pursuant to CERCLA section 104(d), States, political subdivisions thereof, and Indian Tribes may apply for enforcement Cooperative Agreements. To be eligible for an enforcement Cooperative Agreement, the State, political subdivision or Indian Tribe must demonstrate that it has the authority, jurisdiction, and the necessary administrative capabilities to take an enforcement action(s) to compel PRP cleanup of the site, or recovery of the cleanup costs. To accomplish this, the State, political subdivision or Indian Tribe, respectively, must submit the following for EPA approval:

(a) A letter from the State Attorney General, or comparable local official (of a political subdivision) or comparable Indian Tribal official, certifying that it has the authority, jurisdiction, and administrative capabilities that

provide a basis for pursuing enforcement actions against a PRP to secure the necessary response;

(b) A copy of the applicable State, local (political subdivision) or Indian Tribal statute(s) and a description of how it is implemented;

(c) Any other documentation required by EPA to demonstrate that the State, local (political subdivision) or Indian Tribal government has the statutory authority, jurisdiction, and administrative capabilities to perform the enforcement activity(ies) to be funded under the Cooperative Agreement.

§ 35.6150 Activities eligible for funding under enforcement Cooperatve Agreements.

An enforcement Cooperative Agreement application from a State, political subdivision or Indian Tribe may request funding for the following enforcement activities:

(a) PRP searches;

(b) Issuance of notice letters and negotiation activities;

(c) Administrative and judicial enforcement actions taken under State or Indian Tribal law;

(d) Management assistance and oversight of PRPs during Federal enforcement response;

(e) Oversight of PRPs during a State, political subdivision or Indian Tribe enforcement response contingent on the applicant having taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities. If the State, political subdivision, Indian Tribe or EPA cannot obtain PRP commitment to fund such oversight activities, then these activities will be considered eligible for CERCLA funding under an enforcement Cooperative Agreement.

§ 35.6155 State, political subdivision or Indian Tribe-lead enforcement Cooperative Agreements.

(a) The State, political subdivision or Indian Tribe must comply with the requirements described in § 35.6105 (a)(1) through (a)(6) of this subpart, as appropriate.

(b) The CERCLA section 104 assurances described in § 35.6105(b) are not applicable for enforcement Cooperative Agreements.

(c) Before an enforcement Cooperative Agreement is awarded, the State, political subdivision or Indian Tribe must:

(1) Assure EPA that it will notify and consult with EPA promptly if the recipient determines that its laws or other restrictions prevent the recipient from acting consistently with CERCLA; and

(2) If the applicant is seeking funds for oversight of PRP cleanup, the applicant must:

(i) Demonstrate that the proposed Statement of Work or cleanup plan prepared by the PRP satisfies the recipient's enforcement goals for those instances in which the recipient is seeking funding for oversight of PRP cleanup activities negotiated under the recipient's own enforcement authorities; and

(ii) Demonstrate that the PRP has the capability to attain the goals set forth in the plan;

(iii) Demonstrate that it has taken all necessary action to compel PRPs to fund the oversight of cleanup activities negotiated under the recipient's enforcement authorities.

Removal Response Cooperative Agreements

§ 35.6200 Eligibility for removal Cooperative Agreements.

When a planning period of more than six months is available, States, political subdivisions and Indian Tribes may apply for removal Cooperative Agreements.

§ 35.6205 Removal Cooperative Agreements.

(a) The State must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, the State must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves out-of-State shipment of CERCLA wastes, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(b) Pursuant to CERCLA section 104(c)(3), the State is not required to share in the cost of a CERCLA-funded removal action, unless the removal is conducted at a site that was publicly operated by a State or political subdivision at the time of disposal of hazardous substances and a CERCLA-funded remedial action is ultimately undertaken at the site. In this situation, the State must share at least 50 percent in the cost of all removal, remedial planning, and remedial action costs at the time of the remedial action as stated in § 35.6105(b)(2)(ii) of this subpart.

(c) If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume the lead responsibility for all, or a portion, of the removal activity at a site. Political subdivisions must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, political subdivisions also must comply with the notification requirement at § 35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the State's jurisdiction, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(d) The State must provide the cost share assurance discussed in § 35.6205(b) above on behalf of a political subdivision that is given the lead for a removal action.

(e) Indian Tribes must comply with the requirements described in § 35.6105(a) of this subpart. To the extent practicable, Indian Tribes also must comply with the notification requirement at §35.6120 when a removal action is necessary and involves the shipment of CERCLA wastes out of the Indian Tribe's jurisdiction, and when, based on the site evaluation, EPA determines that a planning period of more than six months is available before the removal activities must begin.

(f) Indian Tribes are not required to share in the cost of a CERCLA-funded removal action.

Core Program Cooperative Agreements

§ 35.6215 Eligibility for Core Program Cooperative Agreements.

(a) States and Indian Tribes may apply for Core Program Cooperative Agreements in order to conduct CERCLA implementation activities that are not directly assignable to specific sites, but are intended to support a State's or Indian Tribe's ability to participate in the CERCLA; response program.

(b) Only the State or Indian Tribal government agency designated as the single point of contact with EPA for CERCLA implementation is eligible to receive a Core Program Cooperative Agreement.

(c) When it is more economical for a government entity other than the recipient (such as a political subdivision or State Attorney General) to implement tasks funded through a Core Program Cooperative Agreement, benefits to such entities must be provided for in an intergovernmental agreement.

§ 35.6220 General.

The recipient of a Core Program Cooperative Agreement must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790) described in this subpart. Recipients may not incur site-specific costs. Where these sections entail site-specific requirements, the recipient is not required to comply on a site-specific basis.

§ 35.6225 Activities eligible for funding under Core Program Cooperative Agreements.

To be eligible for funding under a Core Program Cooperative Agreement, activities must support a recipient's abilities to implement CERCLA. Once the recipient has in place program functions described in § 35.6225 (a)

through (d) below, EPA will evaluate the recipient's program needs to sustain interaction with EPA in CERCLA implementation as described in § 35.6225(e). The amount of funding provided under the Core Program will be determined by EPA based on the availability of funds and the recipient's program needs in the areas described in (a) through (d) below:

(a) Procedures for emergency response actions and longer-term remediation of environmental and health risks at hazardous waste sites (including but not limited to the development of generic health and safety plans, quality assurance project plans, and community relation plans);

(b) Provisions for satisfying all requirements and assurances (including the development of a fund or other financing mechanism(s) to pay for studies and remediation activities);

(c) Legal authorities and enforcement support associated with proper administration of the recipient's program and with efforts to compel potentially responsible parties to conduct or pay for studies and/or remediation (including but not limited to the development of statutory authorities; access to legal assistance in identifying applicable or relevant and appropriate requirements of other laws; and development and maintenance of the administrative, financial and recordkeeping systems necessary for cost recovery actions under CERCLA);

(d) Efforts necessary to hire and train staff to manage publicly-funded cleanups, oversee responsible party-lead cleanups, and provide clerical support; and

(e) Other activities deemed necessary by EPA to support sustained EPA/recipient interaction in CERCLA implementation (including but not limited to general program management and supervision necessary for a recipient to implement CERCLA activities, and interagency coordination on all phases of CERCLA response).

Continued funding of tasks in subsequent years will be based on an evaluation of demonstrated progress towards the goals in the existing Core Program Cooperative Agreement Statement of Work.

§ 35.6230 Application requirements.

To receive a Core Program Cooperative Agreement, the applicant must submit an application form ("Application for Federal Assistance," SF-424, for non-construction programs) to EPA. Applications for additional funding need include only the revised pages. The application must include the following:

(a) *A project narrative statement,* including the following:

(1) *A Statement of Work (SOW)* which must include a detailed description of the CERCLA-funded activities and tasks to be conducted, the projected costs associated with each task, the number of products to be completed, and a schedule for implementation. Eligible activities under Core Program Cooperative Agreements are discussed in § 35.6225 of this subpart;

(2) *A background statement,* describing the current abilities and authorities of the recipient's program for implementing CERCLA, the program's needs to sustain and increase recipient involvement in CERCLA implementation, and the impact of Core Program Cooperative Agreement funds on the recipient's involvement in site-specific CERCLA response.

(b) *Budget sheets* (SF-424A);

(c) *Proposed project and budget periods* for CERCLA-funded activities. The project and budget periods may be one or more years and may be extended incrementally, up to 12 months at a time, with EPA approval;

(d) *Certifications* for a drug-free workplace; debarment, suspensions, and other responsibility matters; procurement; and lobbying, pursuant to § 35.6105(a) (3) through (6) of this subpart.

§ 35.6235 Cost sharing.

The recipient of a Core Program Cooperative Agreement must provide at least ten percent of the direct and indirect costs of all activities covered by the Core Program Cooperative Agreement. The recipient must provide its cost share with non-Federal funds or with Federal funds authorized by statute to be used for matching purposes. Funds used for matching purposes under any other Federal grant or Co-

operative Agreement cannot be used for matching purposes under a Core Program Cooperative Agreement. The recipient may provide its share using in-kind contributions if such contributions are provided for in the Cooperative Agreement. The recipient may not use CERCLA State credits to offset any part of the recipient's required match for Core Program Cooperative Agreements. See § 35.6285 (c), (d), and (f) regarding credit, over match, and advance match, respectively.

Support Agency Cooperative Agreements

§ 35.6240 Eligibility for support agency Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for support agency Cooperative Agreements to ensure their meaningful and substantial involvement in response activities, as specified in sections 104 and 121(f)(1) of CERCLA and the NCP. (See § 35.6800 (a) and (b).)

§ 35.6245 Allowable activities.

Support agency activities are those activities conducted by the recipient to ensure its meaningful and substantial involvement. The activities described in section 121(f)(1) of CERCLA, as amended, and in subpart F of the NCP, are eligible for funding under a support agency Cooperative Agreement.

§ 35.6250 Support agency Cooperative Agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a)(1), (4), (5) and (6), and other requirements as negotiated with EPA. (Indian Tribes are exempt from the requirement of Intergovernmental Review in part 29 of this chapter.) An applicant may submit a non-site-specific budget for support agency activities, with the exception of remedial action support agency activities, which require cost share and must be applied for within a site-specific budget. All support agency activities are subject to the applicable sections of this subpart.

(b) *Cooperative Agreement requirements.* The recipient must comply with the requirements regarding financial administration (§§ 35.6270 through 35.6290 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6650 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a Cooperative Agreement (§§ 35.6750 through 35.6790) described in this subpart.

§ 35.6255 Cost sharing.

The requirements for cost sharing under a support agency Cooperative Agreement are the same as the cost sharing requirements of § 35.6105(b)(2) of this subpart. The State may use in-kind services as part of its cost share. (See § 35.6815(b) for SSC payment requirements.)

Financial Administration Requirements Under a Coopertive Agreement

§ 35.6270 Standards for financial management systems.

(a) *Accounting system standards.* (1) *General.* The recipient's system must track expenses by site, activity, and, operable unit, as applicable, according to object class. The system must also provide control, accountability, and an assurance that funds, property, and other assets are used only for their authorized purposes. The recipient must allow an EPA review of the adequacy of the financial management system as described in 40 CFR 31.20(c).

(2) *Allowable costs.* The recipient's systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The system need not track expenses by site. However, all pre-remedial costs must be documented under a single Superfund account number designated specifically for the preremedial activity.

(4) *Core Program.* Since all costs associated with Core Program Cooperative Agreements are non-site-specific, the systems need not track expenses by site. However, all Core Program costs must be documented under the Superfund account number(s) designated specifically for Core Program activity.

(5) *Support Agency.* Unless otherwise specified in the Cooperative Agreement, all support agency costs, with the exception of remedial action support agency costs, may be documented under a single Superfund account number designated specifically for support agency activities. Remedial action support agency activities must be documented site-specifically.

(6) *Accounting system control procedures.* Except as provided for in paragraph (a)(3) of this section, accounting system control procedures must ensure that accounting information is:

(i) Accurate, charging only costs attributable to the site, activity, and operable unit, as applicable; and

(ii) Complete, recording and charging to individual sites, activities, and operable units, as applicable, all costs attributable to the recipient's CERCLA effort.

(7) *Financial reporting.* The recipient's accounting system must use actual costs as the basis for all reports of direct site charges. The recipient must comply with the requirements for financial reporting contained in § 35.6670 of this subpart.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that enables site-specific costs to be tracked by site, activity, and operable unit, as applicable, and provides sufficient documentation for cost recovery purposes.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office within 30 working days of a request, unless another time frame is specified in the Cooperative Agreement.

(3) In addition, the recipient must comply with the requirements regarding records described in §§ 35.6700, 35.6705, and 35.6710 of this subpart. The recipient must comply with the requirements regarding source documentation described in 40 CFR 31.20(b)(6).

(4) For pre-remedial and Core Program activities, the recordkeeping system must comply with the requirements described in paragraphs (a)(3) and (a)(4), respectively, of this section.

§ 35.6275 Period of availability of funds.

(a) The recipient must comply with the requirements regarding the availability of funds described in 40 CFR 31.23.

(b) Except as permitted in § 35.6285, the Award Official must sign the assistance agreement before costs are incurred. The recipient may incur costs between the date the Award Official signs the assistance agreement and the date the recipient signs the agreement, if the costs are identified in the agreement and the recipient does not change the agreement.

§ 35.6280 Payments.

(a) *General.* In addition to the following requirements, the recipient must comply with the requirements regarding payment described in 40 CFR 31.21(f) through (h).

(1) *Assignment of payment.* The recipient cannot assign the right to receive payments under the recipient's Cooperative Agreement. EPA will make payments only to the payee identified in the Cooperative Agreement.

(2) *Interest.* If the recipient earns interest on an advance of EPA funds, the recipient must return the interest unless the recipient is a State or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, or a Tribal organization as defined under section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(b) *Payment method*—(1) *Letter of credit.* In order to receive payment by the letter of credit method, the recipient must comply with the requirements regarding letter of credit described in 40 CFR 31.20 (b)(7) and 31.21(b). The recipient must identify and charge costs to specific sites, activities, and operable units, as applicable, for drawdown purposes as specified in the Cooperative Agreement.

(2) *Reimbursement.* If the recipient is unable to meet letter of credit requirements, EPA will pay the recipient by reimbursement. The recipient must comply with the requirements regarding reimbursement described in 40 CFR 31.21(d).

(3) *Working capital advances.* If the recipient is unable to meet the criteria for payment by either letter of credit or reimbursement, EPA may provide cash on a working capital advance basis. Under this procedure EPA shall advance cash to the recipient to cover its estimated disbursement needs for an initial period generally geared to the recipient's disbursing cycle. Thereafter, EPA shall reimburse the recipient for its actual cash disbursements. In such cases, the recipient must comply with the requirements regarding working capital advances described in 40 CFR 31.21(e).

§ 35.6285 Recipient payment of response costs.

The recipient may pay for its share of response costs using cash, services, credits or any combination of these, as follows:

(a) *Cash.* The recipient may pay for its share of response costs in the form of cash.

(b) *Services.* The recipient may provide equipment and services to satisfy its cost share requirements under Cooperative Agreements. The recipient must comply with the requirements regarding in-kind and donated services described in 40 CFR 31.24.

(c) *Credit—* (1) *General credit requirements.* Credits are limited to State site-specific expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity obligations or expenditures incurred by the State or political subdivision between January 1, 1978 and December 11, 1980.

(ii) The State may claim credit for remedial action expenditures incurred by the State after October 17, 1986.

(iii) The State may not claim credit for removal actions taken after December 11, 1980.

(2) *Credit submission requirements.* (i) *Expenditures incurred before a site is listed on the NPL.* Although EPA may require additional documentation, the State must submit the following before EPA will approve the use of the credit:

(A) Specific amounts claimed for credit, by site (estimated amounts are unacceptable), based on supporting cost documentation;

(B) Units of government (State agency, county, local) that incurred the costs, by site;

(C) Description of the specific function performed by each unit of government at each site;

(D) Certification (signed by the State's fiscal manager or the financial director for each unit of government) that credit costs have not been previously reimbursed by the Federal government or any other party, and have not been used for matching purposes under any other Federal program or grant; and

(E) Documentation, if requested by EPA, to ensure the actions undertaken at the site are cost eligible and consistent with CERCLA, as amended, and the NCP requirements. This requirement does not apply for costs incurred before December 11, 1980.

(ii) *Expenditures incurred after a site is listed on the NPL.* A State may receive credit for remedial action expenditures after October 17, 1986, only if the State entered into a Cooperative Agreement before incurring costs at the site.

(3) *Use of credit.* The State must first apply credit at the site at which it was earned. With the approval of EPA, the State may use excess credit earned at one site for its cost share at another site (See CERCLA section 104(c)(5)). Credits must be applied on a site-specific basis, and, therefore, may not be used to meet State cost-share requirements for Core Program Cooperative Agreements. EPA will not reimburse excess credit.

(4) *Credit verification.* Credits are subject to verification by audit and technical review of actions performed at sites.

(d) *Over match.* The recipient may not use contributions in excess of the required cost-share at one site to meet the cost-share obligation at another site or the Core Program cost-share obligation. Overmatch is not "credit" pursuant to § 35.6285(c)(3).

(e) *Cost sharing.* The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24. Finally, the recipient cannot use costs incurred under the Core Program to offset cost-share requirements at a site.

(f) *Advance match.* (1) A Cooperative Agreement for a site-specific response entered into after October 17, 1986 cannot authorize a State to contribute funds during remedial planning and then apply those contributions to the remedial action cost share (advance match).

(2) A State may seek reimbursement for costs incurred under Cooperative Agreements which authorize advance match.

(3) Reimbursements are subject to the availability of appropriated funds.

(4) If the State does not seek reimbursement, EPA will apply the advance match to off-set the State's required cost share for remedial action at the site. The State may not use advance match for credit at any other site, nor may the State receive reimbursement until the conclusion of CERCLA-funded remedial response activities. Also, the State may not use advance match for credit against cost-share obligations for Core Program Cooperative Agreements.

(5) Claims for advance match are subject to verification by audit.

[55 FR 23007, June 5, 1990, as amended at 55 FR 24343, June 15, 1990]

§ 35.6290 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR part 31.25.

Personal Property Requirements under a Cooperative Agreement

§ 35.6300 General personal property acquisition and use requirements.

(a) *General.* (1) Property may be acquired only when authorized in the Cooperative Agreement.

(2) The recipient must acquire the property during the approved project period.

(3) The recipient must:

(i) Charge property costs by site, activity, and operable unit, as applicable;

(ii) Document the use of the property by site, activity, and operable unit, as applicable; and

(iii) Solicit and follow EPA's instructions on the disposal of any property purchased with CERCLA funds as specified in § 35.6340 and § 35.6345 of this subpart.

(b) *Exception.* The recipient is not required to charge property costs by site under a pre-remedial or Core Program Cooperative Agreement.

§ 35.6305 Obtaining supplies.

To obtain supplies, the recipient must agree to comply with the requirements in §§ 35.6300, 35.6315(b), 35.6325 through 35.6340, and 35.6350 of this subpart. Supplies obtained with Core Program funds must be for non-site-specific purposes. All purchases of supplies under the Core Program must comply with the requirements in the above listed sections, except where these requirements are site-specific.

§ 35.6310 Obtaining equipment.

To obtain equipment, the recipient must agree to comply with the requirements in § 35.6300 and §§ 35.6315 through 35.6350 of this subpart.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase equipment with recipient funds.* The recipient may purchase equipment with the recipient's own funds and may charge EPA a fee for using equipment on a CERCLA-funded project. The fee must be based on a usage rate, subject to the usage rate requirements in § 35.6320 of this subpart.

(b) *Borrow federally owned property.* The recipient may borrow federally owned property, with the exception of motor vehicles, for use on CERCLA-funded projects. The loan of the federally owned property may only extend through the project period. At the end of the project period, or when the federally owned property is no longer needed for the project, the recipient must return the property to the Federal Government.

(c) *Lease, use contractor services, or purchase with CERCLA funds.* To acquire equipment through lease, use of

contractor services, or purchase with CERCLA funds, the recipient must conduct and document a cost comparison analysis to determine which of these methods of obtaining equipment is the most cost effective. In order to obtain the equipment, the recipient must submit documentation of the cost comparison analysis to EPA for approval. The recipient must obtain the equipment through the most cost effective method, subject to the requirements listed below:

(1) *Lease or rent equipment.* If it is the most cost effective method of acquisition, the recipient may lease or rent equipment, subject only to the requirements in § 35.6300 of this subpart.

(2) *Use contractor services.* (i) If it is the most cost effective method of acquisition, the recipient may hire the services of a contractor.

(ii) The recipient must obtain award official approval before authorizing the contractor to purchase equipment with CERCLA funds. (See § 35.6325 of this subpart regarding the title and vested interest of equipment purchased with CERCLA funds.) This does not apply for recipients who have used the sealed bids method of procurement.

(iii) The recipient must require the contractor to allocate the cost of the contractor services by site, activity, and operable unit, as applicable.

(3) *Purchase equipment with CERCLA funds.* If equipment purchase is the most cost-effective method of obtaining the equipment, the recipient may purchase the equipment with CERCLA funds. To purchase equipment with CERCLA funds, the recipient must comply with the following requirements:

(i) The recipient must include in the Cooperative Agreement application a list of all items of equipment to be purchased with CERCLA funds, with the price of each item.

(ii) If the equipment is to be used on sites, the recipient must allocate the cost of the equipment by site, activity, and operable unit, as applicable, by applying a usage rate subject to the usage rate requirements in § 35.6320 of this subpart.

(iii) The recipient may not use CERCLA funds to purchase a transportable or mobile treatment system.

(iv) Equipment obtained with Core Program funds must be for non-site-specific purposes. All purchases of equipment must comply with the requirements in § 35.6300, and §§ 35.6310 through 35.6350 of this subpart, except where these requirements are site-specific.

§ 35.6320 Usage rate.

(a) *Usage rate approval.* To charge EPA a fee for use of equipment purchased with recipient funds or to allocate the cost of equipment by site, activity, and operable unit, as applicable, the recipient must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. The EPA-approved usage rate must be included in the Cooperative Agreement before the recipient incurs these equipment costs.

(b) *Usage rate application.* The recipient must record the use of the equipment by site, activity, and operable unit, as applicable, and must apply the usage rate to calculate equipment charges by site, activity, and operable unit, as applicable. For Core Program and pre-remedial activities, the recipient is not required to apply a usage rate.

§ 35.6325 Title and EPA interest in CERCLA-funded property.

(a) *EPA's interest in CERCLA-funded property.* EPA has an interest (the percentage of EPA's participation in the total award) in both equipment and supplies purchased with CERCLA funds.

(b) *Title in CERCLA-funded property.* Title in both equipment and supplies purchased with CERCLA funds vests in the recipient.

(1) *Right to transfer title.* EPA retains the right to transfer title of all property purchased with CERCLA funds to the Federal Government or a third party within 120 calendar days after project completion or at the time of disposal.

(2) *Equipment used as all or part of the remedy.* The following require-

ments apply to equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA no longer has an interest in fixed in-place equipment once the equipment is installed.

(ii) *Equipment that is an integral part of services to individuals.* EPA no longer has an interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, once EPA certifies that the remedy is operational and functional.

§ 35.6330 Title to federally owned property.

Title to all federally owned property vests in the Federal Government.

§ 35.6335 Property management standards.

The recipient must comply with the following property management standards for property purchased with CERCLA funds. The recipient may use its own property management system if it meets the following standards.

(a) *Control.* The recipient must maintain:

(1) *Property records* for CERCLA-funded property which include the contents specified in § 35.6700(c) of this subpart;

(2) *A control system* which ensures adequate safeguards for prevention of loss, damage, or theft of the property. The recipient must make provisions for the thorough investigation and documentation of any loss, damage, or theft;

(3) *Procedures* to ensure maintenance of the property in good condition and periodic calibration of the instruments used for precision measurements;

(4) *Sales procedures* to ensure the highest possible return, if the recipient is authorized to sell the property;

(5) *Provisions for financial control and accounting* in the financial management system of all equipment; and

(6) *Identification* of all federally owned property.

(b) *Inventory and reporting for CERCLA-funded equipment.*

(1) *Physical inventory.* The recipient must conduct a physical inventory at least once every two years for all equipment except that which is part of the in-place remedy. The recipient must reconcile physical inventory results with the equipment records.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports set forth in § 35.6660 of this subpart.

(c) *Inventory and reporting for federally owned property.*

(1) *Physical inventory.* The recipient must conduct a physical inventory:

(i) Annually;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports in § 35.6660 of this subpart.

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment which is no longer needed, or at the end of the project period, whichever is earlier, the recipient must:

(1) Analyze two alternatives: the cost of leaving the equipment in place, and the cost of removing the equipment and disposing of it in another manner.

(2) Document the analysis of the two alternatives in the inventory report. See § 35.6660 of this subpart regarding requirements for the inventory report.

(i) If it is most cost-effective to remove the equipment and dispose of it in another manner:

(A) If the equipment has a residual fair market value of $5,000 or more, the recipient must request disposition instructions from EPA in the inventory report. See § 35.6345 of this subpart for equipment disposal options.

(B) If the equipment has a residual fair market value of less than $5,000, the recipient may retain the equipment for the recipient's use on another CERCLA site. If, however, there is any remaining residual value at the time of final disposition, the recipient must reimburse the Hazardous Substance Superfund for EPA's vested in-

terest in the current fair market value of the equipment at the time of disposition.

(ii) If it is most cost-effective to leave the equipment in place, recommend in the inventory report that the equipment be left in place.

(3) Submit the inventory report to EPA, even if EPA has stopped supporting the project.

(b) *Supplies.* (1) If supplies have an aggregate fair market value of $5,000 or more at the end of the project period, the recipient must take one of the following actions at the direction of EPA:

(i) Use the supplies on another CERCLA project and reimburse the original project for the fair market value of the supplies;

(ii) If both the recipient and EPA concur, keep the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies; or

(iii) Sell the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies, less any reasonable selling expenses.

(2) If the supplies remaining at the end of the project period have an aggregate fair market value of less than $5,000, the recipient may keep the supplies to use on another CERCLA project. If the recipient cannot use the supplies on another CERCLA project, then the recipient may keep or sell the supplies without reimbursing the Hazardous Substance Superfund.

§ 35.6345 Equipment disposal options.

The following disposal options are available:

(a) Use the equipment on another CERCLA project and reimburse the original project for the fair market value of the equipment;

(b) If both the recipient and EPA concur, keep the equipment and reimburse the Hazardous Substance Superfund, for EPA's interest in the current fair market value of the equipment;

(c) Sell the equipment and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the equipment, less any reasonable selling expenses; or

(d) Return the equipment to EPA and, if applicable, EPA will reimburse the recipient for the recipient's proportionate share in the current fair market value of the equipment.

§ 35.6350 Disposal of federally owned property.

When federally owned property is no longer needed, or at the end of the project, the recipient must inform EPA that the property is available for return to the Federal Government. EPA will send disposition instructions to the recipient.

Real Property Requirements under a Cooperative Agreement

§ 35.6400 Acquisition and transfer of interest.

(a) An interest in real property may be acquired only with prior approval of EPA.

(1) If the recipient acquires real property in order to conduct the response, the recipient with jurisdiction over the real property, to the extent of its legal authority, must agree to acquire and hold the necessary real property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Indian Tribe, to the extent of its legal authority, must agree to accept transfer of the acquired interest on or before the completion of the response action. States and Indian Tribes must follow the requirements in §§ 35.6105(b)(5) and 35.6110(b)(2), respectively, of this subpart.

(b) The recipient must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter, "Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally-Assisted Programs."

§ 35.6405 Use.

The recipient must comply with the requirements regarding real property described in 40 CFR 31.31.

COPYRIGHT REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6450 General requirements.

The recipient must comply with the requirements regarding copyrights described in 40 CFR 31.34. The recipient must comply with the requirements regarding contract copyright provisions described in § 35.6595(b)(3) of this subpart.

USE OF RECIPIENT EMPLOYEES ("FORCE ACCOUNT") UNDER A COOPERATIVE AGREEMENT

§ 35.6500 General requirements.

(a) Force Account work is the use of the recipient's own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility. When using Force Account work, the recipient must demonstrate that the employees can complete the work as competently as, and more economically than, contractors, or that an emergency necessitates the use of the Force Account.

(b) Where the value of Force Account services exceeds $25,000, the recipient must receive written authorization for use from the award official.

PROCUREMENT REQUIREMENTS UNDER A COOPERATIVE AGREEMENT

§ 35.6550 Procurement system standards.

(a) *Recipient standards*—(1) *Procurement system evaluation.* (i) An applicant or recipient must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700-48) and submit the form to EPA with its application.

(ii) The certification will be valid for two years or for the length of the project period specified in the Cooperative Agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part. (See subparagraph (a)(4) of this section regarding EPA right to review.) If the recipient substantially revises its procurement system, the recipient must re-evaluate its system and submit a revised EPA Form 5700-48.

(2) *Certified procurement system.* Even if the applicant or recipient has certified that its procurement system meets the intent of the requirements of this subpart, the EPA award official retains the authority as stated in:

(i) Section 35.6565(d)(1)(iii), "Noncompetitive proposals," regarding award official authorization of noncompetitive proposals;

(ii) Section 35.6565(b), "Sealed bids (formal advertising)," regarding award official approval for the use of a procurement method other than sealed bidding for a remedial action award contract, except for Architectural/Engineering services and post-removal site control;

(iii) Section 35.6550(a)(9), "Protests," regarding EPA review of protests; and

(iv) 40 CFR 31.36(g)(2)(iv), "Awarding Agency Review," regarding the review of proposed awards over $25,000 which are to be awarded to other than the apparent low bidder under a sealed bid procurement.

(3) *Noncertified procurement system.* If the applicant or recipient has not certified that its procurement system meets the intent of the requirements of this subpart, then the recipient must follow the requirements of this subpart and allow EPA preaward review of proposed procurement actions that will use EPA funds. In addition, the recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700-41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700-41. This specific requirement is an addition to the requirements regarding cost and price analysis described in § 35.6585 of this subpart.

(4) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a Cooperative Agreement.

(5) *Code of conduct.* The recipient must comply with the requirements of 40 CFR 31.36(b)(3), which describes standards of conduct for employees, officers, and agents of the recipient.

(6) *Completion of contractual and administrative issues.* (i) The recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgement and good administrative practice of all contractual and administrative issues arising out of procurements under the Cooperative Agreement.

(ii) EPA will not substitute its judgement for that of the recipient unless the matter is primarily a Federal concern.

(iii) Violations of law will be referred to the local, State, Tribal, or Federal authority having proper jurisdiction.

(7) *Selection procedures.* The recipient must have written selection procedures for procurement transactions.

(i) EPA may not participate in a recipient's selection panel except to provide technical assistance. EPA staff providing such technical assistance:

(A) Shall constitute a minority of the selection panel (limited to making recommendations on qualified offers and acceptable proposals based on published evaluation criteria) for the contractor selection process; and

(B) Are not permitted to participate in the negotiation and award of contracts.

(ii) When selecting a contractor, recipients:

(A) May not use EPA contractors to provide any support related to procuring a State contractor.

(B) May use the Corps of Engineers for review of State bidding documents, requests for proposals and bids and proposals received.

(8) *Award.* The recipient may award a contract only to a responsible contractor, as described in 40 CFR 31.36(b)(8), and must ensure that each contractor performs in accordance with all the provisions of the contract. (See also 35.6560 of this subpart regarding debarred and suspended contracts.)

(9) *Protest procedures.* The recipient must comply with the requirements described in 40 CFR 31.36(b)(12) regarding protest procedures.

(10) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665 of this subpart.

(11) *Intergovernmental agreements.* (i) To foster greater economy and efficiency, recipients are encouraged to enter into intergovernmental agreements for procurement or use of common goods and services.

(ii) Although intergovernmental agreements are not subject to the requirements set forth at §§ 35.6550 through 35.6610, all procurements under intergovernmental agreements are subject to these requirements except for procurements that are:

(A) Incidental to the purpose of the assistance agreement; and

(B) Made through a central public procurement unit.

(12) *Value engineering.* The recipient is encouraged to include value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

(b) *Contractor standards*—(1) *Disclosure requirements regarding Potentially Responsible Party relationships.* The recipient must require each prospective contractor to provide with its bid or proposal:

(i) Information on its financial and business relationship with all PRPs at the site and with the contractor's parent companies, subsidiaries, affiliates, subcontractors, or current clients at the site. Prospective contractors under a Core Program Cooperative Agreement must provide comparable information for all sites within the recipient's jurisdiction. (This disclosure requirement encompasses past financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the

best interests of the recipient, the prospective contractor may be declared nonresponsible and the contract awarded to the next eligible bidder or offeror.

(2) *Conflict of interest*—(i) *Conflict of interest notification.* The recipient must require the contractor to notify the recipient of any actual, apparent, or potential conflict of interest regarding any individual working on a contract assignment or having access to information regarding the contract. This notification shall include both organizational conflicts of interest and personal conflicts of interest. If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict of interest situation.

(ii) *Contract provisions.* The recipient must incorporate the following provisions or their equivalents into all contracts, except those for well-drilling, fence erecting, plumbing, utility hook-ups, security guard services, or electrical services:

(A) *Contractor data.* The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, EPA, or its authorized agents for the life of the contract, and for a period of five years after completion of the contract.

(B) *Employment.* The contractor shall not accept employment from any party other than the recipient or Federal agencies for work directly related to the site(s) covered under the contract for five years after the contract has terminated. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(3) *Certification of independent price determination.* The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation.

(4) *Recipient's Contractors.* The recipient must require its contractor to comply with the requirements in §§ 35.6270(a) (1) and (2); 35.6320 (a) and (b); 35.6335; 35.6700; and 35.6705. For additional contractor requirements, see also §§ 35.6710(c); 35.6590(c); and 35.6610.

§ 35.6555 Competition.

The recipient must conduct all procurement transactions in a manner providing maximum full and open competition.

(a) *Restrictions on competition.* Inappropriate restrictions on competition include the following:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product, instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) *Geographic and Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or administratively imposed in-State or local geographical preferences in evaluating bids or proposals. However, nothing in this section preempts State licensing laws. In addition, when contracting for architectural and engineering (A/E) services, the recipient may use geographic location as a selection criterion, provided that when geographic location is used, its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(2) *Indian Tribe.* If the project benefits Indians, the recipient must comply

with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(c) *Written specifications.* The recipient's written specifications must include a clear and accurate description of the technical requirements and the qualitative nature of the material, product or service to be procured.

(1) This description must not contain features which unduly restrict competition, unless the features are necessary to:

(i) Test or demonstrate a specific thing;

(ii) Provide for necessary interchangeability of parts and equipment; or

(iii) Promote innovative technologies.

(2) The recipient must avoid the use of detailed product specifications if at all possible.

(d) *Public notice.* When soliciting bids or proposals, the recipient must allow sufficient time (generally 30 calendar days) between public notice of the proposed project and the deadline for receipt of bids or proposals. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

(e) *Prequalified lists.* Recipients may use prequalified lists of persons, firms, or products to acquire goods and services. The list must be current and include enough qualified sources to ensure maximum open and free competition. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 35.6560 Master list of debarred, suspended, and voluntarily excluded persons.

While evaluating bids or proposals, the recipient must consult the most current "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to ensure that the firms submitting proposals are not prohibited from participation in assistance programs. The recipient must comply with the requirements regarding subawards to debarred and suspended parties described in 40 CFR 31.35.

§ 35.6565 Procurement methods.

The recipient must comply with the requirements for payment to consultants described in 40 CFR 31.36(j). In addition, the recipient must comply with the following requirements:

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, the recipient must obtain and document price or rate quotations from an adequate number of qualified sources.

(b) *Sealed bids (formal advertising).* (For a remedial action award contract, except for Architectural/Engineering services and post-removal site control, the recipient must obtain the award official's approval to use a procurement method other than the sealed bid method.) Bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for the recipient to use the sealed bid method, the following conditions must be met:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If the recipient uses the sealed bid method, the recipient must comply with the following requirements:

(i) Publicly advertise the invitation for bids and solicit bids from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) Publicly open all bids at the time and place prescribed in the invitation for bids;

(iv) Award the fixed-price contract in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, the recipient shall consider factors such as discounts, transportation cost, and life cycle costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor. is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of response.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement requirements of this subpart, the recipient of a CERCLA remedial response Cooperative Agreement may use the engineer procured to conduct any or all of the follow-on engineering activities without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using CERCLA funds for follow-on activities, the recipient may use the engineer for sub-

sequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any CERCLA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of response under a Cooperative Agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal Cooperative Agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBEs, WBEs, and small businesses are used whenever possible as sources of supplies, construction, and services. Tasks to encourage small, minority, and women's business utilization in the Superfund program are eligible for funding under Core Program Cooperative Agreements.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) *"Fair share" objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy requires that fair share objectives for minority and women-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one Cooperative Agreement during the year, the recipient may negotiate an annual fair share for all Cooperative Agreements for that year. It is not necessary to have a fair share for each Cooperative Agreement. When a Cooperative Agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the Cooperative Agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over $25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product

sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Indemnification.* When adequate pollution liability insurance is not available to the contractor, EPA may indemnify response contractors for liability related to damage from releases arising out of the contractor's negligent performance. The recipient must comply with the requirements regarding indemnification described in section 119 of CERCLA.

(c) *Accidents and catastrophic loss.* The recipient must require the contractor to provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

(1) Nature, scope, and extent of work to be performed;

(2) Time frame for performance;

(3) Total cost of the contract; and

(4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan which is issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(2) *Violating facilities.* Contracts in excess of $100,000 must contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR part 15) which prohibit the use of facilities included on the EPA List of Violating Facilities under nonexempt Federal contracts, grants or loans.

(3) *Patents, inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(4) *Labor standards.* The recipient must include a copy of EPA Form 5720-4 ("Labor Standards Provisions for Federally Assisted Construction Contracts") in each contract for construction (as defined by the Secretary of Labor in 29 CFR part 5). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a-276a-7), the Copeland Regulations (29 CFR part 3), the Contract Work Hours and Safety Standards Act Overtime Compensation (940 U.S.C. 327-333), and the nondiscrimination provisions in Executive Order 11246, as amended.

(5) *Conflict of interest.* The recipient must include provisions pertaining to conflict of interest as described in § 35.6550(b)(2)(ii) of this subpart.

(c) *Model clauses.* The recipient must comply with the requirements regarding model contract clauses described in 40 CFR 33.1030 (1987).

§ 35.6600 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;

(5) The award official determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the recipient's responsibility for the improper action of others.

§ 35.6605 Privity of contract.

Neither EPA nor the United States shall be a party to any contract nor to any solicitation or request for proposals.

§ 35.6610 Contracts awarded by a contractor.

The recipient must require its contractor to comply with the following provisions in the award of contracts (i.e. subcontracts). (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) The requirements regarding debarred, suspended, and voluntarily excluded persons in § 35.6560 of this subpart.

(b) The limitations on contract award in § 35.6550(a)(8) of this subpart.

(c) The requirements regarding minority and women's business enterprises, and small business in § 35.6580 of this subpart.

(d) The requirements regarding specifications in § 35.6555 (a)(6) and (c) of this subpart.

(e) The Federal cost principles in 40 CFR 31.22.

(f) The prohibited types of contracts in § 35.6575(a) of this subpart.

(g) The cost, price analysis, and profit analysis requirements in § 35.6585 of this subpart.

(h) The applicable provisions in § 35.6595 (b) and (c) of this subpart.

(i) The applicable provisions in § 35.6555(b)(2).

Reports Required Under a Cooperative Agreement

§ 35.6650 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly on the activities delineated in the Statement of Work. EPA may not require submission of progress reports more often than quarterly. The reports must be submitted within 30 days of the end of each Federal Fiscal quarter.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, delays, or other problems, if any, and a description of the corrective measures that are planned. For pre-remedial Cooperative Agreements, the report must include a list of the site-specific products completed and the estimated number of technical hours spent to complete each product.

(2) A comparison of the percentage of the project completed to the project schedule, and an explanation of significant discrepancies.

(3) A comparison of the estimated funds spent to date to planned expenditures and an explanation of significant discrepancies. For remedial, enforcement, and removal reports, the comparison must be on a per task basis.

(4) An estimate of the time and funds needed to complete the work required in the Cooperative Agreement, a comparison of that estimate to the time and funds remaining, and a justification for any increase.

§ 35.6655 Notification of significant developments.

Events may occur between the scheduled performance reporting dates which have significant impact upon the Cooperative Agreement-supported activity. In such cases, the recipient must inform the EPA project officer as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

§ 35.6660 Property inventory reports.

(a) *CERCLA-funded property*—(1) *Content.* The report must contain the following information:

(i) Classification and value of remaining supplies;

(ii) Description of all equipment purchased with CERCLA funds, including its current condition;

(iii) Verification of the current use and continued need for the equipment by site, activity, and operable unit, as applicable;

(iv) Notification of any property which has been stolen or vandalized; and

(v) A request for disposition instructions for any equipment no longer needed on the project.

(2) *Reporting frequency.* The recipient must submit an inventory report to EPA at the following times:

(i) Within 90 days after completing any CERCLA-funded project or any response activity at a site; and

(ii) When the equipment is no longer needed for any CERCLA-funded project or any response activity at a site.

(b) *Federally owned property*—(1) *Content.* The recipient must include the following information for each federally owned item in the inventory report:

(i) Description;

(ii) Decal number;

(iii) Current condition; and

(iv) Request for disposition instructions.

(2) *Reporting frequency.* The recipient must submit an inventory report to the appropriate EPA property accountable officer at the following times:

(i) Annually, due to EPA on the anniversary date of the award;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

§ 35.6665 Procurement reports.

(a) *Department of Labor (DOL) Reports*—(1) *Content.* The recipient must notify the DOL Regional Office of Compliance, in writing, of each construction contract which has or is expected to have an aggregate value of over $10,000 within a 12-month period. The report must include the following:

(i) Construction contractor's name, address, telephone number, and employee identification number;

(ii) Award amount;

(iii) Estimated start and completion dates; and

(iv) Project number, name, and site location.

(2) *Reporting frequency.* The recipient must notify the DOL Office of Compliance within 10 calendar days after the award of each such construction contract. The recipient must submit a copy of the report to the EPA project officer.

(b) *Minority and women's business enterprise (MBE/WBE) Reports.* (1) The recipient must report on its use of MBE and WBE firms by submitting a completed Minority and Women's Business Utilization Report (SF-334) to the award official. Reporting commences with the recipient's award of its first contract and continues until it and its contractors have awarded their last contract for the activities or tasks identified in the Cooperative Agreement. The recipient must submit the MBE/WBE Utilization Report within 30 days after the end of each Federal fiscal quarter, regardless of whether the recipient awards a contract to an MBE or WBE during that quarter.

(2) The recipient must also report on its efforts to encourage MBE participation in the Superfund program pursuant to CERCLA § 105(f). Information on the recipient's efforts to encourage MBE participation in the Superfund program may be included in each SF-334 submitted quarterly, but is required in the SF-334 submitted for the fourth quarter, due November 1 of each year.

§ 35.6670 Financial reports.

(a) *General.* The recipient must comply with the requirements regarding financial reporting described in 40 CFR 31.41.

(b) *Financial Status Report*—(1) *Content.* (i) The Financial Status Report (SF-269) must include financial information by site, activity, and operable unit, as applicable.

(ii) A final Financial Status Report (FSR) must have no unliquidated obligations. If any obligations remain unliquidated, the FSR is considered an interim report and the recipient must submit a final FSR to EPA after liquidating all obligations.

(2) *Reporting frequency.* The recipient must file a Financial Status Report as follows:

(i) Annually due 90 days after the end of the Federal fiscal year or as specified in the Cooperative Agreement; or if quarterly or semiannual reports are required in accordance with 40 CFR 31.41(b)(3), due 30 days after the reporting period;

(ii) Within 90 calendar days after completing each CERCLA-funded response activity at a site (submit the FSR only for each completed activity); and

(iii) Within 90 calendar days after termination or closeout of the Cooperative Agreement.

Records Requirements Under a Cooperative Agreement

§ 35.6700 Project records.

The lead agency for the response action must compile and maintain an administrative record consistent with section 113 of CERCLA, the National Contingency Plan, and relevant EPA policy and guidance. In addition, recipients of assistance (whether lead or support agency) are responsible for maintaining project files as described below.

(a) *General.* The recipient must maintain project records by site, activity, and operable unit, as applicable.

(b) *Financial records.* The recipient must maintain records which support the following items:

(1) Amount of funds received and expended; and

(2) Direct and indirect project cost.

(c) *Property records.* The recipient must maintain records which support the following items:

(1) Description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including the assistance identification number;

(4) Information regarding whether the title is vested in the recipient or EPA;

(5) Unit acquisition date and cost;

(6) Percentage of EPA's interest;

(7) Location, use and condition (by site, activity, and operable unit, as ap-

plicable) and the date this information was recorded; and

(8) Ultimate disposition data, including the sales price or the method used to determine the price, or the method used to determine the value of EPA's interest for which the recipient compensates EPA in accordance with §§ 35.6340, 35.6345, and 35.6350 of this subpart.

(d) *Procurement records*—(1) *General.* The recipient must maintain records which support the following items, and must make them available to the public:

(i) The reasons for rejecting any or all bids; and

(ii) The justification for a procurement made on a noncompetitively negotiated basis.

(2) *Procurements in excess of $25,000.* The recipient's records and files for procurements in excess of $25,000 must include the following information, in addition to the information required in paragraph (d)(1) of this section:

(i) The basis for contractor selection;

(ii) A written justification for selecting the procurement method;

(iii) A written justification for use of any specification which does not provide for maximum free and open competition;

(iv) A written justification for the choice of contract type; and

(v) The basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 35.6585 of this subpart and documentation of negotiations.

(e) *Other records.* The recipient must maintain records which support the following items:

(1) Time and attendance records and supporting documentation;

(2) Documentation of compliance with statutes and regulations that apply to the project; and

(3) The number of site-specific technical hours spent to complete each pre-remedial product.

§ 35.6705 Records retention.

(a) *Applicability.* This requirement applies to all financial and programmatic records, supporting documents, statistical records, and other records which are required to be maintained by the terms of this subpart, program regulations, or the Cooperative Agreement, or are otherwise reasonably considered as pertinent to program regulations or the Cooperative Agreement.

(b) *Length of retention period.* The recipient must maintain all records for 10 years following submission of the final Financial Status Report unless otherwise directed by the EPA award official, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

(c) *Substitution of microform.* Microform copies may be substituted for the original records. The recipient must have written EPA approval before destroying original records. The microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR part 1230) and EPA records management procedures (EPA Order 2160).

(d) *Starting date of retention period.* The recipient must comply with the requirements regarding the starting dates for records retention described in 40 CFR 31.42(c) (1) and (2).

§ 35.6710 Records access.

(a) *Recipient requirements.* The recipient must comply with the requirements regarding records access described in 40 CFR 31.42(e).

(b) *Availability of records.* The recipient must, with the exception of certain policy, deliberative, and enforcement documents which may be held confidential, ensure that all files are available to the public.

(c) *Contractor requirements.* The recipient must require its contractor to comply with the requirements regarding records access described in 40 CFR 31.36(i)(10).

OTHER ADMINISTRATIVE REQUIREMENTS FOR COOPERATIVE AGREEMENTS

§ 35.6750 Modifications.

The recipient must comply with the requirements regarding changes to the Cooperative Agreement described in 40 CFR 31.30.

§ 35.6755 Monitoring program performance.

The recipient must comply with the requirements regarding program performance monitoring described in 40 CFR 31.40 (a) and (e).

§ 35.6760 Enforcement and termination for convenience.

The recipient must comply with all terms and conditions in the Cooperative Agreement, and is subject to the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

§ 35.6765 Non-Federal audit.

The recipient must comply with the requirements regarding non-Federal audits described in 40 CFR 31.26.

§ 35.6770 Disputes.

The recipient must comply with the requirements regarding dispute resolution procedures described in 40 CFR 31.70.

§ 35.6775 Exclusion of third-party benefits.

The Cooperative Agreement benefits only the signatories to the Cooperative Agreement.

§ 35.6780 Closeout.

(a) Closeout of a Cooperative Agreement, or an activity under a Cooperative Agreement, can take place in the following situations:

(1) After the completion of all work for a response activity at a site; or

(2) After all activities under a Cooperative Agreement have been completed; or

(3) Upon termination of the Cooperative Agreement.

(b) The recipient must comply with the closeout requirements described in 40 CFR 31.50 and 31.51.

§ 35.6785 Collection of amounts due.

The recipient must comply with the requirements described in 40 CFR 31.52 regarding collection of amounts due.

§ 35.6790 High risk recipients.

If EPA determines that a recipient is not responsible, EPA may impose restrictions on the award as described in 40 CFR 31.12.

REQUIREMENTS FOR ADMINISTERING A SUPERFUND STATE CONTRACT (SSC)

§ 35.6800 General.

An SSC is required when either EPA or a political subdivision is the lead agency for a CERCLA response. This rule does not address whether Indian Tribes are subject to the requirements in § 35.6805(i)(2) (See § 35.610(a)).

(a) *EPA-lead SSC (Two-party SSC).* (1) An SSC with a State or Indian Tribe is required before EPA can obligate or transfer funds for an EPA-lead remedial action.

(2) The State must comply with the requirements described in §§ 35.6805 and 35.6815 of this subpart. The Indian Tribe must comply with the requirements described in § 35.6805 (a) through (h), (i)(4), (l) through (v); § 35.6815(b); and, if appropriate, § 35.6815 (c) and (d).

(b) *Political subdivision-lead SSC (Three-party SSC).* (1) To ensure State involvement as required under section 121(f) of CERCLA and subpart F of the National Contingency Plan, an SSC is required between EPA, the State and a political subdivision before a political subdivision may take the lead for any phase of remedial response. The SSC must contain, or must be amended to include, the State's assurances pursuant to § 35.6805(i) of this subpart before EPA obligates funds for remedial action set forth in the Statement of Work of the SSC.

(2) Both the State and the political subdivision must comply with the requirements described in §§ 35.6805, 35.6815, and 35.6820 of this subpart.

§ 35.6805 Contents of an SSC.

The SSC must include the following provisions:

(a) *General authorities,* which documents the relevant statutes and regulations (of each government entity that is a party to the contract) governing the contract;

(b) *Purpose of the SSC,* which describes the response activities to be conducted and the benefits to be derived;

(c) *Negation of agency relationship* between the signatories, which states that no signatory of the SSC can represent or act on the behalf of any other signatory in any matter associated with the SSC;

(d) *A site description,* pursuant to § 35.6105(a)(2)(i) of this subpart;

(e) *A site-specific Statement of Work,* pursuant to § 35.6105(a)(2)(ii) of this subpart and a statement of whether the contract constitutes an initial SSC or an amendment to an existing contract;

(f) *A statement of intention to follow EPA policy and guidance;*

(g) *A project schedule* to be prepared during response activities;

(h) *A statement desinating a primary contact* for each party to the contract, which designates representatives to act on behalf of each signatory in the implementation of the contract. This statement must document the authority of each project manager to approve modifications to the project so long as such changes are within the scope of the contract and do not significantly impact the SSC;

(i) *The CERCLA assurances,* as appropriate, as described below:

(1) Operation and maintenance. The State must provide an assurance pursuant to § 35.6105(b)(1) of this subpart.

(2) Twenty-year waste capacity. The State must provide an assurance pursuant to § 35.6105(b)(3) of this subpart.

(3) Off-site storage, treatment, or disposal. If off-site storage, destruction, treatment, or disposal is required, the State must provide an assurance pursuant to § 35.6105(b)(4) of this subpart; the political subdivision may not provide this assurance.

(4) Real Property Acquisition. When real property must be acquired, the State must provide an assurance pursuant to § 35.6105(b)(5) of this subpart. An Indian Tribe must provide an assurance pursuant to § 35.6110(b)(2).

(5) Provision of State cost share. The State must provide assurances for cost sharing pursuant to § 35.6105(b)(2). Even if the political subdivision is providing the actual cost share, the State must guarantee payment of the cost share in the event of default by the political subdivision.

(j) *Cost-share conditions,* which include:

(1) An estimate of the response action cost (excluding EPA's indirect costs) that requires cost share;

(2) The basis for arriving at this figure (See § 35.6285(c) for credit provisions); and

(3) The payment schedule as negotiated by the signatories, and consistent with either a lump-sum or incremental-payment option. Final payment must be made by completion of all activities in the site-specific Statement of Work with the exception of any change orders and claims handled during reconciliation of the SSC;

(k) *Reconciliation provision,* which states that the SSC remains in effect until the financial settlement of project costs and final reconciliation of response costs (including all change orders, claims, overpayments, reimbursements, etc.) ensure that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. Overpayments in an SSC may not be used to meet the cost-sharing obligation at another site. Reimbursements for any overpayment will be made to the payer identified in the SSC.

(l) *Amendability of the SSC,* which provides that:

(1) Formal amendments are required when alterations to CERCLA-funded activities are necessary or when alterations impact the State's assurances pursuant to the National Contingency Plan and CERCLA, as amended. Such amendments must include a Statement of Work for the amendment as described in § 35.6805(e) above;

(2) Any change(s) in the SSC must be agreed to, in writing, by the signa-

tories, except as provided elsewhere in the SSC, and must be reflected in all response agreements affected by the change(s);

(m) *List of Support Agency Cooperative Agreements* that are also in place for the site;

(n) *Litigation,* which describes EPA's right to bring an action against any party under section 106 of CERCLA to compel cleanup, or for cost recovery under section 107 of CERCLA.

(o) *Sanctions for failure to comply with SSC terms,* which states that if the signatories fail to comply with the terms of the SSC, EPA may proceed under the provisions of section 104(d)(2) of CERCLA and may seek in the appropriate court of competent jurisdiction to enforce the SSC or to recover any funds advanced or any costs incurred due to a breach of the SSC. Other signatories to the SSC may seek remedies in the appropriate court of competent jurisdiction.

(p) *Site access.* The State or political subdivision or Indian Tribe is expected to use its own authority to secure access to the site and adjacent properties, as well as all rights-of-way and easements necessary to complete the response actions undertaken pursuant to the SSC;

(q) *Joint inspection of the remedy.* Following completion of the remedial action, the State and EPA will jointly inspect the project. The SSC must include a statement indicating the State's approval of the final remedial action report submitted by EPA.

(r) *Exclusion of third-party benefits,* which states that the SSC is intended to benefit only the signatories of the SSC, and extends no benefit or right to any third party not a signatory to the SSC; and

(s) *Any other provision* deemed necessary by all parties to facilitate the response activities covered by the SSC.

(t) *State review.* The State or Indian Tribe must review and comment on the response actions pursuant to the SSC. Unless otherwise stated in the SSC, all time frames for review must follow those prescribed in the NCP.

(u) *Responsible party activities,* which states that if a Responsible Party takes over any activities at the site, the SSC will be modified or terminated, as appropriate.

(v) *Out-of-State or out-of-Indian Tribal jurisdiction transfers of CERCLA waste,* which states that, unless otherwise provided for by EPA or a political subdivision, the State or Indian Tribe must provide the notification requirements described in § 35.6120.

§ 35.6815 Administrative requirements.

In addition to the requirements specified in § 35.6805, the State and/or political subdivision must comply with the following:

(a) *Financial administration.* The State and/or political subdivision must comply with the following requirements regarding financial administration:

(1) *Payment.* The State may pay for its share of the costs of the response activities in cash or credit. As appropriate, specific credit provisions should be included in the SSC consistent with the requirements described in § 35.6285(c) of this subpart. The State may not pay for its cost share using in-kind services, unless the State has entered into a support agency Cooperative Agreement with EPA. The use of the support agency Cooperative Agreement as a vehicle for providing cost share must be documented in the SSC. If the political subdivision agrees to provide all or part of the State's cost share pursuant to a political subdivision-lead Cooperative Agreement, the political subdivision may pay for those costs in cash or in-kind services under that agreement. The use of a political subdivision-lead Cooperative Agreement as a vehicle for providing cost share must also be documented in the SSC. The State or political subdivision must make payments during the course of the site-specific project and must complete payments by completion of activities in the site-specific Statement of Work. (See § 35.6255 of this subpart for requirements concerning cost sharing under a support agency Cooperative Agreement.) The specific payment terms must be documented in the SSC pursuant to § 35.6805 of this subpart.

(2) *Collection of amounts due.* The State and/or political subdivision must comply with the requirements described in 40 CFR 31.52(a) regarding collection of amounts due.

(3) *Failure to comply with negotiated payment terms.* Failure to comply with negotiated payment terms may be construed as default by the State on its required assurances, even if the political subdivision is responsible for providing all or part of the cost share. (See § 35.6805(i)(5) of this subpart.)

(b) *Personal Property.* The State, Indian Tribe, or political subdivision is required to accept title. The following requirements apply to equipment used as all or part of the remedy:

(1) *Fixed in-place equipment.* EPA no longer has an interest in fixed in-place equipment once the equipment is installed.

(2) *Equipment that is an integral part of services to individuals.* EPA no longer has an interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, once EPA certifies that the remedy is operational and functional.

(c) *Reports.* The State and/or political subdivision or Indian Tribe must comply with the following requirements regarding reports:

(1) *EPA-lead.* The nature and frequency of reports between EPA and the State or Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of all reports which the political subdivision is required to submit to EPA in accordance with the requirements of its Cooperative Agreement. (See § 35.6650 for requirements regarding quarterly progress reports.)

(d) *Records.* The State and political subdivision or Indian Tribe must maintain records on a site-specific basis. The State and political subdivision or Indian Tribe must comply with the requirements regarding record retention described in § 35.6705 and the requirements regarding record access described in § 35.6710.

§ 35.6820 Conclusion of the SSC.

In order to conclude the SSC, the signatories must:

(a) Satisfactorily complete the response activities at the site and make all payments based upon project costs determined in § 35.6805(j);

(b) Produce a final accounting of all project costs, including change orders and outstanding contractor claims; and

(c) Submit all State cost-share payments to EPA (see § 35.6805(i)(5)), undertake responsibility for O&M, and if applicable, accept interest in real property (see § 35.6805(i)(4)).

EFFECTIVE DATE NOTE: At 55 FR 23001, June 5, 1990, subpart O to part 35 was revised, effective July 5, 1990. For the convenience of the user, the superseded text of subpart O follows.

Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AUTHORITY: 42 U.S.C. 9601 *et seq.*

SOURCE: 54 FR 4135, Jan. 27, 1989, unless otherwise noted.

GENERAL

§ 35.6000 Authority.

This regulation is issued under section 10 CERCLA, 42 U.S.C. 9601 *et seq.*

§ 35.6005 Purpose and scope.

(a) This regulation codifies recipient requirements for administering CERCLA-funded cooperative agreements. This regulation also codifies requirements for administering Superfund State Contracts (SSC's) for non-State-lead remedial responses.

(b) The requirements in this regulation do not apply to Technical Assistance Grants (TAG's) or to CERCLA research and development grants, including the Superfund Innovative Technology Evaluation (SITE) Demonstration Program.

(c) 40 CFR Part 31, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," establishes consistency and uniformity among Federal agencies in the administration of grants and cooperative agreements to State, local, and Federally recognized Indian tribal governments. For CERCLA-funded cooperative agreements this subpart supplements the requirements contained in Part 31 for States, political subdivisions thereof, and Federally recognized Indian Tribes. This regulation refer

ences those sections of Part 31 that are applicable to CERCLA-funded cooperative agreements.

§ 35.6010 Eligibility.

This regulation applies to States, political subdivisions thereof, and Federally recognized Indian Tribes. Although section 126 of CERCLA provides that the governing body of a Federally recognized Indian Tribe shall be afforded substantially the same treatment as a State, in this subpart Federally recognized Indian Tribes are not included in the definition of State in order to clarify those requirements with which Federally recognized Indian Tribes must comply and those with which they need not comply.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the meanings set forth below:

(1) *Activity.* A set of tasks that together comprise a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include: pre-remedial (i.e. Preliminary Assessments and Site Inspections), remedial investigation/feasibility studies, remedial design, remedial action, removal, enforcement, and Core Program activities.

(2) *Allowable costs.* Those project costs that are: eligible, reasonable, necessary, and allocable to the project; permitted by the appropriate Federal cost principles; and approved by EPA in the cooperative agreement and/or Superfund State Contract.

(3) *Architectural or engineering (A/E) services.* Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

(4) *Award official.* The EPA official with the authority to execute cooperative agreements and Superfund State Contracts (SSC's) and take other actions authorized by EPA Orders.

(5) *Budget period.* The length of time EPA specifies in an cooperative agreement during which the recipient may expend or obligate Federal funds.

(6) *CERCLA.* The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended by the Superfund Amendments and Reauthorization Act of 1986.

(7) *Change order.* A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from , or revision of, a contract, usually initiated at the contractor's request.

(8) *Claim.* A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

(9) *Closeout.* The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the cooperative agreement and/or Superfund State Contract.

(10) *Community Relations Plan (CRP).* A management and planning tool outlining the specific community relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

(11) *Construction.* Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

(12) *Contract.* A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

(13) *Contractor.* Any party to whom a recipient awards a contract.

(14) *Cooperative agreement.* A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

(15) *Core Program Cooperative Agreement.* A cooperative agreement that provides funds to a State or Federally-recognized Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's ability to participate in the CERCLA response program.

(16) *Cost analysis.* The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

(17) *Cost share.* The portion of allowable project costs that a recipient contributes toward completing its project (i.e.,. non-Federal share, matching share).

(18) *Equipment.* Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

(19) *Excess property.* Any property under the control of a Federal agency that is not required for immediate or foreseeable needs and thus is a candidate for disposal.

(20) *Fair market value.* The amount at which property would change hands between a willing buyer and a willing seller,

neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

(21) *Health and safety plan.* A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological hazards of the site. The health and safety plan outlines: (i) Site hazards; (ii) work areas and site control procedures; (iii) air surveillance procedures; (iv) levels of protection; (v) decontamination and site emergency plans; (vi) arrangements for weather-related problems; and (vii) responsibilities for implementing the health and safety plan.

(22) *In-kind contribution.* The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements in a cooperative agreement only. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

(23) *Indian Tribe.* As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native Village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(24) *Lead agency.* The Federal agency, State agency, political subdivision, or Federally recognized Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

(25) *Minority Business Enterprise (MBE).* A business which is: (i) Certified as socially and economically disadvantaged by the Small Business Administration, (ii) certified as a minority business enterprise by a State or Federal agency, or (iii) an independent business concern which is at least 51 percent owned and controlled by minority group member(s). A minority group member is an individual who is a citizen of the United States and one of the following:

(A) Black American;

(B) Hispanic American (with origins from Puerto Rico, Mexico, Cuba, South or Central America);

(C) Native American (American Indian, Eskimo, Aleut, native Hawaiian), or

(D) Asian-Pacific American (with origins from Japan, China, the Philippines, Vietnam, Korea, Samoa, Guam, the U.S. Trust Territories of the Pacific, Northern Marianas, Laos, Cambodia, Taiwan or the Indian subcontinent).

(26) *National Priorities List (NPL).* EPA's list of the most serious uncontrolled or abandoned hazardous waste sites identified for possible long-term remedial action under Superfund. A site must be on NPL to receive money from the Trust Fund for remedial action. The list is based primarily on the score a site receives from the Hazard Ranking System.

(27) *Operation and maintenance (O&M).* Activities required to maintain the effectiveness of response actions. O&M is the sole responsibility of the State.

(28) *Personal property.* Property other than real property. It includes both supplies and equipment.

(29) *Political subdivision.* The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

(30) *Potentially Responsible Party (PRP).* Any individual(s), or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazar'ous Substance sites. PRPs may include individual(s) or company(ies) identified as having owned, operated, or in some other matter contributed wastes to Hazardous Substance sites.

(31) *Price analysis.* The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

(32) *Profit.* The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of "fee.")

(33) *Project.* The activities or tasks EPA identifies in the cooperative agreement and/or Superfund State Contract.

(34) *Project officer.* The EPA official designated in the cooperative agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

(35) *Project period.* The length of time EPA specifies in the cooperative agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

(36) *Quality Assurance Project Plan.* A written document, associated with site sampling activities, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities designed to achieve the data quality objectives of a specific project(s) or continuing operation(s). The quality assurance project plan will be prepared by the responsible program office, regional office, laboratory,

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contractor, recipient of a cooperative agreement, or other organization. For an enforcement action, EPA must approve a Potentially Responsible Party's quality assurance project plan.

(37) *Real property.* Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

(38) *Recipient.* Any State, political subdivision thereof, or Federally recognized Indian Tribe which has been awarded and has accepted an EPA cooperative agreement.

(39) *Services.* A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawing, specifications). This term does not include employment agreements or collective bargaining agreements. This term includes dismantling and demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, unless further work which will result in construction, alteration, or repair is contemplated at that location.

(40) *Small business.* A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

(41) *State.* The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

(42) *Statement of Work (SOW).* The portion of the cooperative agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

(43) *Subcontractor.* Any first tier party that has a contract with the recipient's prime contractor.

(44) *Superfund State Contract (SSC).* A joint, legally binding agreement between EPA and another party to obtain the necessary assurances before a Federal-lead remedial action can begin at a site. In the case of a political subdivision-lead remedial response, a three-party SSC between EPA, the State, and political subdivision thereof, is required before a political subdivision takes the lead for any phase of remedial response to ensure State involvement pursuant to section 121(f)(1) of CERCLA, as amended. The SSC must be amended to provide the State's CERCLA 104 assurances before a political subdivision can take the lead for remedial action.

(45) *Supplies.* All tangible personal property other than equipment as defined in this subpart.

(46) *Support agency.* The State Agency or Federally recognized Indian Tribe that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance as required by the lead agency during a response.

(47) *Task.* An element of a Superfund response activity.

(48) *Title.* The valid claim to property which denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

(49) *Unit acquisition cost.* The net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

(50) *Value engineering.* A systematic and creative analysis of each contract term or task to ensure that its essential function is provided at the overall lowest cost.

(51) *Women's Business Enterprise (WBE).* A business which is certified as a Women's Business Enterprise by a State or Federal agency, or which meets the following definition. A women's business enterprise is an independent business concern which is at least 51 percent owned by a woman or women who also control and operate it. Determination of whether a business is at least 51 percent owned by a woman or women shall be made without regard to community property laws.

(b) Those words not defined in this section shall have the meanings set forth in 40 CFR 31.3.

§ 35.6020 Principal statutory provisions.

The recipient must comply with the Federal laws described in 40 CFR 31.13, and with other applicable statutory provisions.

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for exceptions to the non-statutory provisions of this regulation. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

Pre-Remedial Response Cooperative Agreements

§ 35.6050 Eligibility for pre-remedial cooperative agreements.

States and Federally recognized Indian Tribes may apply for pre-remedial response cooperative agreements.

§ 35.6055 State-lead pre-remedial cooperative agreements.

(a) *Pre-remedial application requirements.* To receive a pre-remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form.* An "Application for Federal Assistance" (SF-424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(i) *Budget sheets* (SF-424(c));

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with intergovernmental review requirements.* The applicant must comply with 40 CFR Part 29, "Intergovernmental Review of the EPA Programs and Activities" and the "Notice of Supplemental Procedures for Establishing Start Dates of Comment Period for Activities Subject to Executive Order 12372" (48 FR 54692).

(3) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the project officer has approved the site.

(b) *Pre-remedial cooperative agreement requirements.* The recipient must comply with all special conditions in the cooperative agreement, and with the following requirements:

(1) *Health and safety plan.* (i) Before beginning field work, the recipient must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emergency Response," unless the recipient is a Federally recognized Indian Tribe which is exempt from OSHA requirements.

(2) *Quality assurance.* (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Federally recognized Indian Tribe-lead pre-remedial cooperative agreements.

The Federally recognized Indian Tribe must comply with all of the requirements described in § 35.6055 of this subpart except for the intergovernmental review requirements described in § 35.6055(a)(2).

REMEDIAL RESPONSE COOPERATIVE AGREEMENTS

§ 35.6100 Eligibility for remedial cooperative agreements.

States, Federally recognized Indian Tribes, and political subdivisions may apply for remedial response cooperative agreements.

§ 35.6105 State-lead remedial cooperative agreements.

(a) *Remedial application requirements.* To receive a remedial cooperative agreement, the applicant must submit the following items to EPA:

(1) *Application form,* as described in § 35.6055(a)(1) of this subpart, accompanied by the following:

(i) *Budget sheets* displaying costs by site and activity;

(ii) *A site-specific Statement of Work (SOW),* including estimated costs per task; and

(iii) *Proposed project and budget periods.*

(2) *Evidence of compliance with inergovernmental review requirements,* as described in § 35.6055(a)(2) of this subpart.

(3) *A site-specific Community Relations Plan* or an assurance that field work will not begin until one is in place. The Regional community relations coordinator must approve the Community Relations Plan before the recipient begins field work. The recipient must comply with the community relations requirements described in EPA policy and guidance, and in the National Contingency Plan (NCP).

(4) *A site-specific health and safety plan,* or an assurance that the applicant will have an EPA-accepted final plan before starting field work. Unless specifically waived by the award official, the applicant must have a site-specific health and safety plan in place providing for the protection of on-site personnel and area residents. The site-specific health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled "Hazardous Waste Operations and Emer-

gency Response," unless the recipient is a Federally recognized Indian Tribe exempt from OSHA requirements.

(5) *Quality assurance*—(i) *General.* If the project involves environmentally related measurements or data generation, the recipient must comply with the requirements regarding quality assurance described in 40 CFR 31.45.

(ii) *Quality assurance plan.* The applicant must have a separate quality assurance project plan/sampling plan for each site to be covered by the cooperative agreement. The applicant must submit the quality assurance project plan and sampling plan, which incorporates results of any site investigation performed at that site, to EPA with its cooperative agreement application. However, at the option of the EPA award official with program concurrence, the applicant may submit with its application a schedule for developing the detailed site-specific quality assurance plan. The recipient must submit the detailed site-specific plan to EPA in adequate time (generally 45 days) in order for approval to be granted before beginning field work. The recipient may not begin field work until the EPA approves the quality assurance plan.

(iii) *Split sampling.* The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

(b) *Remedial action cooperative agreement requirements: assurances.* The State must comply with all special conditions in the cooperative agreement. In addition, before beginning remedial action, the State must provide EPA with written assurances as specified below.

(1) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the expected life of each such action.

(2) *Cost sharing.* The State must provide assurances for cost sharing as follows:

(i) *Privately-operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(ii) *Publicly-operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(3) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA.

(4) *Property title and interest acquisition.* If appropriate, the State must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6110 Federally recognized Indian Tribe-lead remedial cooperative agreements.

(a) *Application requirements.* The Federally-recognized Indian Tribe must comply with all of the requirements described in § 35.6105(a) of this subpart, except for the intergovernmental review requirements described in § 35.6055(a)(2).

(b) *Cooperative agreement requirements.* (1) The Federally recognized Indian Tribe must comply with all special conditions in the cooperative agreement.

(2) If appropriate, the Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. See § 35.6400 of this subpart regarding information on property title and interest requirements.

§ 35.6115 Political subdivision-lead remedial cooperative agreements.

(a) *General.* If both the State and EPA agree, a political subdivision with the necessary capabilities and jurisdictional authority may assume lead responsibility for a site. The State and political subdivision must enter into a three-party Superfund State Contract (SSC) with EPA before a political subdivision can be awarded a cooperative agreement.

(b) *Three-party Superfund State Contract requirements.* The three-party SSC must specify the responsibilities of the signatories. By signing the SSC, the EPA, the State, and the political subdivision agree to:

(1) Ensure that the SSC specifies the substantial and meaningful involvement of the State as required by section 121 (f)(1) of CERCLA, as amended.

(2) Ensure that the three-party SSC includes the State's CERCLA 104 assurances at the time of remedial action, if the political subdivision is designated the lead for remedial action.

(3) Follow the appropriate administrative requirements regarding SSC's described in § 35.6805, 35.6815, and 35.6820 of this subpart.

(c) *Political subdivision cooperative agreement requirements.*—(1) *Application requirements.* To receive a remedial cooper-

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ative agreement, the political subdivision must prepare an application which includes the documentation described in § 35.6105(a)(1) through (a)(5).

(2) *Cooperative agreement requirements.* The political subdivision must comply with all special conditions in the cooperative agreement.

§ 35.6120 Twenty-year waste capacity.

After October 17, 1989, EPA will not enter into a cooperative agreement for a remedial action without an adequate assurance as required by section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the cooperative agreement.

Enforcement Cooperative Agreements

§ 35.6150 Eligibility for enforcement cooperative agreements.

States may apply for enforcement cooperative agreements.

§ 35.6155 State-lead enforcement cooperative agreements.

The State must comply with the requirements described in § 35.6105(a) (1) through (5) of this subpart. Assurances and provisions which apply to enforcement activities must be contained in the cooperative agreement. The CERCLA assurances described in § 35.6105(b) are not applicable for enforcement actions.

Removal Response Cooperative Agreements

§ 35.6200 Eligibility for removal cooperative agreements.

States and Federally recognized Indian Tribes may apply for non-time-critical removal cooperative agreements.

§ 35.6205 Removal cooperative agreements.

(a) The State must comply with the requirements described in § 35.6105(a) (1) through (5) of this subpart. Federally recognized Indian Tribes must comply with the requirements described in § 35.6105 (a)(1), and (a)(3) through (a)(5) of this subpart.

(b) The State is not required to share in the cost of a CERCLA-funded removal action, unless the removal is conducted at a site that was publicly operated by a State or political subdivision at the time of disposal of hazardous substances and a CERCLA-funded remedial action is ultimately undertaken at the site. In this situation, the State must share at least 50 percent in the cost of all removal, remedial planning, and remedial action costs at the time of the remedial action as described in § 35.6105(b)(2)(ii) of this subpart.

(c) Federally recognized Indian Tribes are never required to share in the cost of a CERCLA-funded removal action.

Financial Administration Requirements Under a Cooperative Agreement

§ 35.6250 Standards for financial management systems.

(a) *Accounting system standards.*—(1) *General.* The recipient's and its contractor's systems must track expenses by site and activity, according to object class. The systems must also provide control, accountability, and an assurance that funds, property, and other assets are used only for their authorized purposes. The recipient must allow an EPA review of the adequacy of the financial management system as described in 40 CFR 31.20(c).

(2) *Allowable costs.* The recipient's and its contractor's systems must comply with the appropriate allowable cost principles described in 40 CFR 31.22.

(3) *Pre-remedial.* The systems need not track expenses by site. However, all pre-remedial costs must be documented under a single Superfund account number designated specifically for the pre-remedial activity.

(4) *Accounting system control procedures.* Except as provided for in paragraph (a)(3) of this section, accounting system control procedures must ensure that accounting information is:

(i) Accurate, charging only costs attributable to the site and activity; and

(ii) Complete, recording and charging to individual sites and activities all costs attributable to the recipient's CERCLA effort.

(5) *Financial reporting.* The recipient's accounting system must use actual costs as the basis for all reports of direct site charges. The recipient must comply with the requirements for financial reporting contained in § 35.6670 of this subpart.

(b) *Recordkeeping system standards.* (1) The recipient must maintain a recordkeeping system that consists of complete site-specific files containing documentation of costs incurred.

(2) The recipient must provide this site-specific documentation to the EPA Regional Office upon request and within specified time frames (generally within 30 days of request).

(3) In addition, the recipient and the recipient's contractors must comply with the requirements regarding records described in §§ 35.6700, 35.6705, and 35.6710 of this sub-

part. The recipient must comply with the requirements regarding source documentation described in 40 CFR 31.20(b)(6).

(4) For the pre-remedial activity, the recordkeeping system must comply with the requirements described in paragraph (a)(3) of this section.

§ 35.6255 Period for availability of funds.

The recipient must comply with the requirements regarding the availability of funds described in 40 CFR 31.23.

§ 35.6260 Cost sharing.

The recipient may not use costs incurred at one site to meet the cost sharing obligation at another site. However, the recipient may apply excess credits from one site to the required cost-share at another site. See § 35.6270(c)(3) of this subpart for the requirements regarding the use of excess credits. The recipient must comply with the requirements regarding cost sharing described in 40 CFR 31.24.

§ 35.6265 Payments.

(a) *General.* In addition to the following requirements, the recipient must comply with the requirements regarding payment described in 40 CFR 31.21 (f) through (h).

(1) *Assignment of payment.* The recipient cannot assign the right to receive payments under the recipient's cooperative agreement. EPA will make payments only to the payee identified in the cooperative agreement.

(2) *Interest.* If the recipient earns interest on an advance of EPA funds, the recipient must return the interest unless the recipient is a State or State agency as defined under section 203 of the Intergovernmental Cooperation Act of 1968, or a tribal organization as defined under section 102, 103, or 104 of the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(b) *Payment Method*—(1) *Letter of credit.* In order to receive payment by the letter of credit method, the recipient must comply with the requirements regarding letter of credit described in 40 CFR 31.20(b)(7) and 31.21(b). The recipient must attribute costs to specific sites and activities for drawdown purposes except for the pre-remedial activity.

(2) *Reimbursement.* If the recipient is unable to meet letter of credit requirements, EPA will pay the recipient by reimbursement. The recipient must comply with the requirements regarding reimbursement described in 40 CFR 31.21(d).

§ 35.6270 Recipient payment of response costs.

The recipient may pay for its share of response costs using cash, services, credits or any combination of these, as follows:

(a) *Cash.* The recipient may pay for its share of response costs in the form of cash.

(b) *Services.* The recipient may provide equipment and services to satisfy its cost share requirements under cooperative agreements. The recipient must comply with the requirements regarding in-kind and donatet services described in 40 CFR 31.24 (b) and (c).

(c) *Credit*—(1) *General credit requirements.* Credits are limited to State expenses that EPA determines to be reasonable, documented, direct, out-of-pocket expenditures of non-Federal funds for remedial action. Credits are established on a site-specific basis. Only a State may claim credit.

(i) The State may claim credit for response activity expenditures or obligations incurred by the State or political subdivision between January 1, 1978 and December 11, 1980.

(ii) The State may claim credit for remedial action expenditures incurred by the State after October 17, 1986.

(iii) The State may not claim credit for removal actions taken after December 11, 1980.

(2) *Credit submission requirements*—(i) *Expenditures incurred before a site is listed on the NPL.* Although EPA may require additional documentation, the State must submit the following before EPA will approve the use of the credit:

(A) Specific amounts claimed for credit, by site (estimated amounts are unacceptable), based on supporting cost documentation;

(B) Units of government (State agency, county, local) that incurred the costs, by site;

(C) Description of the specific function performed by each unit of government at each site;

(D) Certification (signed by the State's fiscal manager or the financial director for each unit of government) that credit costs have not been previously reimbursed by the Federal government or any other party, and have not been used for matching purposes under any other Federal program or grant; and

(E) Documentation, if requested by EPA, to ensure the actions undertaken at the site are cost eligible and consistent with CERCLA, as amended, and the NCP requirements. This requirement does not apply for costs incurred before December 11, 1980.

(ii) *Expenditures incurred after a site is listed on the NPL.* A State may receive

credit for remedial action expenditures after October 17, 1986, only if the State entered into a cooperative agreement before incurring costs at the site.

(3) *Use of credit.* The State must first apply credit at the site at which it was earned. With the approval of EPA, the State may use excess credit earned at one site for its cost share at another site. EPA will not reimburse excess credit.

(4) *Credit verification.* Credits are subject to verification by audit and technical review of actions performed at sites.

(d) *Advance match.* (1) A cooperative agreement entered into after October 17, 1986 cannot authorize a State to contribute funds during remedial planning and then apply those contributions to the remedial action cost share (advance match).

(2) A State may seek reimbursement for costs incurred under cooperative agreements which authorize advance match.

(3) Reimbursements are subject to the availability of appropriated funds.

(4) If the State does not seek reimbursement, EPA will apply the advance match to off-set the State's required cost share for remedial action at the site. The State may not use advance match for credit at any other site nor may the State receive reimbursement until the conclusion of CERCLA-funded remedial response activities.

(5) Claims for advance match are subject to verification by audit.

§ 35.6275 Program income.

The recipient must comply with the requirements regarding program income described in 40 CFR 31.25.

Personal Property Requirements Under a Cooperative Agreement

§ 35.6300 General personal property acquisition and use requirements.

(a) *General.* (1) Property may be acquired only when authorized in the cooperative agreement.

(2) The recipient must acquire the property during the approved project period.

(3) The recipient must:

(i) Charge property costs by site and activity;

(ii) Document the use of the property; and

(iii) Solicit and follow EPA's instructions on the disposal of any property purchased with CERCLA funds as specified in §§ 35.6340 and 35.6345 of this subpart.

(b) *Exception.* The recipient is not required to charge property costs by site under a pre-remedial or Core Program Cooperative Agreement.

§ 35.6305 Obtaining supplies.

To obtain supplies, the recipient must agree to comply with the requirements in §§ 35.6300, 35.6315(b), and 35.6325 through 35.6335 of this subpart.

§ 35.6310 Obtaining equipment.

To obtain equipment, the recipient must agree to comply with the requirements in § 35.6300 and §§ 35.6315 through 35.6350 of this subpart.

§ 35.6315 Alternative methods for obtaining property.

(a) *Purchase with recipient funds.* The recipient may purchase equipment with the recipient's own funds and may charge EPA a fee for using equipment on a CERCLA-funded project. The fee must be based on a usage rate, subject to the usage rate requirements in § 35.6320 of this subpart.

(b) *Borrow Federally owned property.* The recipient may borrow Federally owned property, with the exception of motor vehicles, for use on CERCLA-funded projects. The loan of the Federally owned property may only extend through the project period. At the end of the project period, or when the Federally owned property is no longer needed for the project, the recipient must return the property to the Federal Government.

(c) *Lease, use contractor services, or purchase with CERCLA funds.* To acquire equipment through lease, use of contractor services, or purchase with CERCLA funds, the recipient must conduct and document a cost comparison analysis to determine which of these methods of obtaining equipment is the most cost effective. In order to obtain the equipment, the recipient must submit documentation of the cost comparison analysis to EPA for approval. The recipient must obtain the equipment through the most cost effective method, subject to the requirements listed below:

(1) *Lease or rent equipment.* If it is the most cost effective method of acquisition, the recipient may lease or rent equipment, subject only to the requirements in § 35.6300 of this subpart.

(2) *Use contractor services.* (i) If it is the most cost effective method of acquisition, the recipient may hire the services of a contractor.

(ii) The recipient must obtain award official approval before authorizing the contractor to purchase equipment with CERCLA funds. (See § 35.6325 of this subpart regarding the title and vested interest of equipment purchased with CERCLA funds.) This does not apply for recipients who have used the sealed bids method of procurement.

(iii) The recipient must require the contractor to allocate the cost of the contractor services by site and activity.

(3) *Purchase equipment with CERCLA funds.* If equipment purchase is the most cost-effective method of obtaining the equipment, the recipient may purchase the equipment with CERCLA funds. To purchase equipment with CERCLA funds, the recipient must comply with the following requirements:

(i) The recipient must include in the cooperative agreement application a list of all items of equipment to be purchased with CERCLA funds, with the price of each item.

(ii) If the equipment is to be used on more than one site, the recipient must allocate the cost of the equipment by site and activity by applying a usage rate subject to the usage rate requirements in § 35.6320 of this subpart.

(iii) The recipient may not use CERCLA funds to purchase a transportable or mobile treatment system.

§ 35.6320 Usage rate.

(a) *Usage rate approval.* To charge EPA a fee for use of equipment purchased with recipient funds or to allocate the cost of equipment by site and activity, the recipient or the recipient's contractor must apply a usage rate. The recipient must submit documentation of the usage rate computation to EPA. EPA must approve the usage rate.

(b) *Usage rate application.* The recipient or the recipient's contractor must record the use of the equipment by site and activity and must apply the usage rate to calculate equipment charges by site and activity. For Core Program and pre-remedial activities, the recipient is not required to apply a usage rate.

§ 35.6325 Title and EPA interest in CERCLA-funded property.

(a) *EPA's interest in CERCLA-funded property.* EPA has an interest (the percentage of EPA's participation in the total award) in both equipment and supplies purchased with CERCLA funds.

(b) *Title in CERCLA-funded property.* Title in both equipment and supplies purchased with CERCLA funds vests in the recipient.

(1) *Right to transfer title.* EPA retains the right to transfer title of all property purchased with CERCLA funds to the Federal Government or a third party within 120 calendar days after project completion or at the time of disposal.

(2) *Equipment used as all or part of the remedy.* The following requirements apply to equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its interest in the title to fixed in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

§ 35.6330 Title to Federally owned property.

Title to all Federally owned property vests in the Federal Government.

§ 35.6335 Property management standards.

The recipient and the recipient's contractor must comply with the following property management standards for property purchased with CERCLA funds. The recipient may use its own property management system if it meets the following standards.

(a) *Control.* The recipient must maintain:

(1) *Property records* for CERCLA-funded property which include the contents specified in § 35.6700(c) of this subpart.

(2) *A control system* which ensures adequate safeguards for prevention of loss, damage, or theft of the property. The recipient must make provisions for the thorough investigation and documentation of any loss, damage, or theft;

(3) *Procedures* to ensure maintenance of the property in good condition and periodic calibration of the instruments used for precision measurements;

(4) *Sales procedures* to ensure the highest possible return, if the recipient is authorized to sell the property;

(5) *Provisions for financial control and accounting* in the financial management system of all equipment; and

(6) *Identification* of all Federally owned property.

(b) *Inventory and reporting for CERCLA-funded equipment*—(1) *Physical inventory.* The recipient must conduct a physical inventory at least once every two years for all equipment except that which is part of the in-place remedy. The recipient must reconcile physical inventory results with the equipment records.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports set forth in § 35.6660 of this subpart.

(c) *Inventory and reporting for Federally owned property*—(1) *Physical inventory.* The recipient must conduct a physical inventory:

(i) Annually;

(ii) When the property is no longer needed; and

(iii) Within 90 days from the end of the project period.

(2) *Inventory reports.* The recipient must comply with requirements for inventory reports in § 35.6660 of this subpart.

§ 35.6340 Disposal of CERCLA-funded property.

(a) *Equipment.* For equipment which is no longer needed, or at the end of the project period, whichever is earlier, the recipient must:

(1) Analyze two alternatives: the cost of leaving the equipment in place, and the cost of removing the equipment and disposing of it in another manner.

(2) Document the analysis of the two alternatives in the inventory report. See § 35.6660 of this subpart regarding requirements for the inventory report.

(i) If it is most cost-effective to remove the equipment and dispose of it in another manner:

(A) If the equipment has a residual fair market value of $5,000 or more, the recipient must request disposition instructions from EPA in the inventory report. See § 35.6345 of this subpart for equipment disposal options.

(B) If the equipment has a residual fair market value of less than $5,000, the recipient may retain the equipment for the recipient's use on another CERCLA site. If, however, there is any remaining residual value at the time of final disposition, the recipient must reimburse the Hazardous Substance Superfund for EPA's vested interest in the current fair market value of the equipment at the time of disposition.

(ii) If it is most cost-effective to leave the equipment in place, recommend in the inventory report that the equipment be left in place.

(3) Submit the inventory report to EPA, even if EPA has stopped supporting the project.

(b) *Supplies.* (1) If supplies have an aggregate fair market value of $5,000 or more at the end of the project period, the recipient must take one of the following actions at the direction of EPA:

(i) Use the supplies on another CERCLA site and reimburse the original site for the fair market value of the supplies;

(ii) If both the recipient and EPA concur, keep the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies; or

(iii) Sell the supplies and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the supplies, less any reasonable selling expenses.

(2) If the supplies remaining at the end of the project period have an aggregate fair market value of less than $5,000, the recipient may keep the supplies to use on another CERCLA site. If the recipient cannot use the supplies on another CERCLA site, then the recipient may keep or sell the supplies without reimbursing the Hazardous Substance Superfund.

§ 35.6345 Equipment disposal options.

The following disposal options are available:

(a) Use the equipment on another CERCLA site and reimburse the original site for the fair market value of the equipment;

(b) If both the recipient and EPA concur, keep the equipment and reimburse the Hazardous Substance Superfund, for EPA's interest in the current fair market value of the equipment;

(c) Sell the equipment and reimburse the Hazardous Substance Superfund for EPA's interest in the current fair market value of the equipment, less any reasonable selling expenses; or

(d) Return the equipment to EPA and, if applicable, EPA will reimburse the recipient for the recipient's proportionate share in the current fair market value of the equipment.

§ 35.6350 Disposal of Federally owned property.

When Federally owned property is no longer needed, or at the end of the project, the recipient must inform EPA that the property is available for return to the Federal Government. EPA will send disposition instructions to the recipient.

Real Property Requirements Under a Cooperative Agreement

§ 35.6400 Acquisition and transfer of interest.

(a) An interest in real property may be acquired only with prior approval of EPA.

(1) If a State or Federally recognized Indian Tribe acquires real property in order to conduct the response, the recipient with jurisdiction over the real property must agree to acquire and hold the necessary real property interest.

(2) If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the response action. States and Federally recognized Indian Tribes must follow the requirements in § 35.6105(b)(5) and 35.6110(b)(2) of this subpart. Political subdivisions must follow the requirements in § 35.6815(c) of this subpart.

(b) The State or Federally recognized Indian Tribe must comply with applicable Federal regulations for real property acquisition under assistance agreements contained in part 4 of this chapter.

§ 35.6405 Use.

The recipient must comply with the requirements regarding real property described in 40 CFR 31.31.

Copyright Requirements Under a Cooperative Agreement

§ 35.6450 General requirements.

The recipient must comply with the requirements regarding copyrights described in 40 CFR 31.34. The recipient must comply with the requirements regarding contract copyright provisions described in § 35.6595(b)(3) of this subpart.

Use of Recipient Employees ("Force Account") Under a Cooperative Agreement

§ 35.6500 General requirements.

(a) Force Account work is the use of the recipient's own employees or equipment for construction, construction-related activities (including architecture and engineering services), or repair or improvement to a facility. When using Force Account work, the recipient must demonstrate that the employees can complete the work as competently as, and more economically than, contractors, or that an emergency necessitates the use of the Force Account.

(b) Where the value of Force Account services exceeds $25,000, the recipient must receive written authorization for use from the award official.

Procurement Requirements Under a Cooperative Agreement

§ 35.6550 Procurement system standards.

(a) *Recipient standards*—(1) *Procurement system evaluation.*

(i) An applicant or recipient must evaluate its own procurement system to determine if the system meets the intent of the requirements of this subpart. After evaluating its procurement system, the applicant or recipient must complete the "Procurement System Certification" (EPA Form 5700–48) and submit the form to EPA with its application.

(ii) The certification will be valid for two years or for the length of the project period specified in the cooperative agreement, whichever is greater, unless the recipient substantially revises its procurement system or the award official determines that the recipient is not following the intent of the requirements in this part (see paragraph (a)(4) of this section regarding EPA right to review). If the recipient substantially revises its procurement system, the recipient must re-evaluate its system and submit a revised EPA Form 5700–48.

(2) *Certified procurement system.* Even if the applicant or recipient has certified that its procurement system meets the intent of the requirements of this subpart, the EPA award official retains the authority as stated in:

(i) Section 35.6565(d)(1)(iii), "Noncompetitive proposals," regarding award official authorization of noncompetitive proposals;

(ii) Section 35.6565(b), "Sealed bids (formal advertising)," regarding award official approval for the use of a procurement method other than sealed bidding for a construction award;

(iii) 40 CFR 31.36(b)(12), "Protests," regarding EPA review of protests; and

(iv) 40 CFR 31.36(g)(2)(ii), "Awarding Agency Review," regarding the review of proposed awards over $25,000 which are to be awarded to other than the apparent low bidder under a sealed bid procurement.

(3) *Noncertified procurement system.* If the applicant or recipient has not certified that its procurement system meets the intent of the requirements of this subpart, then the recipient must follow the requirements of this subpart and allow EPA preaward review of proposed procurement actions that will use EPA funds. In addition, the recipient with a noncertified procurement system must comply with the following requirements:

(i) The recipient's contractors and subcontractors must submit their cost or price data on EPA Form 5700–41, "Cost or Price Summary Format for Subagreements Under U.S. EPA Grants," or in another format which provides information similar to that required by EPA Form 5700–41. This specific requirement is an addition to the requirements regarding cost and price analysis described in § 35.6585 of this subpart.

(ii) When soliciting bids or proposals, the recipient must allow at least 30 days between public notice of the project and the deadline for receipt of bids or proposals. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over a reasonable area.

(4) *EPA review.* EPA reserves the right to review any recipient's procurement system or procurement action under a cooperative agreement.

(5) *Code of conduct.* The recipient must comply with the requirements of 40 CFR 31.36(b)(3), which describes standards of conduct for employees, officers, and agents of the recipient.

(6) *Completion of contractual and administrative issues.* The recipient is responsible for the settlement and satisfactory comple-

tion in accordance with sound business judgement and good administrative practice of all contractual and administrative issues arising out of procurements under the cooperative agreement. EPA will not substitute its judgement for that of the recipient unless the matter is primarily a Federal concern. Violations of law will be referred to the local, State, tribal, or Federal authority having proper jurisdiction.

(7) *Selection procedures.* The recipient must have written selection procedures for procurement transactions.

(i) EPA may not participate in a recipient's selection panel except to provide technical assistance. EPA staff providing such technical assistance:

(A) Shall constitute a minority of the selection panel (limited to making recommendations on qualified offers and acceptable proposals based on published evaluation criteria) for the contractor selection process; and

(B) Are not permitted to participate in the negotiation and award of contracts.

(ii) When selecting a contractor, recipients:

(A) May not use EPA contractors to provide any support related to procuring a State contractor.

(B) May use the Corps of Engineers for review of State bidding documents, requests for proposals and bids and proposals received.

(8) *Award.* The recipient may award a contract only to a responsible contractor, as described in 40 CFR 31.36(b)(8), and must ensure that each contractor performs in accordance with all the provisions of the contract (see also § 35.6560 of this subpart regarding debarred and suspended contracts).

(9) *Protest procedures.* The recipient must comply with the requirements described in 40 CFR 31.36(b)(12) regarding protest procedures.

(10) *Reporting.* The recipient must comply with the requirements for procurement reporting contained in § 35.6665 of this subpart.

(11) *Intergovernmental agreements.* To foster greater economy and efficiency, recipients are encouraged to enter into State and local intergovernmental agreements for procurement or use of common goods and services.

(12) *Value engineering.* The recipient is encouraged to include value engineering clauses in contracts for construction projects of sufficient size to offer reasonable opportunities for cost reductions.

(b) *Contractor standards*—(1) *Disclosure requirements regarding Potentially Responsible Party relationships.* The recipient must require each prospective contractor to provide with its bid or proposal:

(i) Information on its financial and business relationship with all PRP's at the site, and with their parent companies, subsidiaries, affiliates, subcontractors, and current clients or attorneys and agents (this disclosure requirement encompasses past and anticipated financial and business relationships, including services related to any proposed or pending litigation, with such parties);

(ii) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists; and

(iii) A statement that it shall disclose immediately any such information discovered after submission of its bid or proposal or after award. The recipient shall evaluate such information and if a member of the contract team has a conflict of interest which prevents the team from serving the best interests of the recipient, the prospective contractor may be declared nonresponsible and the contract awarded to the next eligible bidder or offeror.

(2) *Conflict of interest*—(i) *Conflict of interest notification.* The contractor shall notify the recipient of any actual, apparent, or potential conflict of interest regarding any individual working on a contract assignment or having access to information regarding the contract. This notification shall include both organizational conflicts of interest and personal conflicts of interest. If a personal conflict of interest exists, the individual who is affected shall be disqualified from taking part in any way in the performance of the assigned work that created the conflict of interest situation.

(ii) *Contract provisions.* The recipient must incorporate the following provisions of their equivalents into all contracts:

(A) *Contractor data.* The contractor shall not provide data generated or otherwise obtained in the performance of contractor responsibilities under a contract to any party other than the recipient, EPA, or its authorized agents.

(B) *Employment.* The contractor shall not accept employment from any party other than the recipient or Federal agencies for work directly related to the site(s) covered under the contract for three years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer. The recipient agency may exempt the contractor from this requirement through a written release. This release must include EPA concurrence.

(C) *Activity and cost documentation.* For six years after the contract has terminated, or until any cost recovery action related to the site(s) is completed, whichever is longer, the contractor shall provide witnesses and documentation of activities performed and costs incurred under the contract upon request to the recipient, EPA, or its authorized agents. The contractor shall be entitled

to reasonable compensation for any such activities performed.

(3) *Certification of independent price determination.* The recipient must require that each contractor include in its bid or proposal a certification of independent price determination. This document certifies that no collusion, as defined by Federal and State antitrust laws, occurred during bid preparation.

§ 35.6555 Competition.

The recipient must conduct all procurement transactions in a manner providing maximum full and open competition.

(a) *Restrictions on competition.* Inappropriate restrictions on competition include the following:

(1) Placing unreasonable requirements on firms in order for them to qualify to do business;

(2) Requiring unnecessary experience and excessive bonding requirements;

(3) Noncompetitive pricing practices between firms or between affiliated companies;

(4) Noncompetitive awards to consultants that are on retainer contracts;

(5) Organizational conflicts of interest;

(6) Specifying only a "brand name" product, instead of allowing "an equal" product to be offered and describing the performance of other relevant requirements of the procurement; and

(7) Any arbitrary action in the procurement process.

(b) *Geographic and Federally recognized Indian Tribe preferences*—(1) *Geographic.* When conducting a procurement, the recipient must prohibit the use of statutorily or admininstratively imposed in-State or local geographical preferences in evaluating bids or proposals. However, nothing in this section preempts State licensing laws. In addition, when contracting for architectural and engineering (A/E) services, the recipient may use geographic location as a selection criterion, provided that when geographic location is used, its application leaves an appropriate number of qualified firms, given the nature and size of the project, to compete for the contract.

(2) *Federally recognized Indian Tribe.* If the project benefits Indians, the recipient must comply with the Indian Self-Determination and Education Assistance Act of 1975 (Pub. L. 93-638).

(c) *Written specifications.* The recipient's written specifications must include a clear and accurate description of the technical requirements and the qualitative nature of the material, product or service to be procured.

(1) This description must not contain features which unduly restrict competition, unless the features are necessary to:

(i) Test or demonstrate a specific thing;

(ii) Provide for necessary interchangeability of parts and equipment; or

(iii) Promote innovative technologies.

(2) The recipient must avoid the use of detailed product specifications if at all possible.

(d) *Public notice.* When soliciting bids or proposals, the recipient must give adequate (generally 30 days before receipt of bids or proposals) public notice of the proposed project. The recipient must publish the public notice in professional journals, newspapers, or publications of general circulation over reasonable area. Recipients with a non-certfified procurement system must follow the public notice requirements described in § 35.6550(a)(3)(ii) of this subpart.

(e) *Prequalified lists.* Recipients may use prequalified lists of persons, firms, or products to acquire goods and services. The list must be current and include enough qualified sources to ensure maximum open and free competiton. Recipients must not preclude potential bidders from qualifying during the solicitation period.

§ 35.6560 Master list of debarred, suspended, and voluntarily excluded persons.

While evaluating bids or proposals, the recipient and its contractor must consult the most current "List of Parties Excluded from Federal Procurement or Nonprocurement Programs" to ensure that the firms submitting proposals are not prohibited from participation in assistance programs. The recipient and its contractor must comply with the requirements regarding subawards to debarred and suspended parties described in 40 CFR 31.35.

§ 35.6565 Procurement methods.

The recipient must comply with the requirements for payment to consultants described in 40 CFR 31.36(j). In addition, the recipient must comply with the following requirements:

(a) *Small purchase procedures.* Small purchase procedures are those relatively simple and informal procurement methods for securing services, supplies, or other property that do not cost more than $25,000 in the aggregate. If small purchase procurements are used, the recipient must obtain and document price or rate quotations from an adequate number of qualified sources.

(b) *Sealed bids (formal advertising).* (For a construction award, the recipient must obtain the award official's approval to use a procurement method other than the sealed bid method.) Bids are publicly solicited and a fixed-price contract (lump sum or unit price) is awarded to the responsible bidder whose bid, conforming with all the material

terms and conditions of the invitation for bids, is the lowest in price.

(1) In order for the recipient to use the sealed bid method, the following conditions must be met:

(i) A complete, adequate, and realistic specification or purchase description is available;

(ii) Two or more responsible bidders are willing and able to compete effectively for the business; and

(iii) The procurement lends itself to a fixed-price contract and the selection of the successful bidder can be made principally on the basis of price.

(2) If the recipient uses the sealed bid method, the recipient must comply with the following requirements:

(i) Publicly advertise the invitation for bids and solicit bids from an adequate number of known suppliers, providing them sufficient time prior to the date set for opening the bids;

(ii) The invitation for bids, which must include any specifications and pertinent attachments, must define the items or services in order for the bidder to properly respond;

(iii) Publicly open all bids at the time and place prescribed in the invitation for bids;

(iv) Award the fixed-price contract in writing to the lowest responsive and responsible bidder. Where specified in bidding documents, the recipient shall consider factors such as discounts, transportation cost, and life cycle costs in determining which bid is lowest. The recipient may only use payment discounts to determine the low bid when prior experience indicates that such discounts are usually taken advantage of; and

(v) If there is a sound documented reason, the recipient may reject any or all bids.

(c) *Competitive proposals.* The technique of competitive proposals is normally conducted with more than one source submitting an offer, and either a fixed-price or cost-reimbursement type contract is awarded. It is generally used when conditions are not appropriate for the use of sealed bids. If the recipient uses the competitive proposal method, the following requirements apply:

(1) Recipients must publicize requests for proposals and all evaluation factors and must identify their relative importance. The recipient must honor any response to publicized requests for proposals to the maximum extent practical;

(2) Recipients must solicit proposals from an adequate number of qualified sources;

(3) Recipients must have a method for conducting technical evaluations of the proposals received and for selecting awardees;

(4) Recipients must award the contract to the responsible firm whose proposal is most advantageous to the program, with price and other factors considered; and

(5) Recipients may use competitive proposal procedures for qualifications-based procurement of architectural/engineering (A/E) professional services whereby competitor's qualifications are evaluated and the most qualified competitor is selected, subject to negotiation of fair and reasonable compensation. This method, where price is not used as a selection factor, may only be used in the procurement of A/E professional services. The recipient may not use this method to purchase other types of services even though A/E firms are a potential source to perform the proposed effort.

(d) *Noncompetitive proposals.* (1) The recipient may procure by noncompetitive proposals only when the award of a contract is infeasible under small purchase procedures, sealed bids or competitive proposals, and one of the following circumstances applies:

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585 of this subpart.

§ 35.6570 Use of the same engineer during subsequent phases of the project.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement request of this subpart, the recipient of a CERCLA remedial response cooperative agreement may use the engineer procured to conduct any or all of the remedial investigation (RI), the feasibility study (FS), or design to perform follow-on engineering activities under the remedial response without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using EPA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 of this subpart when it selected the engineer and the code

of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any EPA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of remedial response under a cooperative agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements of this subpart to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal cooperative agreement, the recipient must award a fixed price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 Contracting with minority and women's business enterprises (MBE/WBE), small businesses, and labor surplus area firms.

(a) *Procedures.* The recipient must comply with the six steps described in 40 CFR 31.36(e)(2) to ensure that MBE's, WBE's and small businesses are used whenever possible as sources of supplies, construction, and services.

(b) *Labor surplus firms.* EPA encourages recipients to procure supplies and services from labor surplus area firms.

(c) *"Fair share" objectives.* It is EPA's policy that recipients award a fair share of contracts to small, minority and women's businesses. The policy requires that fair share objectives for minority and woman-owned business enterprises be negotiated with the States and/or recipients, but does not require fair share objectives be established for small businesses.

(1) Each recipient must establish an annual "fair share" objective for MBE and WBE use. A recipient is not required to attain a particular statistical level of participation by race, ethnicity, or gender of the contractor's owners or managers.

(2) If the recipient is awarded more than one cooperative agreement during the year, the recipient may negotiate an annual fair share for all cooperative agreements for that year. It is not necessary to have a fair share for each cooperative agreement. When a cooperative agreement is awarded to a recipient with which a "fair share" agreement has not been negotiated, the recipient must not award any contracts under the cooperative agreement until the recipient has negotiated a fair share objective with EPA.

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over $25,000 and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in (a)(1) of this section, the recipient must perform a price analysis to determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Indemnification.* When adequate pollution liability insurance is not available to the contractor, EPA may indemnify response contractors for liability related to

damage from releases arising out of the contractor's negligent performance. The recipient must comply with the requirements regarding indemnification described in section 119 of CERCLA, as amended.

(c) *Accidents and catastrophic loss.* The contractor must provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

(1) Nature, scope, and extent of work to be performed;

(2) Time frame for performance;

(3) Total cost of the contract; and

(4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan which is issued in compliance with the Energy Policy and Conservation Act (Pub. L. 94-163).

(2) *Violating facilities.* Contracts in excess of $100,000 must contain a provision which requires contractor compliance with all applicable standards, orders or requirements issued under section 306 of the Clean Air Act (42 U.S.C. 1857(h)), section 508 of the Clean Water Act (33 U.S.C. 1368), Executive Order 11738, and EPA regulations (40 CFR Part 15) which prohibit the use of facilities included on the EPA List of Violating Facilities under nonexempt Federal contracts, grants or loans.

(3) *Patents, inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(4) *Labor standards.* (i) The recipient must include a copy of EPA Form 5720-4 ("Labor Standards Provisions for Federally Assisted Construction Contracts") in each contract for construction (as defined by the Secretary of Labor). The form contains the Davis-Bacon Act requirements (40 U.S.C. 276a-276a-7), the Copeland Regulations (29 CFR Part 3), the Contract Work Hours and Safety Standards Act Overtime Compensation (940 U.S.C. 327-333), and the nondiscrimination provisions in Executive Order 11246, as amended.

(ii) If the contract is solely for dismantling or demolition of buildings, ground improvements, and other real property structures, and the removal of such structures or portions of them, the Davis-Bacon Act does not apply unless further work will result in construction at that location, even though by separate contract.

(5) *Conflict of interest.* The recipient must include provisions pertaining to conflict of interest as described in § 35.6550(b)(2)(ii) of this subpart.

(c) *Model clauses.* The recipient must comply with the requirements regarding model contract clauses described in 40 CFR 33.1030.

§ 35.660 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the cooperative agreement;

(2) A formal cooperative agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;

(5) The award official determines that there is a significant Federal interest in the issues involved in the claim; and

(6) In the case of defending against a contractor claim, the claim does not result from the recipient's responsibility for the improper action of others.

§ 35.6605 Privity of contract.

Neither EPA nor the United States shall be a party to any contract nor to any solicitation or request for proposals.

§ 35.6610 Contracts awarded by a contractor.

A contractor must comply with the following provisions in the award of contracts (i.e., subcontracts). (This section does not apply to a supplier's procurement of materials to produce equipment, materials and catalog, off-the-shelf, or manufactured items.)

(a) The requirements regarding debarred, suspended, and voluntarily excluded persons in § 35.6560 of this subpart.

(b) The limitations on contract award in § 35.6550(a)(8) of this subpart.

(c) The requirements regarding minority and women's business enterprises, and small business in § 35.6580 of this subpart.

(d) The requirements regarding specifications in § 35.6555 (a)(6) and (c) of this subpart.

(e) The Federal cost principles in 40 CFR 31.22.

(f) The prohibited types of contracts in § 35.6575(a) of this subpart.

(g) The cost, price analysis, and profit analysis requirements in § 35.6585 of this subpart.

(h) The applicable provisions in § 35.6595 (b) and (c) of this subpart.

(i) The applicable provisions in § 35.6555(b)(2).

Reports Required Under a Cooperative Agreement

§ 35.6650 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content for pre-remedial, remedial, enforcement, and removal progress reports.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, delays or other problems, if any, and a description of the corrective measures that are planned. For pre-remedial cooperative agreements, the report must include a list of the site-specific products completed and the number of technical hours spent to complete each product.

(2) A comparison of the percentage of the project completed to the project schedule, and an explanation of significant discrepancies.

(3) A comparison of the estimated funds spent to date to planned expenditures and an explanation of significant discrepancies. For pre-remedial cooperative agreements, the report should compare aggregated expenditures. For remedial, enforcement, and removal reports, the comparison must be on a per task basis.

(4) An estimate of the time and funds needed to complete the work required in the cooperative agreement, a comparison of that estimate to the time and funds remaining, and a justification for any increase.

§ 35.6655 Notification of significant developments.

Events may occur between the scheduled performance reporting dates which have significant impact upon the cooperative agreement-supported activity. In such cases, the recipient must inform the EPA project officer as soon as the following types of conditions become known:

(a) Problems, delays, or adverse conditions which will materially impair the ability to meet the objective of the award. This disclosure must include a statement of the action taken, or contemplated, and any assistance needed to resolve the situation.

(b) Favorable developments which enable meeting time schedules and objectives sooner or at less cost than anticipated or producing more beneficial results than originally planned.

§ 35.6660 Property inventory reports.

(a) *CERCLA-funded property*—(1) *Content.* The report must contain the following information:

(1) Classification and value of remaining supplies;

(ii) Description of all equipment purchased with CERCLA funds, including its current condition;

(iii) Verification of the current use and continued need for the equipment by site and activity;

(iv) Notification of any property which has been stolen or vandalized; and

(v) A request for disposition instructions for any equipment no longer needed on the project.

(2) *Reporting frequency.* The recipient must submit an inventory report to EPA at the following times:

(i) Within 90 days after completing any response activity at a site; and

(ii) When the equipment is no longer needed for any response activity at a site.

(b) *Federally owned property*—(1) *Content.* The recipient must include the following information for each Federally-owned item in the inventory report:

(i) Description;

(ii) Decal number;

(iii) Current condition; and

(iv) Request for disposition instructions.

(2) *Reporting frequency.* The recipient must submit an inventory report to the ap-

propriate EPA property accountable officer at the following times:

(i) Annually, due to EPA on the anniversary date of the award;

(ii) When the property is no longer needed; and

(iii) Within 90 days after the end of the project period.

§ 35.6665 Procurement reports.

(a) *Report for the Department of Labor (DOL)*—(1) *Content.* The recipient must notify the DOL Regional Office of Compliance, in writing, of each construction contract which has or is expected to have an aggregate value of over $10,000 within a 12-month period. The report must include the following:

(i) Construction contractor's name, address, telephone number, and employee identification number;

(ii) Award amount;

(iii) Estimated start and completion dates; and

(iv) Project number, name, and site location.

(2) *Reporting frequency.* The recipient must notify the DOL Office of Compliance within 10 calendar days after the award of each such construction contract. The recipient must submit a copy of the report to the EPA project officer.

(b) *Name of contractor.*—(1) *Content.* For construction contracts over $25,000, the recipient must submit the name of the contractor to the project officer.

(2) *Reporting frequency.* The recipient must submit the name of the contractor to the project officer within 10 calendar days after the award of each such construction contract.

(c) *Minority and women's business enterprises (MBE/WBE)*—(1) *Content.* The recipient must report on its use of MBE and WBE firms by submitting a completed Minority and Women's Business Utilization Report (SF-334) to the award official.

(2) *Reporting frequency.* The recipient must submit the MBE/WBE Utilization Report within 30 days after the end of each Federal fiscal quarter, regardless of whether the recipient awards a contract to an MBE or WBE during that quarter. Reporting commences with the recipient's award of its first contract and continues until they and their contractors have awarded their last contract for the activities or tasks identified in the cooperative agreement.

§ 35.6670 Financial reports.

(a) *General.* The recipient must comply with the requirements regarding financial reporting described in 40 CFR 31.41.

(b) *Financial Status Report.*—(1) *Content.* (i) The Financial Status Report (SF-269) must include site and activity-specific financial information.

(ii) A final Financial Status Report (FSR) must have no unliquidated obligations. If any obligations remain unliquidated, the FSR is considered an interim report and the recipient must submit a final FSR to EPA after liquidating all obligations.

(2) *Reporting frequency.* The recipient must file a Financial Status Report as follows:

(i) Annually (unless the cooperative agreement requires quarterly or semi-annual reports in accordance with 40 CFR 31.41(b)(3)), due 90 days after the cooperative agreement anniversary date if annual reports are required; due 30 days after the reporting period if quarterly or semiannual reports are required;

(ii) Within 90 calendar days after completing each CERCLA-funded response activity at a site (submit the FSR only for each completed activity); and

(iii) Within 90 calendar days after termination or closeout of the cooperative agreement.

Records Requirements Under a Cooperative Agreement

§ 35.6700 Project records.

The recipient is responsible for maintaining project files as described below.

(a) *General.* The recipient must maintain project records by site and activity.

(b) *Financial records.* The recipient must maintain records which support the following items:

(1) Amount of funds received and expended; and

(2) Direct and indirect project cost.

(c) *Property records.* The recipient must maintain records which support the following items:

(1) Description of the property;

(2) Manufacturer's serial number, model number, or other identification number;

(3) Source of the property, including the assistance identification number;

(4) Information regarding whether the title is vested in the recipient or EPA;

(5) Unit acquisition date and cost;

(6) Percentage of EPA's interest;

(7) Location, use and condition (by site and by activity) and the date this information was recorded; and

(8) Ultimate disposition data, including the sales price or the method used to determine the price, or the method used to determine the value of EPA's interest for which the recipient compensates EPA in accordance with § 35.6340, 35.6345, and 35.6350 of this subpart.

(d) *Procurement records*—(1) *General.* The recipient must maintain records which sup-

port the following items, and must make them available to the public:

(i) The reasons for rejecting any or all bids; and

(ii) The justification for a procurement made on a noncompetitively negotiated basis.

(2) *Procurements in excess of $25,000.* The recipient's records and files for procurements in excess of $25,000 must include the following information, in addition to the information required in paragraph (d)(1) of this section:

(i) The basis for contractor selection;

(ii) A written justification for selecting the procurement method;

(iii) A written justification for use of any specification which does not provide for maximum free and open competition;

(iv) A written justification for the choice of contract type; and

(v) The basis for award cost or price, including a copy of the cost or price analysis made in accordance with § 35.6585 of this subpart and documentation of negotiations.

(e) *Other records.* The recipient must maintain records which support the following items:

(1) Time and attendance records and supporting documentation;

(2) Documentation of compliance with statutes and regulations that apply to the project; and

(3) The number of site-specific technical hours spent to complete each pre-remedial product.

§ 35.6705 Records retention.

(a) *Applicability.* This requirement applies to all financial and programmatic records, supporting documents, statistical records, and other records which are required to be maintained by the terms of this subpart, program regulations, or the cooperative agreement, or are otherwise reasonably considered as pertinent to program regulations or the cooperative agreement.

(b) *Length of retention period.* The recipient and the recipient's contractor must retain all records for ten years following submission of the final Financial Status Report for the site, and must obtain written approval from the EPA award official before destroying any records. If any litigation, claim, negotiation, audit, cost recovery, or other action involving the records has been started before the expiration of the ten-year period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular ten-year period, whichever is later.

(c) *Substitution of microform.* Microform copies may be substituted for the original records. The recipient must have written EPA approval before destroying original records. The microform copying must be performed in accordance with the technical regulations concerning micrographics of Federal Government records (36 CFR 1230 et seq.) and EPA records management procedures (EPA Order 2160 [1]).

(d) *Starting date of retention period.* The recipient and the recipient's contractor must comply with the requirements regarding the starting dates for records retention described in 40 CFR 31.42(c) (1) and (2).

§ 35.6710 Records access.

(a) *Recipient requirements.* The recipient must comply with the requirements regarding records access described in 40 CFR 31.42(e).

(b) *Availability of records.* The recipient must, with the exception of certain policy, deliberative, and enforcement documents which may be held confidential, ensure that all files are available to the public.

(c) *Contractor requirements.* The recipient's contractor must comply with the requirements regarding records access described in 40 CFR 31.36(i)(10).

Other Administrative Requirements for Cooperative Agreements

§ 35.6750 Modifications.

The recipient must comply with the requirements regarding changes to the cooperative agreement described in 40 CFR 31.30.

§ 35.6755 Monitoring program performance.

The recipient must comply with the requirements regarding program performance monitoring described in 40 CFR 31.40 (a) and (e).

§ 35.6760 Enforcement and termination for convenience.

The recipient must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

§ 35.6765 Non-Federal audit.

The recipient must comply with the requirements regarding non-Federal audits described in 40 CFR 31.26.

§ 35.6770 Disputes.

The recipient must comply with the requirements regarding dispute resolution procedures described in 40 CFR 31.70.

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[1] Statement of available.

§ 35.6775 Exclusion of third-party benefits.

The cooperative agreement benefits only the signatories to the cooperative agreement.

§ 35.6780 Closeout.

(a) Closeout of a cooperative agreement can take place in the following situations:
(1) After the completion of all work for a response activity:
(2) After all activities under a cooperative agreement have been completed; or
(3) Upon termination of the cooperative agreement.
(b) The recipient must comply with the closeout requirements described in 40 CFR 31.50 and 31.51.

§ 35.6785 Collection of amounts due.

The recipient must comply with the requirements described in 40 CFR 31.52 regarding collection of amounts due.

§ 35.6790 High risk recipients.

If EPA determines that a recipient is not responsible, EPA may impose restrictions on the award as described in 40 CFR 31.12.

REQUIREMENTS FOR ADMINISTERING A SUPERFUND STATE CONTRACT (SSC)

§ 35.6800 General.

An SSC is required when either EPA or a political subdivision is the lead agency for a CERCLA response.
(a) *EPA-lead SSC.* (1) An SSC with a State or Federally recognized Indian Tribe is required before EPA initiates remedial action during an EPA-lead remedial response.
(2) The State or Federally recognized Indian Tribe must comply with the requirements decribed in §§ 35.6805, 35.6810, and 35.6815 of this subpart.
(b) *Three-party SSC (political subdivision-lead).* (1) An SSC is required before a political subdivision takes the lead for a remedial response.
(2) Both the State and the political subdivision must comply with the requirements described in §§ 35.6805, 35.6815, and 35.6820 of this subpart. In addition, the State must comply with the requirements described in § 35.6810 of this subpart.

§ 35.6805 Contents of an SSC.

The SSC must include the followig provisions:
(a) *Purpose of contract,* which describes the activities to be conducted and the benefits to be derived by the signatories;
(b) *Negation of agency relationship* between the signatories, which states that no signatories of the SSC can represent or act on the behalf of any other signatory in any matter associated with the SSC;
(c) *Amendability of the SSC,* which states that any change in the SSC must be agreed to, in writing, by the signatories, except as provided elsewhere in the SSC;
(d) *Litigation,* which describes EPA's right to bring an action against any party for liability under sections 106 and 107 of CERCLA, as amended;
(e) *Sanctions for failure to comply with SSC terms;* which states that if the signatories fail to comply with the terms of the SSC, EPA may proceed under the provisions of section 104(d)(2) of CERCLA and may seek in the appropriate court of competent jurisdiction to enforce the SSC;
(f) *The CERCLA assurances,* as appropriate, as described in § 35.6810 of this subpart;
(g) *Cost share provisions,* which include an estimate of the total project costs and the basis for arriving at this figure, and the payment terms as negotiated by the signatories;
(h) *Site access.* The State is expected, to the extent of its legal athority, to secure access to the site and adjacent properties, as well as all rights-of-way and easements necessary to complete the response actions undertaken pursuant to the SSC;
(i) *Exclusion of third-party benefits,* which states that the SSC is intended to benefit only the signatories of the SSC, and extends no benefit or right to any third party not a signatory to the SSC; and
(j) *Any other provision* deemed necessary by all parties to facilitate the response activities covered by the SSC.

§ 35.6810 Assurances.

The SSC must include the following:
(a) *Operation and maintenance.* The State must provide an assurance that it will assume responsibility for the operation and maintenance of implemented remedial actions for the action's expected life. In addition, even if the political subdivision is designated as being responsible for O&M, the State must guarantee that it will assume any or all O&M activities in the event of default by the political subdivision.
(b) *Cost sharing.* The State must provide assurances for cost sharing as provided in paragraphs (b)(1) and (2) of this section. In addition, even if the political subdivision is providing the actual cost share, the State must guarantee payment of the cost share in the event of default by the political subdivision.
(1) *Privately operated.* Where a facility was privately operated, whether privately or publicly owned, at the time of disposal, the State must provide 10 percent of the cost of the remedial action, if CERCLA-funded.

(2) *Publicly operated.* Where a facility was publicly operated by a State or political subdivision at the time of disposal of hazardous substances at the facility, the State must provide at least 50 percent of the cost of removal, remedial planning, and remedial action if the remedial action is CERCLA-funded.

(c) *Off-site storage, treatment, or disposal.* If offsite storage, destruction, treatment, or disposal is required, the State must assure the availability of a hazardous waste disposal facility that is in compliance with Subtitle C of the Solid Waste Disposal Act and is acceptable to EPA. The political subdivision may not provide this assurance.

(d) *Twenty-year waste capacity.* After October 17, 1989, EPA will not enter into an SSC for a remedial action without an adequate assurance as required by Section 104(c)(9) that there are hazardous waste treatment or disposal facilities that comply with Subtitle C of the Solid Waste Disposal Act that have adequate capacity for the destruction, treatment, or secure disposition of all hazardous wastes that are reasonably expected to be generated for 20 years after the date of the SSC.

(e) *Property title and interest acquisition.* If appropriate, the State or Federally-recognized Indian Tribe must assure EPA that it will take title to, acquire interest in, or accept transfer of such interest in real property acquired with CERCLA funds. The State must provide this assurance even if it intends to transfer this title to the political subdivision. See § 35.6400 of this subpart for additional information on property title and interest requirements.

§ 35.6815 Administrative requirements.

In addition to the requirements specified in § 35.6805, the State and/or political subdivision must comply with the following:

(a) *State review.* The State must review and comment on the response actions pursuant to the SSC.

(b) *Financial administration.* The State and/or political subdivision must comply with the following requirements regarding financial administration:

(1) *Payment.* The State may pay for its share of the costs of the response activities in cash or credit. If the political subdivision provides all or part of the cost share, the political subdivision may pay for those costs in cash or in-kind services. The State may not pay for its cost share using in-kind services, unless the State has entered into a support agency cooperative agreement with EPA. The use of the support agency cooperative agreement as a vehicle for providing cost share must be documented in the SSC. The payment must be provided during the course of the project. See § 35.6915 of this subpart for requirements concerning cost sharing under a support agency cooperative agreement.

(2) *Collection of amounts due.* The State and/or political subdivision must comply with the requirements described in 40 CFR 31.52(a) regarding collection of amounts due.

(3) *Failure to comply with negotiated payment terms.* Failure to comply with negotiated payment terms may be construed as default by the State on its required assurances, even if the political subdivision is responsible for providing all or part of the cost share (see § 35.6805(e) of this subpart).

(c) *Property.* If the State or Federally-recognized Indian Tribe is required to accept title, the following requirements concerning property must be met:

(1) *Equipment used as all or part of the remedy.* The following requirements apply to title and vested interest in equipment used as all or part of the remedy:

(i) *Fixed in-place equipment.* EPA will relinquish its vested interest in the title to fixed in-place equipment after certifying that the remedy is functional and operational.

(ii) *Equipment that is an integral part of services to individuals.* EPA will relinquish its vested interest in equipment that is an integral part of services to individuals, such as pipes, lines, or pumps providing hookups for homeowners on an existing water distribution system, when EPA certifies that the remedy is functional and operational.

(2) *Real property.* If it is necessary for the Federal Government to acquire the interest in real property to permit conduct of the response, the State or Federally recognized Indian Tribe must agree to accept transfer of the acquired interest on or before the completion of the response action even if the State intends to transfer title to the political subdivision. See the requirements in § 35.6810(e) of this subpart regarding the assurance for property title and interest acquisition.

(d) *Reports.* The State and/or political subdivision or Federally recognized Indian Tribe must comply with the following requirements regarding reports:

(1) *EPA-lead.* The nature and frequency of reports between EPA and the State or Federally recognized Indian Tribe will be specified in the SSC.

(2) *Political subdivision-lead.* The political subdivision must submit to the State a copy of the quarterly progress report which the political subdivision is required to submit to EPA in accordance with the requirements of its cooperative agreement. (See § 35.6650 for requirements regarding quarterly progress reports.)

(e) *Records.* The State and political subdivision or Federally recognized Indian Tribe must maintain records on a site-specific

basis. The State and political subdivision must comply with the requirements regarding record retention described in § 35.6705 and the requirements regarding record access described in § 35.6710.

§ 35.6820 Conclusion of the SSC.

(a) The SSC remains in effect until either one of the following occurs:

(1) *SSC conclusion.* In order to conclude the SSC, the signatories must:

(i) Satisfactorily complete the response activities at the site;

(ii) Produce a final accounting of all project costs, including change orders and outstanding contractor claims; and

(iii) Submit all State cost share payments to EPA (see § 35.6810(b) regarding cost share assurances).

(2) *Termination of the SSC.* The State and political subdivision or Federally recognized Indian Tribe must comply with the requirements regarding enforcement of the terms of an award and termination for convenience described in 40 CFR 31.43 and 31.44.

(b) For remedial action, the SSC remains in effect until the final reconciliation of response costs ensures that both EPA and the State have satisfied the cost share requirement contained in section 104 of CERCLA, as amended. Overpayments in an SSC may not be used to meet the cost-sharing obligation at another site. Reimbursements for any overpayment made after reconciliation will be made to the payee identified in the SSC.

Requirements for Core Program Cooperative Agreements

§ 35.6850 Eligibility for Core Program Cooperative Agreements.

States and Federally recognized Indian Tribes may apply for Core Program cooperative agreements in order to conduct CERCLA implementation activities that are not assignable to specific sites, but are intended to develop and maintain a State's or Federally recognized Indian Tribe's ability to participate in the CERCLA response program.

§ 35.6855 General.

The recipient of a Core Program cooperative agreement must comply with the requirements regarding financial administration (§§ 35.6250 through 35.6275 of this subpart), property (§§ 35.6300 through 35.6450), procurement (§§ 35.6550 through 35.6610), reporting (§§ 35.6655 through 35.6670), records (§§ 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement (§§ 35.6750 through 35.6780), described in this subpart. Recipients may not incur site-specific costs. Where these sections entail site-specific requirements, the recipient is not required to comply on a site-specific basis.

§ 35.6860 Application requirements.

To receive a Core Program cooperative agreement, the applicant must submit an application form ("Application for Federal Assistance," SF-424, for non-construction programs) to EPA. Applications for additional funding need include only the revised pages. The application must include the following:

(a) *A project workplan*—(b) *Intergovernmental review comments,* in accordance with §35.6055(a)(2) of this subpart (Federally recognized Indian Tribes need not comply with this requirement); and

(c) *Project and budget periods.* The budget period is one year, and may be extended incrementally, up to 12 months at a time, based on EPA approval of an amended workplan and budget. The project period will be determined in the cooperative agreement.

§ 35.6865 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly on the activities delineated in the work plan. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a description of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

§ 35.6870 Cost sharing.

The recipient of a Core Program cooperative agreement must provide at least five percent of the direct and indirect costs of all activities covered by the Core Program cooperative agreement. The recipient must provide its cost share with non-Federal funds not used for matching purposes under any other cooperative agreement. The recipient may provide its share using in-kind contributions. The recipient may not use CERCLA State credits to offset any part of the recipient's required match for Core Program cooperative agreements. See § 35.6270 (c) and (d) regarding credit and advance match, respectively.

§ 35.6875 Payment to recipient.

The State or Federally-recognized Indian Tribe is not required to attribute costs to specific sites and activities for drawdown purposes for Core Program cooperative agreement costs.

REQUIREMENTS FOR SUPPORT AGENCY ACTIVITIES UNDER COOPERATIVE AGREEMENTS

§ 35.6900 Eligibility for support agency cooperative agreements.

States and Federally-recognized Indian Tribes may apply for support agency cooperative agreements to ensure their meaningful and substantial involvement when EPA or a political subdivision has the lead for response activities, as specified in section 121(f)(1) of CERCLA.

§ 35.6905 Allowable activities.

Support agency activities are those activities conducted by a State or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe to ensure the State's or Federally-recognized Indian Tribe's meaningful and substantial involvement when it is the support agency at a Federal-lead site. The activities described in section 121(f)(1) of CERCLA, as amended, are eligible for funding under a support agency cooperative agreement.

§ 35.6910 Support agency cooperative agreement requirements.

(a) *Application requirements.* The applicant must comply with the requirements described in § 35.6105(a) (1), (2), (3), and (5) of this subpart.

(b) *Cooperative agreement requirements.* The recipient must comply with the requirements regarding financial administration 35.6250 through 35.6275 of this subpart), property 35.6300 through 35.6450), procurement 35.6550 through 35.6610), reporting 35.6655 through 35.6670), records 35.6700 through 35.6710), and other administrative requirements under a cooperative agreement 35.6750 through 35.6780) described in this subpart.

§ 35.6915 Cost sharing.

The requirements for cost sharing under a support agency cooperative agreement are the same as the cost sharing requirements of § 35.6105(b)(2) and § 35.6110(a) of this subpart. The State may use in-kind services as part of its cost share, as long as it is documented in the SSC (see § 35.6815(b) for SSC payment requirements).

§ 35.6920 Quarterly progress reports.

(a) *Reporting frequency.* The recipient must submit progress reports quarterly. EPA may not require submission of progress reports more often than quarterly.

(b) *Content.* The quarterly progress report must contain the following information:

(1) An explanation of work accomplished during the reporting period, a discription of problems, if any, and the corrective measures that are planned;

(2) A comparison of the estimate of funds spent to date to planned expenditures; and

(3) An estimate of the funds needed to complete the work required in the cooperative agreement, and a justification for any increase.

Subpart P—Financial Assistance for the National Estuary Program

AUTHORITY: Sec. 320 of the Clean Water Act, as amended (33 U.S.C. 1330).

SOURCE: 54 FR 40804, Oct. 3, 1989 (interim), unless otherwise noted.

§ 35.9000 Applicability.

This subpart codifies policies and procedures for financial assistance awarded by the EPA to state, interstate, and regional water pollution control agencies and entities and other eligible agencies, institutions, organizations, and individuals for pollution abatement and control programs under the National Estuary Program (NEP). These provisions supplement the EPA general assistance regulations in 40 CFR parts 30 and 31.

§ 35.9005 Purpose.

Section 320(g) of the Clean Water Act (CWA) authorizes assistance to eligible states, agencies, entities, institutions, organizations, and individuals for developing a comprehensive conservation and management plan (CCMP) for an estuary.

§ 35.9010 Definitions.

Aggregate Costs. The total cost of all research, surveys, studies, modeling, and other technical work completed by a Management Conference during a fiscal year to develop a Comprehensive Conservation and Management Plan for the estuary.

Annual Work Plan. The plan, developed by the Management Conference each year, which documents projects to be undertaken during the upcoming year. The Annual Work Plan is devel-

oped within budgetary targets provided by EPA.

Five-Year State/EPA Conference Agreement. Agreement negotiated among the States represented in a Management Conference and the EPA shortly after the Management Conference is convened. The agreement identifies milestones to be achieved during the term of the Management Conference.

Management Conference. A Management Conference convened by the Administrator under Section 320 of the CWA for an estuary in the NEP.

National Program Assistance Agreements. Assistance Agreements approved by the EPA Assistant Administrator for Water for work undertaken to accomplish broad NEP goals and objectives.

Work Program. The Scope of Work of an assistance application, which identifies how and when the applicant will use funds to produce specific outputs.

§ 35.9015 Summary of annual process.

(a) EPA considers various factors to allocate among the Management Conferences the funds requested in the President's budget for the NEP. Each year, the Director of the Office of Marine and Estuarine Protection issues budgetary targets for the NEP for each Management Conference. These targets are based upon negotiated Five-Year State/EPA Conference Agreements.

(b) Using the budgetary targets provided by EPA, each Management Conference develops Annual Work Plans describing the work to be completed during the year and identifies individual projects to be funded for the completion of such work. Each applicant having a scope of work approved by the Management Conference completes a standard EPA application, including a proposed work program. After the applicant submits an application, the Regional Administrator reviews it and, if it meets applicable requirements, approves the application and agrees to make an award when funds are available. The Regional Administrator awards assistance from funds appropriated by Congress for that purpose.

(c) The recipient conducts activities according to the approved application and assistance award. The Regional Administrator evaluates recipient performance to ensure compliance with all conditions of the assistance award.

(d) The Regional Administrator may use funds not awarded to an applicant to supplement awards to other recipients who submit a score of work approved by the management conference for NEP funds.

(e) The EPA Assistant Administrator for Water may approve National Program awards as provided in § 35.9070.

§ 35.9020 Planning targets.

The EPA Assistant Administrator for Water develops planning targets each year to help each Management Conference develop an Annual Work Plan. These targets are broad budgetary goals for total expenditures by each estuary program and are directly related to the activities that are to be carried out by each Management Conference in that year as specified in the Five-Year State/EPA Conference Agreement. The planning targets also are based on the Director's evaluation of the ability of each Management Conference to use appropriated funds effectively.

§ 35.9030 Work program.

The work program is part of the application for financial assistance and becomes part of the award document. It is part of the basis for an award decision and the basis for management and evaluation of performance under an assistance award. The work program must specify the level of effort and amount and source of funding estimated to be needed for each identified activity, the outputs committed for each activity, and the schedule for delivery of outputs.

§ 35.9035 Budget period.

An applicant may choose its budget period in consultation with and subject to the approval of the Regional Administrator.

§ 35.9040 Application for assistance.

Each applicant should submit a complete application at least 60 days

before the beginning of the budget period. In addition to meeting applicable requirements contained in 40 CFR part 30 or 31, a complete application must contain a discussion of performance to date under an existing award, the proposed work program, and a list of all applicable EPA-approved State strategies and program plans, with a statement certifying that the proposed work program is consistent with these elements. The annual workplan developed and approved by the management conference each fiscal year must demonstrate that non-Federal sources provide at least 25 percent of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a CCMP for the estuary. Each application must contain a copy of the Annual Work Plan as specified in § 35.9065(c) (2) and (3) for the current Federal fiscal year. The funding table in the workplan must demonstrate that the 25 percent match requirements is being met, and the workplan table of project status must show the sources of funds supporting each project.

§ 35.9045 EPA action on application.

The Regional Administrator will review each completed application and should approve, conditionally approve, or disapprove the application within 60 days of receipt. When funds are available, the Regional Administrator will award assistance based on an approved or conditionally approved application. For a continuation award made after the beginning of the approved budget period, EPA will reimburse the applicant for allowable costs incurred from the beginning of the budget period, provided that such costs are contained in the approved application and that the application was submitted before the expiration of the prior budget period.

(a) *Approval.* The Regional Administrator will approve the application only if it satisfies the requirements of CWA section 320; the terms, conditions, and limitations of this subpart; and the applicable provisions of 40 CFR parts 30, 31, and other EPA assistance regulations. The Regional Administrator must also determine that the proposed outputs are consistent with EPA guidance or otherwise demonstrated to be necessary and appropriate; and that achievement of the proposed outputs is feasible, considering the applicant's past performance, program authority, organization, resources, and procedures.

(b) *Conditional approval.* The Regional Administrator may conditionally approve the application after consulting with the applicant if only minor changes are required. The award will include the conditions the applicant must meet to secure final approval and the date by which those conditions must be met.

(c) *Disapproval.* If the application cannot be approved or conditionally approved, the Regional Administrator will negotiate with the applicant to change the output commitments, reduce the assistance amount, or make any other changes necessary for approval. If negotiation fails, the Regional Administrator will disapprove the application in writing.

§ 35.9050 Assistance amount.

(a) *Determining the assistant amount.* In determining the amount of assistance to an applicant, the Regional Administrator will consider the Management Conference planning target, the extent to which the applicant's Work Program is consistent with EPA guidance, and the anticipated cost of the applicant's program relative to the proposed outputs.

(b) Reduction of assistance amount. If the Regional Administrator determines that the proposed outputs do not justify the level of funding requested, he will reduce the assistance amount. If the evaluation indicates that the proposed outputs are not consistent with the priorities contained in EPA guidance, the Regional Administrator may reduce the assistance amount.

§ 35.9055 Evaluation of recipient performance.

The Regional Administrator will oversee each recipient's performance under an assistance agreement. In consultation with the applicant, the Regional Administrator will develop a

process for evaluating the recipient's performance. The Regional Administrator will include the schedule for evaluation in the assistance agreement and will evaluate recipient performance and progress toward completing the outputs in the approved work program according to the schedule. The Regional Administrator will provide the evaluation findings to the recipient and will include these findings in the official assistance file. If the evaluation reveals that the recipient is not achieving one or more of the conditions of the assistance agreement, the Regional Administrator will attempt to resolve the situation through negotiation. If agreement is not reached, the Regional Administrator may impose sanctions under the applicable provisions of 40 CFR part 30 or 31.

§ 35.9060 Maximum Federal share.

The Regional Administrator may provide up to 100 percent of the approved work program costs for a particular application provided that non-Federal sources provide at least 25 percent of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a comprehensive conservation and management plan for the estuary as specified in the estuary Annual Work Plan for each fiscal year.

§ 35.9065 Limitations.

(a) *Management conferences.* The Regional Administrator will not award funds pursuant to CWA section 320(g) to any applicant unless and until the scope of work and overall budget have been approved by the Management Conference of the estuary for which the work is proposed.

(b) *Consistency with work plans.* The Regional Administrator will not award funds pursuant to section CWA 320(g) to any applicant whose application is not consistent with work plan elements in an approved Annual Work Plan and an approved Five-Year State/EPA Conference Agreement by the Management Conference of the estuary for which the work is proposed.

(c) *Elements of annual work plans.* Annual Work Plans to be prepared by estuary Management Conferences must be reviewed by the Office of Marine and Estuarine Protection before final ratification by the Management Conference and must include the following elements:

(1) Introduction—A discussion of achievements in the estuary, a summary of activities undertaken in the past year to further each of the seven purposes of a Management Conference specified in section 320(b) of the CWA, the major emphases for activity in the upcoming year, and a schedule of milestones to be reached during the year.

(2) Funding sources—A table of fund sources for activities in the new year, including a description of the sources and types (e.g., in-kind contributions to be performed by the applicant) of funds comprising the contribution by applicants or third parties, and the source and type of any other non-Federal funds or contributions.

(3) Projects—A description of each project to be undertaken, a summary table of project status listing all activities, the responsible organization or individual, the products expected from each project, approximate schedules, budgets, and the source and type of the non-Federal 25 percent minimum cost share of the aggregate costs of research, surveys, studies, modeling, and other technical work necessary for the development of a comprehensive conservation and management plan for an estuary.

§ 35.9070 National program assistance agreements.

The Assistant Administrator for Water may approve the award of NEP funds for work that has broad applicability to estuaries of national significance. These awards shall be deemed to be consistent with Annual Work Plans and Five-Year State/EPA Conference Agreements approved by individual management conferences. The amount of a national program award shall not exceed 75 percent of the approved work program costs provided the non-Federal share of such costs is provided from non-Federal sources.

PART 39—LOAN GUARANTEES FOR CONSTRUCTION OF TREATMENT WORKS

Sec.

39.100 Purpose.
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AUTHORITY: Pub. L. 94-558, Sec. 213, Federal Water Pollution Control Act, as amended (86 Stat. 816 *et seq.* (33 U.S.C. 1281 *et seq.*) as amended).

SOURCE: 42 FR 25666, May 18, 1977, unless otherwise noted.

§ 39.100 Purpose.

This part implements section 213 of the Federal Water Pollution Control Act Amendments of 1972, as amended, by establishing policies and procedures to ensure that inability to borrow necessary funds from other sources on reasonable terms does not prevent the construction of any wastewater treatment works for which a grant has been, or will be, awarded in compliance with the Act. It provides for the guarantee by the Administrator of full and timely payment of principal and interest on any obligation of the State, municipality, or intermunicipal or interstate agency issued directly and exclusively to the Federal Financing Bank to finance the local share of the costs of any such project.

§ 39.105 Definitions.

The following words and terms shall have the meaning set forth below:

(a) *Act.* The Federal Water Pollution Control Act Amendments of 1972, as amended (Pub. L. 92-500, 33 U.S.C. 1281 *et seq.*).

(b) *Bank.* The Federal Financing Bank established pursuant to the Federal Financing Bank Act of 1973 (12 U.S.C. 2281 *et seq.*).

(c) *Guaranteed Loan Program.* The program established pursuant to Pub. L. 94-558 which amended the Act by adding section 213.

(d) *Loan agreement.* A written agreement between the Eank and the guaranteed borrower stating the terms of the loan.

(e) *Loan guarantee agreement.* A written agreement between EPA and the guaranteed borrower stating the terms of the loan guarantee.

(f) *Local share.* The amount of the total grant eligible and allowable project costs which a public body is obligated to pay under the grant.

(g) *Note.* An evidence of the debt, including a bond, obligation to pay, or other evidence of indebtedness where appropriate.

(h) *Public body.* A State, interstate agency, a municipality, or an intermunicipal agency, as defined below:

(1) *State.* A State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(2) *Interstate agency.* An agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of water pollution.

(3) *Municipality.* A city, town, borough, county, parish, district, association, or other public body (including an intermunicipal agency of two or more of the foregoing entities) created by or pursuant to State law, or an Indian Tribe or an authorized Indian tribal organization, having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or a designated and approved management agency under section 208 of the Act. This definition excludes a special district, such as a school district, which does not have as one of its principal responsibilities the treatment, transport, or disposal of liquid wastes.

(i) *Reasonable terms.* Rates determined by the Secretary of the Treasury with relationship to the current average yield on outstanding marketable obligations of municipalities of comparable maturity.

§ 39.110 Application.

(a) *Who may apply.* A public body which has applied for a grant under Title II of the Act (including grantees whose projects are eligible for reimbursement under section 206 of that title) or which has committed itself to finance the local share of any project(s) for which a grant has been awarded, or for which an application is being processed, may apply through the State agency to the appropriate Regional Administrator for a loan and the commitment to guarantee such loan to finance the local share of such project.

(b) *Financing.* Applications for loan guarantees will be limited to:

(1) Financing that portion of the local share for which permanent financing has not been arranged.

(2) Refinancing that portion of the local share of those projects on which construction has not been completed and for which the public body initially held a public solicitation on a bond issue, received no bids, and subsequently accepted or negotiated financing at interest rates greater than 10 percent.

(c) *Application requirements.* The application shall include documentation of the following:

(1) *Inability to obtain necessary financing.* The applicant shall document that it is unable to obtain on reasonable terms as defined in § 39.105(i) sufficient credit to finance the local share of the project(s). Such documentation shall include:

(i) The results of any public solicitation for bids for obligations to finance the local share or (ii) a certification, acceptable to the Administrator, from a municipal bond underwriter(s), which submitted or might normally have submitted a bid for the obligations. An applicant with an obligation to pay the local share not in excess of $250,000 may obtain certification from two or more local or regional banks to meet paragraph (c)(1)(ii) of this section. An applicant representing communities with a population of 10,000 or less must also submit a written statement from an authorized representative of the Farmers Home Administration that grants, loans, or loan guarantees are not available from Farmers Home Administration in an adequate amount or within a reasonable time, as determined by the Administrator.

(2) *Ability to repay.* The application for a loan guarantee shall be accompanied by an official statement intended to provide EPA with the information needed to reach an informed judgment as to whether there is reasonable assurance of repayment. The official statement must conform to the guidelines for such statement which are available to applicants from the EPA regional office upon request.

(3) *Legal authority of applicant.* The application shall be accompanied by a legal opinion establishing that the applicant has legal authority to obligate itself for payment of the local share, to comply with the loan conditions, and to issue the obligations, and that the obligations will be legal and binding obligations.

(4) *Assurances.* The application shall be accompanied by assurances set forth in an ordinance or other evidence of authority acceptable to the Administrator that it can and will comply with all of the conditions set forth in § 39.115.

(d) *Fees.* The following fees will be charged in order to make the program self-sustaining. These fees may be revised from time to time as determined by the Administrator.

(1) *Application processing.* EPA will charge a non-refundable minimum fee of $1,000 or ⅛ of one percent of the loan amount, whichever is greater, but not to exceed $25,000 for processing applications. This fee will be submitted with the application and will be retained by the EPA whether or not a loan is consummated.

(2) *Fee for issuance of a commitment to guarantee.* A fee will be charged for the issuance of a commitment to guarantee a loan. This fee will be ½ of 1 percent of the principal amount of the loan, and shall be placed in a contingency reserve to offset defaults. This fee is contingent upon the loan being obtained by the applicant and is payable within 30 days of the date of loan approval.

(e) *Format.* The Administrator may, from time to time, prescribe a form or

format for the submission of the application or any portion thereof.

§ 39.115 Conditions of loan guarantee.

Any loan guarantee made pursuant to this part shall be subject to the following conditions:

(a) *Step 1 or Step 2.* Each public body applying for a loan guarantee for the local share of Step 1 or Step 2 costs must assure that:

(1) It will repay the loan using all local resources legally available; and

(2) Any funds due to the public body from the amounts appropriated under section 206 of the Act may be used if such use is necessary for repayment.

(b) *Step 3.* Each public body applying for a loan for the local share of Step 3 costs must assure that:

(1) It will repay the loan using all local resources legally available and, if necessary, (i) all or any portion of the funds retained by it under section 204(b)(3) of the Act, and (ii) any funds due to such grantee from the amounts appropriated under section 206 of the Act;

(2) The facilities are maintained in good repair and operating condition during the period in which the notes or the obligations financed by the Bank are outstanding;

(3) Adequate insurance and bonding are maintained to protect the guarantor;

(4) Financial reports and records necessary to reflect the planned and actual receipt of revenues for repayment are maintained and preserved until 3 years after the notes or the obligations financed by the Bank have been retired.

(5) Revenue plans adequate to assure repayment of principal and interest of the notes or the obligations financed by the Bank are adopted; and

(6) The Administrator is promptly notified whenever it appears that projected annual revenues will be insufficient to meet payments for principal, interest, and operating and maintenance costs. Such notification shall include a description of the steps being taken to remedy the problem.

(c) *Other covenants.* Among other covenants made by the public body in the loan guarantee are the following;

(1) *Application of loan proceeds.* The loan proceeds shall only be applied to the payment of costs associated with the project for which EPA has awarded grant assistance in accordance with § 39.140.

(2) *Payment.* The public body covenants that if amounts adequate for the payment of principal and interest are not available when due and payable, appropriate steps will be taken to levy sufficient additional taxes, fees, or charges and to make such payments in a timely manner.

(3) *Accounts and reports.* The public body shall keep complete and accurate books, records, and accounts relating to the loan, the loan guarantee, and the funds and accounts used to pay the amounts due on the loan. Such books, records, and accounts shall be subject to inspection by the Administrator or the Comptroller General of the United States at reasonable times.

(4) *Status of other encumbrances.* The public body will not on or after the date of execution of the loan guarantee by EPA, create or suffer to be created any lien or charge, which would constitute a lien prior to the lien created to secure the loan. Any bonded indebtedness or liens created by the public body on or after the date of execution of the loan guarantee by EPA and associated with the treatment works being constructed with Federal grant assistance may, at the discretion of the Administrator, be on a parity with the lien of the loan guaranteed by the Administrator.

(d) *Enforcement.* The public body agrees to the enforcement of the foregoing conditions by the Administrator in a court of appropriate jurisdiction pursuant to any of the remedies provided for under § 39.150, Defaults and remedies, in order to avert an Event of Default.

§ 39.120 Limitation on assistance.

The amount of any grant, loan, loan guarantee, or other assistance available from another Federal agency, a State, or other third parties on reasonable terms shall be deducted from the local share amount before the loan guarantee amount is determined.

§ 39.125 Determination of eligibility for assistance and issuance of guarantee.

(a) The Administrator shall make the following determinations before issuing a loan guarantee:

(1) The project for which the loan guarantee is requested is eligible for grant assistance under Title II of the Act;

(2) The applicant is unable to obtain, on reasonable terms, sufficient credit to finance the local share without such a loan guarantee; and

(3) There is reasonable assurance that the applicant will be able to repay the loan or obligation to the Bank.

(b) If the application is approved, the Administrator will issue the loan guarantee and, subsequent to grant award, will request issuance by the Bank.

(c) If the loan application is disapproved, such disapproval shall be final and conclusive unless appealed within 30 days after receipt of the notice of disapproval pursuant to subpart J, Disputes, of the general grant regulations (40 CFR 30.1100 *et seq.*).

§ 39.130 Determination of reasonable rates.

The Secretary of the Treasury in accordance with the Act shall make a determination of whether financing is available at reasonable rates.

§ 39.135 Loan terms.

(a) *Interest rates.* The interest rate(s), to be charged for each loan shall be determined by the Secretary of the Treasury in accordance with section 6(b) of the Federal Financing Bank Act of 1973.

(b) *Repayment period.* The repayment period for any obligation guaranteed by the Environmental Protection Agency shall be for a reasonable term not to exceed the useful life of the project or forty years whichever is less.

§ 39.140 Loan proceeds.

The loan proceeds shall be applied solely to pay costs associated with the construction of the treatment works for which EPA has awarded a grant. Loan proceeds may be dispensed in a lump sum upon execution of the loan agreement; or drawdowns under the loan agreement may be made pursuant to a schedule or requests submitted to the Bank by the borrower. Any loan proceeds or drawdown requests which are paid in advance of the current need for funds to pay costs associated with the EPA grant will be placed by the borrower in investments approved by the Bank under the loan agreement until such time as the proceeds are applied to such costs.

§ 39.145 Loan payments by borrower.

The borrower will submit his payments of principal and interest on the loan directly to the Bank in accordance with the loan agreement. A late payment penalty of 1 percent per month of the payment amount due shall be charged pursuant to the loan agreement and the provisions of the loan guarantee agreement in the event any payment of principal and interest is not paid when due.

§ 39.150 Defaults and remedies.

(a) Each of the following events shall be defined as an "Event of Default":

(1) Default by the public body in the payment of any Principal Installment, if any, on any loan guaranteed by the Administrator when due;

(2) Default by the public body in the payment of any installment of interest on the loan when due; and

(3) Failure or refusal by the public body to comply with section 213 of the Act, or default in the performance or observance of any other of the covenants, agreements, or conditions contained in the loan agreement, or loan guarantee agreement, where such failure, refusal or default shall continue for a period of 45 days after written notice thereof is issued by the Administrator.

(b) The loan agreement and guarantee shall provide that upon the happening and continuance of any event described in paragraph (a) of this section, the Administrator may proceed on behalf of the Environmental Protection Agency and the United States to protect and enforce its rights and the rights of the Federal Financing Bank by such of the following remedies as

the Administrator being advised by counsel, shall deem most effectual:

(1) Enforce by mandamus or other suit, action or proceedings at law or in equity all rights of the Administrator including the rights to require the public body to enforce, collect and receive taxes, fees, or charges adequate to carry out the covenant or payment of principal and interest when due, and to require the public body to carry out any other covenant or agreement with the Administrator to perform its duties under the Act, these regulations and the loan agreement and loan guarantee agreement;

(2) Bring suit upon the loan;

(3) Require the public body by action or suit to account as if it were the trustee of an express trust for the holders of the evidence of indebtedness of the loan;

(4) Enjoin by action or suit any acts or things which may be unlawful or in violation of the rights of the Administrator or the Bank;

(5) Declare all remaining payments of principal and interest on the loan due and payable, and, if all default shall be made good, then, to annul such declaration and its consequences; and

(6) In the event that all the remaining principal and interest on the loan be declared due and payable, apply to a court having jurisdiction for other appropriate administrative and judicial relief.

PART 40—RESEARCH AND DEMONSTRATION GRANTS

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AUTHORITY: Cited in § 40.110.

SOURCE: 38 FR 12784, May 15, 1973, unless otherwise noted.

§ 40.100 Purpose of regulation.

These provisions establish and codify policies and procedures governing the award of research and demonstration grants by the Environmental Protection Agency.

§ 40.105 Applicability and scope.

This part establishes mandatory policies and procedures for all EPA research and demonstration grants. The provisions of this part supplement the EPA general grant regulations and procedures (40 CFR part 30). Accordingly, all EPA research and demonstration grants are awarded subject to the EPA interim general grant regulations and procedures (40 CFR part 30) and to the applicable provisions of this part 40.

§ 40.110 Authority.

EPA research and demonstration grants are authorized under the following statutes:

(a) The Clean Air Act, as amended, 42 U.S.C. 1857 *et seq.*

(1) Section 103 (42 U.S.C. 1857b) authorizes grants for research and demonstration projects relating to the causes, effects, extent, prevention, and control of air pollution.

(2) Section 104 (42 U.S.C. 1857b–1) authorizes grants for research and development of new and improved methods for the prevention and control of air pollution resulting from the combustion of fuels.

(b) The Federal Water Pollution Control Act, as amended, Pub. L. 92–500.

(1) Section 104(b) (33 U.S.C. 1254(b)) authorizes grants for research and demonstration projects relating to the causes, effects, extent, prevention, reduction, and elimination of water pollution.

(2) Section 104(h) (33 U.S.C. 1254(h)) authorizes grants for research and development of new and improved methods for the prevention, removal, reduction, and elimination of pollution in lakes, including the undesirable effects of nutrients and vegetation, and for construction of publicly owned research facilities for such purpose.

(3) Section 104(i) (33 U.S.C. 1254(i)) authorizes grants for research, studies, experiments, and demonstrations relative to the removal of oil from any waters and for the prevention, control, and elimination of oil and hazardous substances pollution.

(4) Section 104(r) (33 U.S.C. 1254(r)) authorized grants for the conduct of basic research into the structure and function of freshwater aquatic ecosystems, and to improve understanding of the ecological characteristics necessary to the maintenance of the chemical, physical, and biological integrity of freshwater aquatic ecosystems.

(5) Section 104(s) (33 U.S.C. (s)) authorizes grants to conduct and report on interdisciplinary studies on river systems, including hydrology, biology, ecology, economics, the relationship between river uses and land uses, and the effects of development within river basins on river systems and on the value of water resources and water-related activities.

(6) Section 105(a) (33 U.S.C. 1255(a)) authorizes grants for research and demonstration of new or improved methods for preventing, reducing, and eliminating the discharge into any waters of pollutants from sewers which carry storm water or both storm water and pollutants; and for the demonstration of advanced waste treatment and water purification methods (including the temporary use of new or improved chemical additives which provide substantial immediate improvement to existing treatment processes), or new or improved methods of joint treatment systems for municipal and industrial wastes.

(7) Section 105(b) (33 U.S.C. 1255(b)) authorizes grants for demonstrating, in river basins or portions thereof, advanced treatment and environmental enhancement techniques to control pollution from all sources, within such basin or portions thereof, including nonpoint sources, together with instream water quality improvement techniques.

(8) Section 105(c) (33 U.S.C. 1255(c)) authorizes grants for research and demonstration projects for prevention of pollution of any waters by industry including, but not limited to, the prevention, reduction, and elimination of the discharge of pollutants.

(9) Section 105(e)(1) (33 U.S.C. 1255(e)(1)) authorizes grants for research and demonstration projects with respect to new and improved methods of preventing, reducing, and eliminating pollution from agriculture.

(10) Section 105(e)(2) (33 U.S.C. 1255(e)(2)) authorizes grants for demonstration projects with respect to new and improved methods of preventing, reducing, storing, collecting, treating, or otherwise eliminating pollution from sewage in rural and other areas where collection of sewage in conventional, communitywide sewage collection systems is impractical, uneconomical, or otherwise infeasible, or where soil conditions or other factors preclude the use of septic tank and drainage field systems.

(11) Section 107 (33 U.S.C. 1257) authorizes grants for projects to demonstrate comprehensive approaches to the elimination or control of acid or other mine water pollution resulting from active or abandoned mining operations and other environmental pollution affecting water quality within all or part of a watershed or river basin, including siltation from surface mining.

(12) Section 108 (33 U.S.C. 1258) authorizes grants for projects to demon-

strate new methods and techniques, and to develop preliminary plans for the elimination or control of pollution within all or any part of the watersheds of the Great Lakes.

(13) Section 113 (33 U.S.C. 1263) authorizes grants for projects to demonstrate methods to provide for central community facilities for safe water and elimination or control of pollution in those native villages of Alaska without such facilities.

(c) The Public Health Service Act, as amended, 42 U.S.C. 241 *et seq.*

(1) Section 301 (42 U.S.C. 241, 242b, and 246) authorizes grants for research relating to the human and environmental effects of radiation.

(d) The Solid Waste Disposal Act, as amended, by the Resource Conservation and Recovery Act of 1976 (42 U.S.C. 6901 *et seq.*).

(1) Section 8001 (42 U.S.C. 6981) authorizes grants for research and demonstration projects relating to solid waste.

(2) Section 8004 (42 U.S.C. 6984) authorizes grants for demonstration of new or improved technologies for resource recovery.

(3) Section 8005 (42 U.S.C. 6985) authorizes grants to conduct special studies and demonstration projects on recovery of useful energy and materials.

(4) Section 8006 (42 U.S.C. 6986) authorizes grants for the demonstration of resource recovery system or for the construction of new or improved solid waste disposal facilities.

(e) The Federal Insecticide, Fungicide, and Rodenticide Act, as amended, Pub. L. 92–516.

(1) Section 20 authorizes grants for research in the pesticides areas with priority given to the development of biologically integrated alternatives for pest control.

(f) The Grant Act, 42 U.S.C. 1891 *et seq.*, authorizes grants for basic scientific research.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115 Definitions.

The statutes identified in § 40.110 contain definitions which are not all repeated here. The following terms shall have the meaning set forth below:

[42 FR 56056, Oct. 20, 1977]

§ 40.115–1 Construction.

May include the preliminary planning to determine the economic and engineering feasibility of a facility, the engineering, architectural, legal, fiscal, and economic investigations and studies, surveys, designs, plans, working drawings, specifications, procedures, and other action necessary to the construction of a facility, the erection, acquisition, alteration, remodeling, improvement, or extension of a facility, and the inspection and supervision of the construction of a facility.

§ 40.115–2 Intermunicipal agency.

(a) Under the Clean Air Act, an agency of two or more municipalities located in the same State or in different States and having substantial powers or duties pertaining to the prevention and control of air pollution.

(b) Under the Resource Conservation and Recovery Act, an agency established by two or more municipalities with responsibility for planning or administration of solid waste.

(c) In all other cases, an agency of two or more municipalities having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–3 Interstate agency.

(a) Under the Clean Air Act, an agency established by two or more States, or by two or more municipalities located in different States, having substantial powers or duties pertaining to the prevention and control of air pollution.

(b) Under the Federal Water Pollution Control Act, an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution of waters.

(c) Under the Resource Conservation and Recovery Act, an agency of two or

more municipalities in different States or an agency established by two or more States, with authority to provide for the disposal of solid wastes and serving two or more municipalities located in different States.

(d) In all other cases, an agency of two or more States having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–4 Municipality.

(a) Under the Federal Water Pollution Control Act, a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law, or an Indian tribe or an authorized Indian tribal organization, with jurisdiction over disposal of sewage, industrial wastes, or other wastes; or a designated and approved management agency under section 208 of the act.

(b) Under the Resource Conservation and Recovery Act, a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, with responsibility for the planning or administration of solid waste management, or an Indian tribe or authorized tribal organization or Alaska Native village or organization, and any rural community or unincorporated town or village or any other public entity for which an application for assistance is made by a State or political subdivision thereof.

(c) In all other cases, a city, town, borough, county, parish, district, or other public body created by or pursuant to State law, or an Indian tribe or an authorized Indian tribal organization, having substantial powers or duties pertaining to the control of pollution.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56056, Oct. 20, 1977]

§ 40.115–5 Person.

(a) Under the Federal Water Pollution Control Act, an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(b) Under the Resource Conservation and Recovery Act, an individual, trust, firm, joint stock company, corporation (including a government corporation), partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

[38 FR 12784, May 15, 1973, as amended at 42 FR 56057, Oct. 20, 1977]

§ 40.115–6 State.

(a) Under the Federal Water Pollution Control Act, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(b) Under the Resource Conservation and Recovery Act, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(c) In all other cases, a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam and American Samoa.

[42 FR 56057, Oct. 20, 1977]

§ 40.120 Publication of EPA research objectives.

The Office of Research and Development of EPA publishes a statement of research objectives and priorities annually in a document entitled "Office of Research and Development—Program Guide." This document may be obtained from either the Office of Research and Development, RD-674, or the Grants Administration Division, PM-216, U.S. Environmental Protection Agency, Washington, DC 20460.

[42 FR 56057, Oct. 20, 1977]

§ 40.125 Grant limitations.

§ 40.125–1 Limitations on duration.

(a) No research or demonstration grant shall be approved for a budget period in excess of 2 years except demonstration grants involving construction.

(b) No research or demonstration grant shall be approved for a project period in excess of 5 years.

(c) The grant award official may extend the budget and project periods for up to an additional 12 months without additional grant funds, when such extensions are in the best interest of the Government.

[42 FR 56057, Oct. 20, 1977]

EDITORIAL NOTE: For Class deviation documents affecting § 40.125-1, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 40.125–2 Limitations on assistance.

In addition to the cost-sharing requirements pursuant to 40 CFR 30.720, research and demonstration grants shall be governed by the specific assistance limitations listed below:

(a) *Federal Water Pollution Control Act.* (1) Section 104(s)—no grant in any fiscal year may exceed $1 million.

(2) Sections 105(a), (c) and 108—no grant may exceed 75 percent of the allowable actual project costs.

(b) *Clean Air Act.* (1) Section 104—no grant may exceed $1,500,000.

(c) *Resource Conservation and Recovery Act.* (1) Sections 8001, 8004, and 8005. The maximum practicable cost sharing is required.

(2) Section 8006. The Federal share for any grant for the demonstration of resource recovery systems shall not exceed 75 percent and is subject to the conditions contained in section 8006(b) of the Act. The Federal share for any grant for the construction of new or improved solid waste disposal facilities shall not exceed 50 percent in the case of a project serving an area which includes only one municipality and 75 percent in any other case, and is subject to the limitations contained in section 8006(c) of the Act. Not more than 15 percent of the total funds authorized to be appropriated for any fiscal year to carry out this section shall be awarded for projects in any one State.

[38 FR 12784, May 15, 1973, as amended at 42 FR 20083, May 8, 1977; 42 FR 56057, Oct. 20, 1977]

§ 40.130 Eligibility.

Except as otherwise provided below, grants for research and demonstration projects may be awarded to any responsible applicant in accordance with 40 CFR 30.340:

(a) The Clean Air Act, as amended—public or nonprofit private agencies, institutions, organizations, and to individuals.

(b) Resource Conservation and Recovery Act.

(1) Section 8001, public authorities, agencies, and institutions; private agencies and institutions; and individuals.

(2) Section 8004 and 8005, public agencies and authorities or private persons.

(3) Section 8006, State, municipal, intersate or intermunicipal agencies.

(4) No grant may be made under this Act to any private profit-making organization.

(c) The Federal Insecticide, Fungicide, and Rodenticide Act, as amended—other Federal agencies, universities, or others as may be necessary to carry out the purposes of the act.

(d) The Federal Water Pollution Control Act, as amended:

(1) Section 104(b)—State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and to individuals.

(2) Sections 104(h) and (i)—public or private agencies and organizations and to individuals.

(3) Section 104(r)—colleges and universities.

(4) Section 104(s)—institutions of higher education.

(5) Sections 105(a), (e)(2), and 107—State, municipal, interstate, and intermunicipal agencies.

(6) Section 195(b)—State or States or interstate agency.

(7) Sections 105(c) and (e)(1)—persons.

(8) Section 108—State, political subdivision, interstate agency, or other public agency, or combination thereof.

(9) Section 113—only to the State of Alaska.

(e) The Public Health Service Act, as amended—only to nonprofit agencies, institutions, organizations, and to individuals.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 42 FR 56057, Oct. 20, 1977]

§ 40.135 Application.

§ 40.135–1 Preapplication coordination.

(a) *All applicants.* (1) Applicants for research and demonstration grants are encouraged to contact EPA for further information and assistance prior to submitting a formal application. The EPA regional office or the laboratory nearest the applicant will be able to provide such assistance or to refer the applicant to an appropriate EPA representative.

(2) Applicants shall prepare an environmental assessment of the proposed project where applicable, outlining the anticipated impact on the environment pursuant to 40 CFR part 6.

(b) Applications for grants for demonstration projects funded by the Office of Solid Waste will be solicited through the Department of Commerce Business Daily, and selections will be made on a competitive basis.

[38 FR 12784, May 15, 1973, as amended at 41 FR 20659, May 20, 1976; 42 FR 56057, Oct. 20, 1977; 48 FR 29302, June 24, 1983]

§ 40.135–2 Application requirements.

All applications for research and demonstration grants shall be submitted in an original and 8 copies to the Environmental Protection Agency, Grants Administration Division, Washington, DC 20460, in accordance with §§ 30.315 through 30.315–3.

(a) *Applications involving human subjects.* (1) Safeguarding the rights and welfare of human subjects involved in projects supported by EPA grants is the responsibility of the institution which receives or is accountable to EPA for the funds awarded for the support of the project.

(2) Institutions must submit to EPA, for review, approval, and official acceptance, a written assurance of its compliance with guidelines established by Department of Health, Education, and Welfare concerning protection of human subjects. However, institutions which have submitted and have had accepted, general assurance to DHEW under these guidelines will be considered as being in compliance with this requirement. These guidelines are provided in DHEW Publication No. (NIH) 72–102, the "Institutional Guide to DHEW Policy on Protection of Human Subjects." Copies of this publication are available from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20420.

(3) Applicants must provide with each proposal involving human subjects a certification that it has been or will be reviewed in accordance with the institution's assurance. This certification must be renewed annually on the basis of continuing review of the supported project.

(b) *Applications involving laboratory animals.* Each application for a project involving the use of warm-blooded animals shall include a written assurance that the applicant has registered with the Department of Agriculture and is in compliance with the rules, regulations, and standards enunciated in the Animal Welfare Act, Pub. L. 89–554, as amended.

(c) *Notice of research project (NRP).* Each application for research must include a summary (NRP) of proposed work (200 words or less) incorporating objectives, approach and current plans and/or progress. Upon approval of an application, summaries are forwarded to the Smithsonian Science Information Exchange. Summaries of work in progress are exchanged with government and private agencies supporting research and are forwarded to investigators who request such information.

(d) *Federal Water Pollution Control Act.* (1) All applications for grants under section 105(a) must have been approved by the appropriate State water pollution control agency or agencies.

(2) All applications for grants under section 107, where the proposed project will be located in the Appalachian region, shall have been coordinated with the Appalachian Regional Commission for determination that such demonstration project is consistent with the objectives of the Appalachian Regional Development Act of 1965, as amended.

(e) *Intergovernmental review.* EPA will not award funds under this subpart without review and consultation, if applicable, in accordance with the requirements of Executive Order 12372, as implemented in 40 CFR part 29 of this chapter.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 42 FR 56057, Oct. 20, 1977; 48 FR 29302, June 24, 1983]

§ 40.140 Criteria for award.

In determining the desirability and extent of funding for a project and the relative merit of an application, consideration will be given to the following criteria:

§ 40.140–1 All applications.

(a) The relevancy of the proposed project to the objectives of the EPA research and demonstration program;

(b) The availability of funds within EPA;

(c) The technical feasibility of the project;

(d) The seriousness, extent, and urgency of the environmental problems toward which the project is directed;

(e) The anticipated public benefits to be derived from the project in relation to the costs of the project;

(f) The competency of the applicant's staff and the adequacy of the applicant's facilities and available resources;

(g) The degree to which the project can be expected to produce results that will have general application to pollution control problems nationwide;

(h) Whether the project is consistent with existing plans or ongoing planning for the project area at the State, regional, and local levels;

(i) The existence and extent of local public support for the project;

(j) Whether the proposed project is environmentally sound;

(k) Proposed cost sharing.

§ 40.140–2 [Reserved]

§ 40.140–3 Federal Water Pollution Control Act.

(a) All applications for grants under section 105(c) must provide evidence that the proposed project will contribute to the development or demonstration of a new or improved method of treating industrial wastes or otherwise preventing pollution by industry, which method shall have industrywide application;

(b) All applications for grants under section 113 must include provisions for community safe water supply systems, toilets, bathing and laundry facilities, sewage disposal facilities and programs relating to health and hygiene. Such projects must also be for the further purpose of developing preliminary plans for providing such safe water and such elimination or control of water pollution for all native villages in the State of Alaska.

§ 40.145 Supplemental grant conditions.

In addition to the EPA general grant conditions (40 CFR part 30, subpart C), all grants are awarded subject to the following requirements:

(a) The project will be conducted in an environmentally sound manner.

(b) In addition to the notification of project changes required pursuant to 40 CFR 30.900, prior written approval by the grants officer is required for project changes which may (1) alter the approved scope of the project, (2) substantially alter the design of the project, or (3) increase the amount of Federal funds needed to complete the project. No approval or disapproval of a project change pursuant to 40 CFR 30.900 or this section shall commit or obligate the United States to an increase in the amount of the grant or payments thereunder, but shall not preclude submission or consideration of a request for a grant amendment pursuant to 40 CFR 30.900–1.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.145–1 Resource Conservation and Recovery Act.

Programs for which a Federal grant is awarded by the Environmental Protection Agency to a State, municipal, interstate or intermunicipal agency, or to any public authority, agency or institution, under the Resource Conservation and Recovery Act, shall be the subject of public participation consistent with part 249 of this chapter.

[42 FR 56057, Oct. 20, 1977]

§ 40.145–2 Federal Water Pollution Control Act.

(a) No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimi-

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nation under any program or activity receiving assistance under the Act.

(b) Grants under section 107 are awarded subject to the conditions—(1) that the State shall acquire any land or interests therein necessary for such project to assure the elimination or control of acid or other mine water pollution; and (2) that the State shall provide legal and practical protection to the project area to insure against any activities which will cause future acid or other mine water pollution.

§ 40.145–3 Projects involving construction.

Research and demonstration grants for projects involving construction shall be subject to the following conditions:

(a) The applicant will demonstrate to the satisfaction of the grants officer that he has or will have a fee simple or such other estate or interest in the site of the project, and rights of access, as the grants officer finds sufficient to assure undisturbed use and possession for the purpose of construction and operation for the estimated life of the project; and in the case of projects serving more than one municipality, that the participating communities have such interests or rights as the grants officer finds sufficient to assure their undisturbed utilization of the project for the estimated life of the project.

(b) Invitations for bids or requests for proposals shall be based upon a clear and accurate description of the technical requirements for the material, product, or service to be procured. Such description shall not, in competitive procurements, contain features which unduly restrict competition. "Brand name or equal" description may be used as a means to define the performance or other salient requirements of a procurement, and when so used the specific features of the named brand which must be met by offerors should be clearly specified.

(c) Positive efforts shall be made by the grantees to utilize small business and minority-owned business sources of supplies and services.

(d) Subagreements for construction work may be negotiated when advertising for competitive bids is not feasible; however, the grantee must adequately demonstrate its need to contract with a single or sole source. All such subagreements are subject to prior approval by the grants officer.

(e) Construction work will be performed by the fixed-price (lump sum) or fixed-rate (unit price) method, or a combination of these two methods, unless the grants officer gives advance written approval to use some other method of contracting. The cost-plus-a-percentage-of-cost method of contracting shall not be used. Adequate methods of advertising for and obtaining competitive sealed bids will be employed prior to award of the construction contract. The award of the contract will be made to the responsible bidder submitting the lowest responsive bid, which shall be determined without regard to State or local law whereby preference is given on factors other than the specification requirements and the amount of bid. The grantee must promptly transmit to the grants officer copies of bid protests, decisions on such protests, and related correspondence. The grants officer will cause appropriate review of grantee procurement methods to be made.

(f) On construction contracts exceeding $100,000, each bidder must furnish a bid guarantee equivalent to 5 percent of the bid price. In addition, the contractor awarded the contract must furnish performance and payment bonds, each of which shall be in an amount not less than 100 percent of the contract price. Construction contracts less than $100,000 shall follow the State or local requirements relating to bid guarantees, performance bonds, and payment bonds.

(g) The construction of the project, including the letting of contracts in connection therewith, shall conform to the applicable requirements of State, territorial, and local laws and ordinances to the extent that such requirements do not conflict with Federal laws.

(h) The grantee will provide and maintain competent and adequate engineering supervision and inspection for the project to insure that the construction conforms with the approved plans and specifications.

(i) Any construction contract must provide that representatives of the En-

vironmental Protection Agency and the State, as appropriate, will have access to the work whenever it is in preparation or progress and that the contractor will provide proper facilities for such access and inspection. The contract must also provide that the grants officer, the Comptroller General of the United States, or any authorized representative shall have access to any books, documents, papers, and records of the contractor which are pertinent to the project for the purpose of making audit, examination, excerpts, and transcriptions thereof.

(j) The grantee agrees to construct the project or cause it to be constructed in accordance with the application, plans and specifications, and subagreements approved by EPA in the grant agreement or amendments.

(k) In addition to the notification of project changes pursuant to 40 CFR 30.900, a copy of any construction contract or modifications thereof, and of revisions to plans and specifications must be submitted to the grants officer.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.150 Evaluation of applications.

Every application for a research or demonstration grant will be evaluated by appropriate EPA staff in terms of relevancy and the applicable criteria set forth in § 40.140. Only applications considered relevant to EPA research and demonstration objectives will receive further consideration and be subjected to additional review. Relevancy will be measured by program needs and priorities as defined in the Agency's current planned objectives. Relevancy, coupled with the results of technical review, will provide the basis for funding recommendations.

(a) *New applications.* Applications considered relevant to EPA research and demonstration objectives will be reviewed for technical merit by at least one reviewer within EPA and at least two reviewers outside EPA. Review by a National Advisory Council is statutorily required for radiation grants.

(b) *Continuation applications.* Continuation applications will be reviewed by appropriate EPA staff only. Recommendations for continuation of funding will be based on progress toward the accomplishment of the goals set forth for the project and continued Agency needs and priorities.

§ 40.155 Availability of information.

(a) The availability to the public of information provided to, or otherwise obtained by, the Administrator under this part shall be governed by part 2 of this chapter.

(b) An assertion of entitlement to confidential treatment of part or all of the information in an application may be made using the procedure described in § 30.235(b). See also §§ 2.203 and 2.204 of this chapter.

(c) All information and data contained in the grant application will be subject to external review unless deviation is approved for good cause pursuant to 40 CFR 30.1000.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975; 41 FR 36918, Sept. 1, 1976]

§ 40.160 Reports.

§ 40.160–1 Progress reports.

The grant agreement will normally require the submission of a brief progress report after the end of each quarter of the budget period. A monthly progress report may be required for some demonstration projects, if set forth in the grant agreement. Progress reports should fully describe in chart or narrative format the progress achieved in relation to the approved schedule and project milestones. Special problems or delays encountered must be explained. A summary progress report covering all work on the project to date is required to be included with applications for continuation grants (see § 40.165b). This report may be submitted one quarter prior to the end of the budget period.

§ 40.160–2 Financial status report.

A financial status report must be prepared and submitted within 90 days after completion of the budget and project periods in accordance with §.30.635–3.

[42 FR 56057, Oct. 20, 1977]

§ 40.160–3 Reporting of inventions.

As provided in Appendix B of 40 CFR part 30, immediate and full reporting of all inventions to the Environmental Protection Agency is required. In addition:

(a) An annual invention statement is required with each continuation application.

(b) A final invention report is required within 90 days after completion of the project period.

(c) When a principal investigator changes institutions or ceases to direct a project, an invention statement must be promptly submitted with a listing of all inventions during his administration of the grant.

[38 FR 12784, May 15, 1973, as amended at 40 FR 20083, May 8, 1975]

§ 40.160–4 Equipment report.

At the completion or termination of a project, the grantee will submit a listing of all items of equipment acquired with grant funds with an acquisition cost of $300 or more and having a useful life of more than 1 year.

§ 40.160–5 Final report.

The grantee shall submit a draft of the final report for review no later than 90 days prior to the end of the approved project period. The report shall document project activities over the entire period of grant support and shall describe the grantee's achievements with respect to stated project purposes and objectives. The report shall set forth in complete detail all technical aspects of the projects, both negative and positive, grantee's findings, conclusions, and results, including, as applicable, an evaluation of the technical effectiveness and economic feasibility of the methods or techniques investigated or demonstrated. The final report shall include EPA comment when required by the grants officer. Prior to the end of the project period, one reproducible copy suitable for printing and such other copies as may be stipulated in the grant agreement shall be transmitted to the grants officer.

§ 40.165 Continuation grants.

To be eligible for a continuation grant within the approved project period, the grantee must:

(a) Have demonstrated satisfactory performance during all previous budget periods; and

(b) Submit no later than 90 days prior to the end of the budget period a continuation application which includes a detailed summary progress report, an estimated financial statement for the current budget period, a budget for the new budget period; and an updated work plan revised to account for actual progress accomplished during the current budget period.

PART 45—TRAINING ASSISTANCE

Sec.

45.100 Purpose and scope.
45.105 Authority.
45.110 Objectives.
45.115 Definitions.
45.120 Applicant eligibility.
45.125 Application requirements.
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APPENDIX A—ENVIRONMENTAL PROTECTION AGENCY TRAINING PROGRAMS

AUTHORITY: Sec. 103 of the Clean Air Act, as amended (42 U.S.C. 7403), secs. 104(g), 109, and 111 of the Clean Water Act, as amended (33 U.S.C. 1254(g), 1259, and 1261), secs. 7007 and 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6977 and 6981); sec. 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j–1).

SOURCE: 49 FR 41004, Oct. 18, 1984, unless otherwise noted.

§ 45.100 Purpose and scope.

This part establishes the policies and procedures for the award of training assistance by the Environmental Protection Agency (EPA). The provisions of this part supplement EPA's "General Regulation for Assistance Programs," 40 CFR part 30.

§ 45.105 Authority.

The EPA is authorized to award training assistance under the following statutes:

(a) Section 103 of the Clean Air Act, as amended (42 U.S.C. 7403);

(b) Sections 104(g), 109, and 111 of the Clean Water Act, as amended (33 U.S.C. 1254(g), 1259, and 1261);

(c) Sections 7007 and 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6977 and 6981);

(d) Section 1442 of the Safe Drinking Water Act, as amended (42 U.S.C. 300j-1).

§ 45.110 Objectives.

Assistance agreements are awarded under this part to support students through traineeships for occupational and professional training, and to develop career-oriented personnel qualified to work in occupations involving environmental protection and pollution abatement and control. Training assistance is available to:

(a) Assist in developing, expanding, planning, implementing, and improving environmental training;

(b) Increase the number of trained pollution control and abatement personnel;

(c) Upgrade the level of occupational and professional training among State and local environmental control personnel;

(d) Train people to train others in occupations involving pollution abatement and control; and

(e) Bring new people into the environmental control field.

§ 45.115 Definitions.

The following definitions supplement the definitions in 40 CFR 30.200.

Stipend. Supplemental financial assistance, other than tuition and fees, paid directly to the trainee by the recipient organization.

Trainee. A student selected by the recipient organization who receives support to meet the objectives in § 45.110.

§ 45.120 Applicant eligibility.

Institutions, organizations, and individuals are eligible for EPA training awards as follows:

(a) *Clean Air Act.* Section 103(b)—Air pollution control agencies, public and nonprofit private agencies, institutions, organizations, and individuals. No award may be made under this Act to any private, profitmaking organization.

(b) *Clean Water Act.* (1) Section 104(b)(3)—State water pollution control agencies, interstate agencies, other public or nonprofit private agencies, institutions, organizations, and individuals. No award may be made to any private, profitmaking organization.

(2) Section 104(g)(3)(A)—Public or private agencies and institutions, and individuals.

(3) Sections 104(g)(1) and 104(g)(3)(C)—State and interstate agencies, municipalities, educational institutions and other organizations and individuals.

(4) Sections 109, 110, and 111—Institutions of higher education, or combinations of such institutions.

(c) *Solid Waste Disposal Act.* (1) Section 8001(a)—Public or private authorities, agencies, and institutions and individuals. No award may be made to any private, profitmaking organization.

(2) Section 7007(a)—State or interstate agencies, municipalities, educational institutions, and other organizations.

(d) *Safe Drinking Water Act.* Sections 1442(b) and 1442(d)—Public agencies, educational institutions, and other organizations. No awards may be made to profitmaking agencies or institutions.

§ 45.125 Application requirements.

Applicants must submit their requests for assistance on EPA Form 5700-12, "Application for Federal Assistance." Applicants must submit the original and two copies of the application to EPA. If the assistance agreement is to be awarded by EPA Headquarters, the applicant must send the application to the Environmental Protection Agency, Grants Administration Division, Grants Operation Branch (PM-216), 401 M Street SW., Washington, DC 20460. If the assistance agreement is to be awarded by an EPA Re-

gional Office, the applicant must send the application to the appropriate Regional Office.

(Approved by the Office of Management and Budget under control number 2010-0004)

§ 45.130 Evaluation of applications.

(a) Consistent with 40 CFR 30.301, the appropriate EPA program office staff will review training applications in accordance with the following criteria:

(1) Relevance of proposal to Agency objectives, priorities, achievement of national goals and technical merit;

(2) Competency of the proposed staff in relation to the type of project proposed;

(3) Feasibility of the proposal;

(4) Adequacy of the applicant's resources available for the project;

(5) Amount of funds necessary for the completion of the project;

(b) In addition, awards under section 104(g)(1) of the Clean Water Act, are subject to the following criteria:

(1) Assessment of need for training in a State or municipality based on problems with existing wastewater treatment plants, such as violation of discharge permit conditions, and faulty or improper operation or maintenance.

(2) Need for operating training based on the number of wastewater treatment construction grants in the State.

§ 45.135 Supplemental conditions.

Training awards are subject to the following conditions:

(a) Trainees must be citizens of the United States, its territories, or possessions, or lawfully admitted to the United States for permanent residence.

(b) Recipients shall not require the performance of personal services by individuals receiving training as a condition for assistance.

(c) Trainees are entitled to the normal student holidays observed by an academic institution, or the holiday and vacation schedule applicable to all trainees at a nonacademic institution.

(d) Training awards may include a provision to pay stipends to trainees. Stipends must be paid under section 111 of the Clean Water Act consistent with prevailing practices under comparable federally supported programs.

(e) Training awards under section 111 of the Clean Water Act are subject to the following conditions:

(1) Recipients must obtain the following agreement in writing from persons awarded scholarships for undergraduate study of the operation and maintenance of treatment works:

I agree to enter and remain in an occupation involving the design, operation, or maintenance of wastewater treatment works for a period of two years after the satisfactory completion of my studies under this program. I understand that if I fail to perform this obligation I may be required to repay the amount of my scholarship.

(2) Recipients must take such action as may be reasonably required to enforce the condition in paragraph (e)(1) of this section. Recipients shall credit or pay EPA for any repayments.

§ 45.140 Budget and project period.

The budget and project periods for training awards may not exceed three years.

§ 45.145 Allocability and allowability of costs.

(a) Allocability and allowability of costs will be determined in accordance with 40 CFR 30.410.

(b) Costs incurred for the purchase of land or the construction of buildings are not allowable.

§ 45.150 Reports.

(a) Recipients must submit the reports required in 40 CFR 30.505.

(b) A draft of the final project report is required 90 days before the end of the project period. The recipient shall prepare the final projects report in accordance with the project officer's instructions, and submit the final project report within 30 days after the end of the project period.

§ 45.155 Continuation assistance.

To be eligible for continuation assistance, the recipient must:

(a) Demonstrate satisfactory performance during all previous budget periods;

(b) Include in the application a detailed progress report showing the

progress achieved and explain special problems or delays, a budget for the new budget period, and a detailed work plan for the new budget period; and

(c) Submit a preliminary financial statement for the current budget period that includes estimates of the amount the recipient expects to spend by the end of the current budget period and the amount of any uncommitted funds which the recipient proposes to carry over beyond the term of the current budget period.

APPENDIX A—ENVIRONMENTAL PROTECTION AGENCY TRAINING PROGRAMS

	Administering office	
	Headquarters	Regional
Office of Air, Noise, and Radiation:		
Air Pollution Control Manpower Training Grants.	X	
Air Pollution Control—Technical Training.	X	
Office of Water:		
Water Pollution Control—Professional Training Grants.	X	X.
Safe Drinking Water Professional Training Grants.	X	
Safe Drinking Water—Occupational Training.	X	
Office of Solid Waste and Emergency Response: Hazardous Waste Training.	X	

PART 46—FELLOWSHIPS

Sec.

46.100 Purpose.
46.105 Authority.
46.110 Objectives.
46.115 Types of fellowships.
46.120 Definitions.
46.125 Benefits.
46.130 Eligibility.
46.135 Submission of applications.
46.140 Evaluation of applications.
46.145 Fellowship agreement.
46.150 Fellowship agreement amendment.
46.155 Supplemental conditions.
46.160 Acceptance of fellowship award.
46.165 Duration of fellowship.
46.170 Initiation of studies.
46.175 Completion of studies.
46.180 Payment.

APPENDIX A—ENVIRONMENTAL PROTECTION AGENCY FELLOWSHIP PROGRAMS

AUTHORITY: Sec. 103(b)(5) of the Clean Air Act as amended, (42 U.S.C. 7403(b)(5)); secs. 104(b)(5) and (g)(3)(B) of the Clean Water Act, as amended (33 U.S.C. 1254(b)(5) and (g)(3)(B)); sec. 1442(d)(2) of the Safe Drinking Water Act, as amended, (42 U.S.C. 300j-1(d)(2)); and sec. 8001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6981).

SOURCE: 49 FR 41006, Oct. 18, 1984, unless otherwise noted.

§ 46.100 Purpose.

This part establishes the policies and procedures for all Environmental Protection Agency (EPA) fellowships and supplements the requirements in 40 CFR part 30, "General Regulation for Assistance Programs."

§ 46.105 Authority.

The EPA is authorized to award fellowships under the following statutes:

(a) Section 103(b)(5) of the Clean Air Act as amended (42 U.S.C. 7403(b)(5));

(b) Section 104(b)(5) and (g)(3)(B) of the Clean Air Act, as amended (33 U.S.C. 1254(b)(5) and (g)(3)(B);

(c) Section 1442(d)(2) of the Safe Drinking Water Act, as amended (42 U.S.C. 300j-1(d)(2); and

(d) Section 8001 of the Solid Waste Disposal Act as amended (42 U.S.C. 6981).

§ 46.110 Objectives.

Fellowships awarded under this part are intended to enhance the capability of State or local agencies responsibile for environmental pollution control or other agencies with similar pollution control responsibilities; provide educational renewal opportunities for their career oriented personnel to achieve additional knowledge through academic professional training; and to bring new people into the environmental control field.

§ 46.115 Types of fellowships.

(a) *Local agency fellowships* are awarded to current or prospective employees of a local environmental pollution control or regulatory agency for academic professional training in pollution control science, engineering, and technology and in specialty areas supportive of pollution abatement and control efforts.

(b) *State agency fellowships* are awarded to current or prospective employees of a State environmental pollution control or regulatory agency to provide academic professional training in the areas of pollution abatement and control.

(c) *Special fellowships* are awarded to individuals for education and training in pollution control science, engineering, and technology and in specialty areas supportive of pollution abatement and control efforts.

§ 46.120 Definitions.

The following definitions supplement the definitions in 40 CFR 30.200.

Full-time fellow. An individual enrolled in an academic educational program directly related to pollution abatement and control, and taking a minumum of 30 credit hours or an academic workload otherwise defined by the institution as a full-time curriculum for a school year. The fellow need not be pursuing a degree.

Part-time fellow. An individual enrolled in an academic educational program directly related to pollution abatement an control and taking at least 6 credit hours but less than 30 credit hours per school year, or an academic workload otherwise defined by the institution as less than a full-time curriculum. The fellow need not be pursuing a degree.

Special fellow. An individual enrolled in an educational program relating to environmental sciences, engineering, professional schools, and allied sciences.

Stipend. Supplemental financial assistance other than tuition, fees, and book allowance, paid directly to the fellow.

§ 46.125 Benefits.

(a) Recipients of assistance under this part shall be entitled to tuition and fees. Recipients may receive an allowance for books and supplies up to a maximum of $750 for the school year for a full-time fellow, and are entitled to the normal student holidays observed by the academic institution.

(b) Recipients of a fellowships may receive a stipend at a level determined by the EPA program office based on EPA's needs and resources, and on the student's course load.

(c) Part-time fellows will not be paid more than the maximum amount paid to an equivalent full-time fellow under the same fellowships program.

§ 46.130 Eligibility.

(a) All applicants for fellowships under this part must be:

(1) Citizens of the United States, its territories, or possessions, or lawfully admitted to the United States for permanent residence; and

(2) Accepted by an accredited educational institutional for full-time or part-time enrollment for academic credit in an educational program directly related to pollution abatement and control.

(b) Applicants for State or local agency fellowships must be current or prospective employees of a State or local agency with responsibilities for environmental pollution control, and must be recommended by the administrator, or designee, of the State or local agency. The administrator, or designee, will recommend applicants based on the State or local need for academic professional training which will enhance the capability of the State or local agency.

§ 46.135 Submission of applications.

(a) Applicants must submit their requests for assistance on EPA Form 5770–2, "Fellowship Application." Applicants must submit the original and two copies of the application and undergraduate or graduate transcripts, as appropriate, to the Grants Administration Division, Grants Operation Branch (PM–216), Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460.

(b) The applicant must submit documentation to show compliance with the eligibility requirements in § 46.130, and any additional information required by the award official. Instructions for filing are contained in the application kit.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 2010–0004)

§ 46.140 Evaluation of applications.

(a) EPA will evaluate fellowship applications based upon:

(1) Their relevance to EPA's program needs;

(2) The availability of funds;

(3) EPA's priorities;

(4) Appropriateness of the fellow's proposed course of study; and

(5) Evaluation of, the applicant in terms of potential for study, as evidenced by academic record, letters of reference, training plans; and any other available information.

§ 46.145 Fellowship agreement.

(a) The fellowship agreement is the written agreement, including amendments, between EPA and a fellow. The agreement, EPA Form 5770–8, "Fellowship Agreement," will state the terms and conditions governing the fellowship.

(b) EPA will not participate in costs incurred by the fellow before both the award official and the fellow sign the agreement.

(c) The fellow must use the funds for the purposes stated in the fellowship agreement. If the fellow fails to comply with the terms and conditions of the award, the award official may apply the sanctions in 40 CFR part 30, subpart I.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 2010–0004)

§ 46.150 Fellowship agreement amendment.

(a) The fellow must receive a formal amendment before implementing:

(1) Changes in the objective of the agreement;

(2) Changes in the assistance amount;

(3) Substantial changes within the scope of the agreement; or

(4) Changes in the project period.

(b) Fellows must submit a completed EPA Form 5770–6, "Fellowship Amendment" when requesting an amendment to the fellowship agreement.

(c) Minor changes in the agreement that are consistent with the objective of the agreement and within the scope of the agreement do not require a formal amendment before the fellow implements the change. However, such changes do not obligate EPA to provide Federal funds for any costs incurred by the fellow in excess of the assistance amount unless the award official approves the change in advance under § 46.150(a). The fellow must inform the EPA project officer in writing before implementing minor changes.

(The information collection requirements contained in paragraph (b) were approved by the Office of Management and Budget under control number 2010–0004)

§ 46.155 Supplemental conditions.

Recipients of a State or local fellowship receiving financial assistance under section 1442(d)(2) of the Safe Drinking Water Act, as amended; sections 104(b)(5) and (g)(3)(B) of the Clean Water Act as amended; and section 8001 of the Solid Waste Disposal Act must agree to remain in the employment of the State or local agency that recommended the recipient for an EPA fellowship for twice the period of the fellowship. If the recipient fails to perform this obligation the recipient may be required to repay the amount of the EPA fellowship.

§ 46.160 Acceptance of fellowship award.

The applicant accepts the fellowship by signing and returning the fellowship agreement to the EPA award official within three weeks after receipt, or within any extension of such time that may be permitted by the EPA award official. If the applicant does not sign and return the agreement to the award official or request an extension of the acceptance time within three calendar weeks after receiving the agreement, the offer is null and void.

§ 46.165 Duration of fellowship.

(a) Full-time fellowships will not exceed one year.

(b) Part-time fellowships will not exceed three years.

§ 46.170 Initiation of studies.

(a) The fellow must submit EPA 5770–7 "Fellowship Activation Notice"

when they start their course of studies.

(b) If the EPA Grants Administration Division has not received the signed Fellowship Activation Notice within six months following the date of the award, EPA may terminate the fellowship.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 2010-0004)

§ 46.175 Completion of studies.

Fellows must submit EPA Form 5770-9 "EPA Fellowship Termination Notice," when the fellow completes the course of study.

(Approved by the Office of Management and Budget under control number 2010-0004)

§ 46.180 Payment.

(a) EPA will pay stipends directly to the fellow on a monthly basis or any other basis approved by the Project Officer, only after EPA has received the signed EPA Form 5770-7, "Fellowship Activation Notice."

(b) EPA will pay the book allowance directly to the fellow only after EPA receives the signed EPA Form 5770-7.

(c) EPA will pay tuition and fees in a lump payment directly to the sponsoring institution only after EPA has received the signed EPA Form 5770-7.

(The information collection requirements contained in paragraph (a) were approved by the Office of Management and Budget under control number 2010-0004)

APPENDIX A—ENVIRONMENTAL PROTECTION AGENCY FELLOWSHIP PROGRAMS

	Administering office	
	Headquarters	Regional
Office of Air, Noise, and Radiation: Air Pollution Control Fellowships.	X	
Office of Water:		
Water Pollution Control Fellowships.	X	
Safe Drinking Water Fellowships.	X	
Office of Research and Development: Interdisciplinary Fellowships.	X	
Office of Solid Waste and Emergency Response: Hazardous Waste Fellowships.	X	

SUBCHAPTER C—AIR PROGRAMS

PART 50—NATIONAL PRIMARY AND SECONDARY AMBIENT AIR QUALITY STANDARDS

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50.1 Definitions.
50.2 Scope.
50.3 Reference conditions.
50.4 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).
50.5 National secondary ambient air quality standards for sulfur oxides (sulfur dioxide).
50.6 National primary and secondary ambient air quality standards for particulate matter.
50.7 [Reserved]
50.8 National primary ambient air quality standards for carbon monoxide.
50.9 National primary and secondary ambient air quality standards for ozone.
50.10 [Reserved]
50.11 National primary and secondary ambient air quality standard for nitrogen dioxide.
50.12 National primary and secondary ambient air quality standards for lead.

APPENDICES TO PART 50

APPENDIX A—REFERENCE METHOD FOR THE DETERMINATION OF SULFUR DIOXIDE IN THE ATMOSPHERE (PARAROSANILINE METHOD)
APPENDIX B—REFERENCE METHOD FOR THE DETERMINATION OF SUSPENDED PARTICULATE MATTER IN THE ATMOSPHERE (HIGH-VOLUME METHOD)
APPENDIX C—MEASUREMENT PRINCIPLE AND CALIBRATION PROCEDURE FOR THE MEASUREMENT OF CARBON MONOXIDE IN THE ATMOSPHERE (NON-DISPERSIVE INFRARED PHOTOMETRY)
APPENDIX D—MEASUREMENT PRINCIPLE AND CALIBRATION PROCEDURE FOR THE MEASUREMENT OF OZONE IN THE ATMOSPHERE
APPENDIX E—REFERENCE METHOD FOR DETERMINATION OF HYDROCARBONS CORRECTED FOR METHANE
APPENDIX F—MEASUREMENT PRINCIPLE AND CALIBRATION PROCEDURE FOR THE MEASUREMENT OF NITROGEN DIOXIDE IN THE ATMOSPHERE (GAS PHASE CHEMILUMINESCENCE)
APPENDIX G—REFERENCE METHOD FOR THE DETERMINATION OF LEAD IN SUSPENDED PARTICULATE MATTER COLLECTED FROM AMBIENT AIR
APPENDIX H—INTERPRETATION OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR OZONE
APPENDIX I—[RESERVED]
APPENDIX J—REFERENCE METHOD FOR THE DETERMINATION OF PARTICULATE MATTER AS PM_{10} IN THE ATMOSPHERE
APPENDIX K—INTERPRETATION OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER

AUTHORITY: Secs. 109 and 301(a), Clean Air Act, as amended (42 U.S.C. 7409, 7601(a)).

SOURCE: 36 FR 22384, Nov. 25, 1971, unless otherwise noted.

§ 50.1 Definitions.

(a) As used in this part, all terms not defined herein shall have the meaning given them by the Act.

(b) *Act* means the Clean Air Act, as amended (42 U.S.C. 1857-18571, as amended by Pub. L. 91-604).

(c) *Agency* means the Environmental Protection Agency.

(d) *Administrator* means the Administrator of the Environmental Protection Agency.

(e) *Ambient air* means that portion of the atmosphere, external to buildings, to which the general public has access.

(f) *Reference method* means a method of sampling and analyzing the ambient air for an air pollutant that is specified as a reference method in an appendix to this part, or a method that has been designated as a reference method in accordance with part 53 of this chapter; it does not include a method for which a reference method designation has been cancelled in accordance with § 53.11 or § 53.16 of this chapter.

(g) *Equivalent method* means a method of sampling and analyzing the ambient air for an air pollutant that has been designated as an equivalent method in accordance with part 53 of this chapter; it does not include a method for which an equivalent method designation has been cancelled in accordance with § 53.11 or § 53.16 of this chapter.

(h) *Traceable* means that a local standard has been compared and certified either directly or via not more than one intermediate standard, to a primary standard such as a National

Bureau of Standards Standard Reference Material (NBS SRM), or a USEPA/NBS-approved Certified Reference Material (CRM).

[36 FR 22384, Nov. 25, 1971, as amended at 41 FR 11253, Mar. 17, 1976; 48 FR 2529, Jan. 20, 1983]

§ 50.2 Scope.

(a) National primary and secondary ambient air quality standards under section 109 of the Act are set forth in this part.

(b) National primary ambient air quality standards define levels of air quality which the Administrator judges are necessary, with an adequate margin of safety, to protect the public health. National secondary ambient air quality standards define levels of air quality which the Administrator judges necessary to protect the public welfare from any known or anticipated adverse effects of a pollutant. Such standards are subject to revision, and additional primary and secondary standards may be promulgated as the Administrator deems necessary to protect the public health and welfare.

(c) The promulgation of national primary and secondary ambient air quality standards shall not be considered in any manner to allow significant deterioration of existing air quality in any portion of any State.

(d) The proposal, promulgation, or revision of national primary and secondary ambient air quality standards shall not prohibit any State from establishing ambient air quality standards for that State or any portion thereof which are more stringent than the national standards.

§ 50.3 Reference conditions.

All measurements of air quality are corrected to a reference temperature of 25° C. and to a reference pressure of 760 millimeters of mercury (1,013.2 millibars).

§ 50.4 National primary ambient air quality standards for sulfur oxides (sulfur dioxide).

The national primary ambient air quality standards for sulfur oxides measured as sulfur dioxide by the reference method described in Appendix A to this part, or by an equivalent method, are:

(a) 80 micrograms per cubic meter (0.03 p.p.m.)—annual arithmetic mean.

(b) 365 micrograms per cubic meter (0.14 p.p.m.)—Maximum 24-hour concentration not to be exceeded more than once per year.

§ 50.5 National secondary ambient air quality standards for sulfur oxides (sulfur dioxide).

The national secondary ambient air quality standard for sulfur oxide measured as sulfur dioxide by the reference method described in Appendix A to this part, or by any equivalent method is 1,300 micrograms per cubic meter (0.5 p.p.m.) maximum 3-hour concentration not to be exceeded more than once per year.

[38 FR 25681, Sept. 14, 1973]

§ 50.6 National primary and secondary ambient air quality standards for particulate matter.

(a) The level of the national primary and secondary 24-hour ambient air quality standards for particulate matter is 150 micrograms per cubic meter ($\mu g/m^3$), 24-hour average concentration. The standards are attained when the expected number of days per calendar year with a 24-hour average concentration above 150 $\mu g/m^3$, as determined in accordance with Appendix K to this part, is equal to or less than one.

(b) The level of the national primary and secondary annual standards for particulate matter is 50 micrograms per cubic meter ($\mu g/m^3$), annual arithmetic mean. The standards are attained when the expected annual arithmetic mean concentration, as determined in accordance with Appendix K to this part, is less than or equal to 50 $\mu g/m^3$.

(c) For the purpose of determining attainment of the primary and secondary standards, particulate matter shall be measured in the ambient air as PM_{10} (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by:

(1) A reference method based on Appendix J and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

[52 FR 24663, July 1, 1987]

§ 50.7 [Reserved]

§ 50.8 National primary ambient air quality standards for carbon monoxide.

(a) The national primary ambient air quality standards for carbon monoxide are:

(1) 9 parts per million (10 milligrams per cubic meter) for an 8-hour average concentration not to be exceeded more than once per year and

(2) 35 parts per million (40 milligrams per cubic meter) for a 1-hour average concentration not to be exceeded more than once per year.

(b) The levels of carbon monoxide in the ambient air shall be measured by:

(1) A reference method based on Appendix C and designated in accordance with part 53 of this chapter, or

(2) An equivalent method designated in accordance with part 53 of this chapter.

(c) An 8-hour average shall be considered valid if at least 75 percent of the hourly average for the 8-hour period are available. In the event that only six (or seven) hourly averages are available, the 8-hour average shall be computed on the basis of the hours available using six (or seven) as the divisor.

(d) When summarizing data for comparision with the standards, averages shall be stated to one decimal place. Comparison of the data with the levels of the standards in parts per million shall be made in terms of integers with fractional parts of 0.5 or greater rounding up.

[50 FR 37501, Sept. 13, 1985]

§ 50.9 National primary and secondary ambient air quality standards for ozone.

(a) The level of the national primary and secondary ambient air quality standards for ozone measured by a reference method based on Appendix D to this part and designated in accordance with part 53 of this chapter, is 0.12 part per million (235 $\mu g/m^3$). The standard is attained when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 part per million (235 $\mu g/m^3$) is equal to or less than 1, as determined by Appendix H.

(Secs. 109 and 301 of the Clean Air Act, as amended (42 U.S.C. 7409, 7601))

[44 FR 8220, Feb. 8, 1979]

§ 50.10 [Reserved]

§ 50.11 National primary and secondary ambient air quality standards for nitrogen dioxide.

(a) The level of the national primary ambient air quality standard for nitrogen dioxide is 0.053 parts per million (100 micrograms per cubic meter), annual arithmetic mean concentration.

(b) The level of national secondary ambient air quality standard for nitrogen dioxide is 0.053 parts per million (100 micrograms per cubic meter), annual arithmetic mean concentration.

(c) The levels of the standards shall be measured by:

(1) A reference method based on Appendix F and designated in accordance with part 53 of this Chapter, or

(2) An equivalent method designated in accordance with part 53 of this Chapter.

(d) The standards are attained when the annual arithmetic mean concentration in a calendar year is less than or equal to 0.053 ppm, rounded to three decimal places (fractional parts equal to or greater than 0.0005 ppm must be rounded up). To demonstrate attainment, an annual mean must be based upon hourly data that are at least 75 percent complete or upon data derived from manual methods that are at least 75 percent complete for the scheduled sampling days in each calendar quarter.

[50 FR 25544, June 19, 1985]

§ 50.12 National primary and secondary ambient air quality standards for lead.

National primary and secondary ambient air quality standards for lead and its compounds, measured as elemental lead by a reference method based on Appendix G to this part, or by an equivalent method, are: 1.5 mi-

crograms per cubic meter, maximum arithmetic mean averaged over a calendar quarter.

(Secs. 109, 301(a) Clean Air Act as amended (42 U.S.C. 7409, 7601(a)))

[43 FR 46258, Oct. 5, 1978]

Appendix A—Reference Method for the Determination of Sulfur Dioxide in the Atmosphere (Pararosaniline Method)

1.0 *Applicability.*

1.1 This method provides a measurement of the concentration of sulfur dioxide (SO_2) in ambient air for determining compliance with the primary and secondary national ambient air quality standards for sulfur oxides (sulfur dioxide) as specified in § 50.4 and § 50.5 of this chapter. The method is applicable to the measurement of ambient SO_2 concentrations using sampling periods ranging from 30 minutes to 24 hours. Additional quality assurance procedures and guidance are provided in part 58, Appendixes A and B, of this chapter and in references 1 and 2.

2.0 *Principle.*

2.1 A measured volume of air is bubbled through a solution of 0.04 M potassium tetrachloromercurate (TCM). The SO_2 present in the air stream reacts with the TCM solution to form a stable monochlorosulfonatomercurate(*3*) complex. Once formed, this complex resists air oxidation(*4, 5*) and is stable in the presence of strong oxidants such as ozone and oxides of nitrogen. During subsequent analysis, the complex is reacted with acid-bleached pararosaniline dye and formaldehyde to form an intensely colored pararosaniline methyl sulfonic acid.(*6*) The optical density of this species is determined spectrophotometrically at 548 nm and is directly related to the amount of SO_2 collected. The total volume of air sampled, corrected to EPA reference conditions (25° C, 760 mm Hg [101 kPa]), is determined from the measured flow rate and the sampling time. The concentration of SO_2 in the ambient air is computed and expressed in micrograms per standard cubic meter (μg/std m^3).

3.0 *Range.*

3.1 The lower limit of detection of SO_2 in 10 mL of TCM is 0.75 μg (based on collaborative test results).(*7*) This represents a concentration of 25 μg SO_2/m^3 (0.01 ppm) in an air sample of 30 standard liters (short-term sampling) and a concentration of 13 μg SO_2/m^3 (0.005 ppm) in an air sample of 288 standard liters (long-term sampling). Concentrations less than 25 μg SO_2/m^3 can be measured by sampling larger volumes of ambient air; however, the collection efficiency falls off rapidly at low concentrations.(*8, 9*) Beer's law is adhered to up to 34 μg of SO_2 in 25 mL of final solution. This upper limit of the analysis range represents a concentration of 1,130 μg SO_2/m^3 (0.43 ppm) in an air sample of 30 standard liters and a concentration of 590 μg SO_2/m^3 (0.23 ppm) in an air sample of 288 standard liters. Higher concentrations can be measured by collecting a smaller volume of air, by increasing the volume of absorbing solution, or by diluting a suitable portion of the collected sample with absorbing solution prior to analysis.

4.0 *Interferences.*

4.1 The effects of the principal potential interferences have been minimized or eliminated in the following manner: Nitrogen oxides by the addition of sulfamic acid,(*10, 11*) heavy metals by the addition of ethylenediamine tetracetic acid disodium salt (EDTA) and phosphoric acid,(*10, 12*) and ozone by time delay.(*10*) Up to 60 μg Fe (III), 22 μg V (V), 10 μg Cu (II), 10 μg Mn (II), and 10 μg Cr (III) in 10 mL absorbing reagent can be tolerated in the procedure.(*10*) No significant interference has been encountered with 2.3 μg NH_3.(*13*)

5.0 *Precision and Accuracy.*

5.1 The precision of the analysis is 4.6 percent (at the 95 percent confidence level) based on the analysis of standard sulfite samples.(*10*)

5.2 Collaborative test results (*14*) based on the analysis of synthetic test atmospheres (SO_2 in scrubbed air) using the 24-hour sampling procedure and the sulfite-TCM calibration procedure show that:

- The replication error varies linearly with concentration from ±2.5 $\mu g/m^3$ at concentrations of 100 $\mu g/m^3$ to ±7 $\mu g/m^3$ at concentrations of 400 $\mu g/m^3$.
- The day-to-day variability within an individual laboratory (repeatability) varies linearly with concentration from ±18.1 $\mu g/m^3$ at levels of 100 $\mu g/m^3$ to ±50.9 $\mu g/m^3$ at levels of 400 $\mu g/m^3$.
- The day-to-day variability between two or more laboratories (reproducibility) varies linearly with concentration from ±36.9 $\mu g/m^3$ at levels of 100 $\mu g/m^3$ to ±103.5 $\mu g/m^3$ at levels of 400 $\mu g/m^3$.
- The method has a concentration-dependent bias, which becomes significant at the 95 percent confidence level at the high concentration level. Observed values tend to be lower than the expected SO_2 concentration level.

6.0 *Stability.*

6.1 By sampling in a controlled temperature environment of 15°±10° C, greater than 98.9 percent of the SO_2–TCM complex is retained at the completion of sampling. (*15*) If kept at 5° C following the completion of sampling, the collected sample has been found to be stable for up to 30 days.(*10*) The

presence of EDTA enhances the stability of SO_2 in the TCM solution and the rate of decay is independent of the concentration of SO_2.(*16*)

7.0 *Apparatus.*

7.1 *Sampling.*

7.1.1 *Sample probe:* A sample probe meeting the requirements of Section 7 of 40 CFR part 58, Appendix E (Teflon® or glass with residence time less than 20 sec.) is used to transport ambient air to the sampling train location. The end of the probe should be designed or oriented to preclude the sampling of precipitation, large particles, etc. A suitable probe can be constructed from Teflon® tubing connected to an inverted funnel.

7.1.2 *Absorber—short-term sampling:* An all glass midget impinger having a solution capacity of 30 mL and a stem clearance of 4±1 mm from the bottom of the vessel is used for sampling periods of 30 minutes and 1 hour (or any period considerably less than 24 hours). Such an impinger is shown in Figure 1. These impingers are commercially available from distributors such as Ace Glass, Incorporated.

7.1.3 *Absorber—24-hour sampling:* A polypropylene tube 32 mm in diameter and 164 mm long (available from Bel Art Products, Pequammock, NJ) is used as the absorber. The cap of the absorber must be a polypropylene cap with two ports (rubber stoppers are unacceptable because the absorbing reagent can react with the stopper to yield erroneously high SO_2 concentrations). A glass impinger stem, 6 mm in diameter and 158 mm long, is inserted into one port of the absorber cap. The tip of the stem is tapered to a small diameter orifice (0.4±0.1 mm) such that a No. 79 jeweler's drill bit will pass through the opening but a No. 78 drill bit will not. Clearance from the bottom of the absorber to the tip of the stem must be 6±2 mm. Glass stems can be fabricated by any reputable glass blower or can be obtained from a scientific supply firm. Upon receipt, the orifice test should be performed to verify the orifice size. The 50 mL volume level should be permanently marked on the absorber. The assembled absorber is shown in Figure 2.

7.1.4 *Moisture trap:* A moisture trap constructed of a glass trap as shown in Figure 1 or a polypropylene tube as shown in Figure 2 is placed between the absorber tube and flow control device to prevent entrained liquid from reaching the flow control device. The tube is packed with indicating silica gel as shown in Figure 2. Glass wool may be substituted for silica gel when collecting short-term samples (1 hour or less) as shown in Figure 1, or for long term (24 hour) samples if flow changes are not routinely encountered.

7.1.5 *Cap seals:* The absorber and moisture trap caps must seal securely to prevent leaks during use. Heat-shrink material as shown in Figure 2 can be used to retain the cap seals if there is any chance of the caps coming loose during sampling, shipment, or storage.

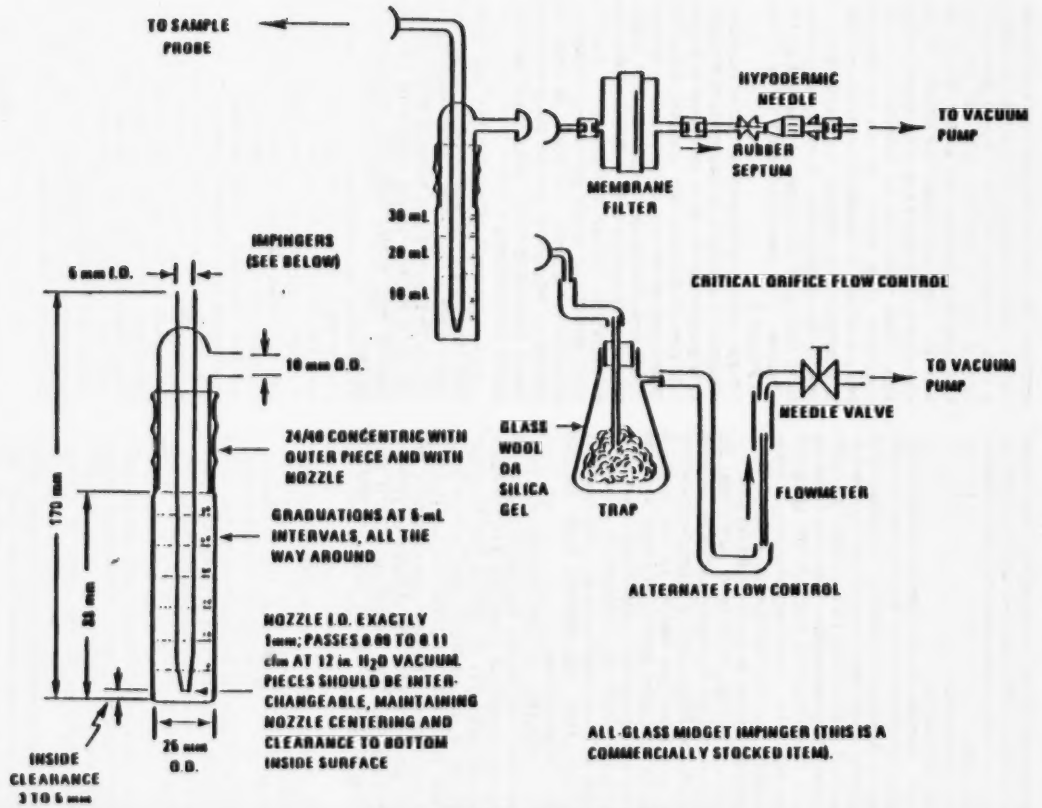
TO SAMPLE PROBE
HYPODERMIC NEEDLE
TO VACUUM PUMP
RUBBER SEPTUM
MEMBRANE FILTER
30 mL
20 mL
10 mL
IMPINGERS (SEE BELOW)
6 mm I.D.
CRITICAL ORIFICE FLOW CONTROL
10 mm O.D.
TO VACUUM PUMP
NEEDLE VALVE
24/40 CONCENTRIC WITH OUTER PIECE AND WITH NOZZLE
GLASS WOOL OR SILICA GEL
TRAP
FLOWMETER
GRADUATIONS AT 5-mL INTERVALS, ALL THE WAY AROUND
170 mm
25 mm
ALTERNATE FLOW CONTROL
NOZZLE I.D. EXACTLY 1mm; PASSES 0.09 TO 0.11 cfm AT 12 in. H_2O VACUUM. PIECES SHOULD BE INTERCHANGEABLE, MAINTAINING NOZZLE CENTERING AND CLEARANCE TO BOTTOM INSIDE SURFACE
ALL-GLASS MIDGET IMPINGER (THIS IS A COMMERCIALLY STOCKED ITEM).
INSIDE CLEARANCE 3 TO 5 mm
26 mm O.D.

Figure 1. Short-term sampling train.

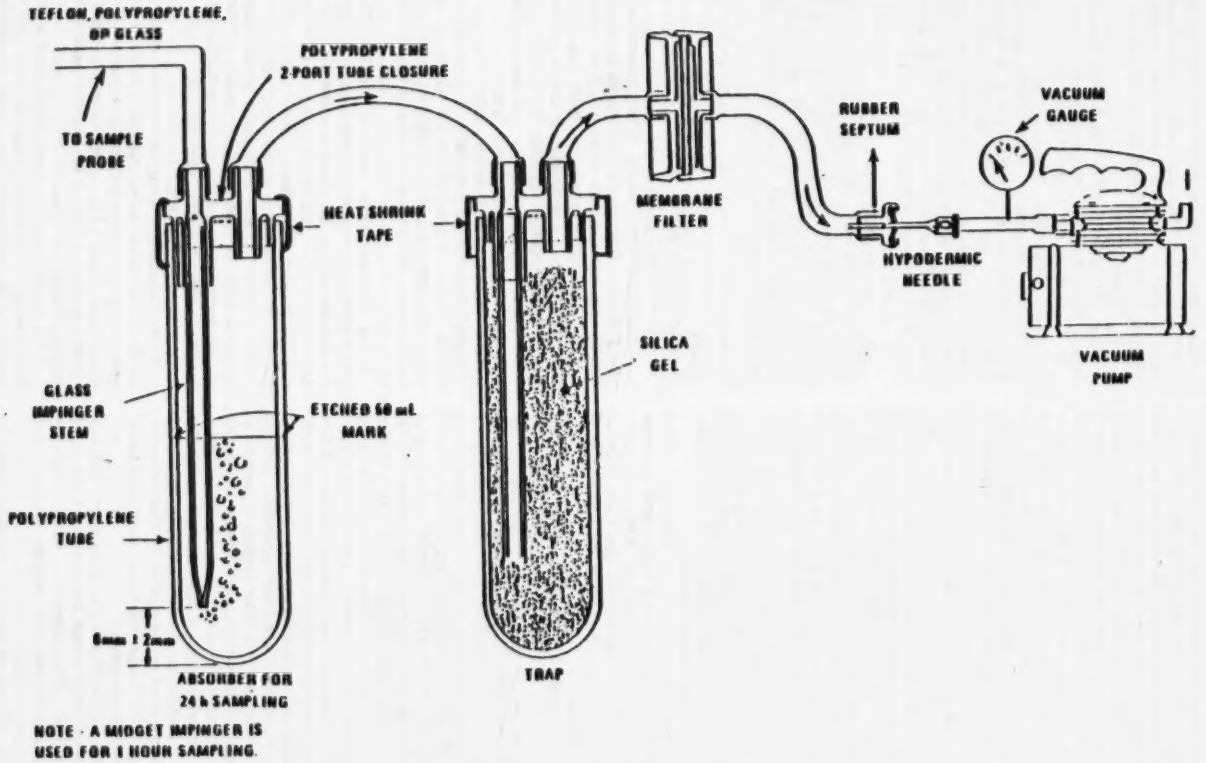

Figure 2. 24-Hour sampling system.

7.1.6 *Flow control device:* A calibrated rotameter and needle valve combination capable of maintaining and measuring air flow to within ±2 percent is suitable for short-term sampling but may not be used for long-term sampling. A critical orifice can be used for regulating flow rate for both long-term and short-term sampling. A 22-gauge hypodermic needle 25 mm long may be used as a critical orifice to yield a flow rate of approximately 1 L/min for a 30-minute sampling period. When sampling for 1 hour, a 23-gauge hypodermic needle 16 mm in length will provide a flow rate of approximately 0.5 L/min. Flow control for a 24-hour sample may be provided by a 27-gauge hypodermic needle critical orifice that is 9.5 mm in length. The flow rate should be in the range of 0.18 to 0.22 L/min.

7.1.7 *Flow measurement device:* Device calibrated as specified in 9.4.1 and used to measure sample flow rate at the monitoring site.

7.1.8 *Membrane particle filter:* A membrane filter of 0.8 to 2 μm porosity is used to protect the flow controller from particles during long-term sampling. This item is optional for short-term sampling.

7.1.9 *Vacuum pump:* A vacuum pump equipped with a vacuum gauge and capable of maintaining at least 70 kPa (0.7 atm) vacuum differential across the flow control device at the specified flow rate is required for sampling.

7.1.10 *Temperature control device:* The temperature of the absorbing solution during sampling must be maintained at 15° ±10° C. As soon as possible following sampling and until analysis, the temperature of the collected sample must be maintained at 5° ±5° C. Where an extended period of time may elapse before the collected sample can be moved to the lower storage temperature, a collection temperature near the lower limit of the 15 ± 10° C range should be used to minimize losses during this period. Thermoelectric coolers specifically designed for this temperature control are available commercially and normally operate in the range of 5° to 15° C. Small refrigerators can be modified to provide the required temperature control; however, inlet lines must be insulated from the lower temperatures to prevent condensation when sampling under humid conditions. A small heating pad may be necessary when sampling at low temperatures (<7° C) to prevent the absorbing solution from freezing.(*17*)

7.1.11 *Sampling train container:* The absorbing solution must be shielded from light during and after sampling. Most commercially available sampler trains are enclosed in a light-proof box.

7.1.12 *Timer:* A timer is recommended to initiate and to stop sampling for the 24-hour period. The timer is not a required piece of equipment; however, without the timer a technician would be required to start and stop the sampling manually. An elapsed time meter is also recommended to determine the duration of the sampling period.

7.2 *Shipping.*

7.2.1 *Shipping container:* A shipping container that can maintain a temperature of 5° ±5° C is used for transporting the sample from the collection site to the analytical laboratory. Ice coolers or refrigerated shipping containers have been found to be satisfactory. The use of eutectic cold packs instead of ice will give a more stable temperature control. Such equipment is available from Cole-Parmer Company, 7425 North Oak Park Avenue, Chicago, IL 60648.

7.3 *Analysis.*

7.3.1 *Spectrophotometer:* A spectrophotometer suitable for measurement of absorbances at 548 nm with an effective spectral bandwidth of less than 15 nm is required for analysis. If the spectrophotometer reads out in transmittance, convert to absorbance as follows:

$$A = \log_{10}(1/T) \quad (1)$$

where:
A = absorbance, and
T = transmittance ($0 < T < 1$).

A standard wavelength filter traceable to the National Bureau of Standards is used to verify the wavelength calibration according to the procedure enclosed with the filter. The wavelength calibration must be verified upon initial receipt of the instrument and after each 160 hours of normal use or every 6 months, whichever occurs first.

7.3.2 *Spectrophotometer cells:* A set of 1-cm path length cells suitable for use in the visible region is used during analysis. If the cells are unmatched, a matching correction factor must be determined according to Section 10.1.

7.3.3 *Temperature control device:* The color development step during analysis must be conducted in an environment that is in the range of 20° to 30° C and controlled to ±1° C. Both calibration and sample analysis must be performed under identical conditions (within 1° C). Adequate temperature control may be obtained by means of constant temperature baths, water baths with manual temperature control, or temperature controlled rooms.

7.3.4 *Glassware:* Class A volumetric glassware of various capacities is required for preparing and standardizing reagents and standards and for dispensing solutions during analysis. These included pipets, volumetric flasks, and burets.

7.3.5 *TCM waste receptacle:* A glass waste receptacle is required for the storage of spent TCM solution. This vessel should be stoppered and stored in a hood at all times.

8.0 *Reagents.*

8.1 *Sampling.*

8.1.1 *Distilled water:* Purity of distilled water must be verified by the following procedure:(*18*)

- Place 0.20 mL of potassium permanganate solution (0.316 g/L), 500 mL of distilled water, and 1mL of concentrated sulfuric acid in a chemically resistant glass bottle, stopper the bottle, and allow to stand.
- If the permanganate color (pink) does not disappear completely after a period of 1 hour at room temperature, the water is suitable for use.
- If the permanganate color does disappear, the water can be purified by redistilling with one crystal each of barium hydroxide and potassium permanganate in an all glass still.

8.1.2 *Absorbing reagent* (0.04 M potassium tetrachloromercurate [TCM]): Dissolve 10.86 g mercuric chloride, 0.066 g EDTA, and 6.0 g potassium chloride in distilled water and dilute to volume with distilled water in a 1,000-mL volumetric flask. (*Caution:* Mercuric chloride is highly poisonous. If spilled on skin, flush with water immediately.) The pH of this reagent should be between 3.0 and 5.0 (*10*) Check the pH of the absorbing solution by using pH indicating paper or a pH meter. If the pH of the solution is not between 3.0 and 5.0, dispose of the solution according to one of the disposal techniques described in Section 13.0. The absorbing reagent is normally stable for 6 months. If a precipitate forms, dispose of the reagent according to one of the procedures described in Section 13.0.

8.2 *Analysis.*

8.2.1 *Sulfamic acid* (0.6%): Dissolve 0.6 g sulfamic acid in 100 mL distilled water. Perpare fresh daily.

8.2.2 *Formaldehyde* (0.2%): Dilute 5 mL formaldehyde solution (36 to 38 percent) to 1,000 mL with distilled water. Prepare fresh daily.

8.2.3 *Stock iodine solution* (0.1 N): Place 12.7 g resublimed iodine in a 250-mL beaker and add 40 g potassium iodide and 25 mL water. Stir until dissolved, transfer to a 1,000 mL volumetric flask and dilute to volume with distilled water.

8.2.4 *Iodine solution* (0.01 N): Prepare approximately 0.01 N iodine solution by diluting 50 mL of stock iodine solution (Section 8.2.3) to 500 mL with distilled water.

8.2.5 *Starch indicator solution:* Triturate 0.4 g soluble starch and 0.002 g mercuric iodide (preservative) with enough distilled water to form a paste. Add the paste slowly to 200 mL of boiling distilled water and continue boiling until clear. Cool and transfer the solution to a glass stopperd bottle.

8.2.6 *1 N hydrochloric acid:* Slowly and while stirring, add 86 mL of concentrated hydrochloric acid to 500 mL of distilled water. Allow to cool and dilute to 1,000 mL with distilled water.

8.2.7 *Potassium iodate solution:* Accurately weigh to the nearest 0.1 mg, 1.5 g (record weight) of primary standard grade potassium iodate that has been previously dried at 180° C for at least 3 hours and cooled in a dessicator. Dissolve, then dilute to volume in a 500-mL volumetric flask with distilled water.

8.2.8 *Stock sodium thiosulfate solution* (0.1 N): Prepare a stock solution by dissolving 25 g sodium thiosulfate ($Na_2S_2O_3 \cdot 5H_2O$) in 1,000 mL freshly boiled, cooled, distilled water and adding 0.1 g sodium carbonate to the solution. Allow the solution to stand at least 1 day before standardizing. To standardize, accurately pipet 50 mL of potassium iodate solution (Section 8.2.7) into a 500-mL iodine flask and add 2.0 g of potassium iodide and 10 mL of 1 N [illegible] Stopper the flask and allow to stand fo. 5 minutes. Titrate the solution with stock sodium thiosulfate solution (Section 8.2.8) to a pale yellow color. Add 5 mL of starch solution (Section 8.2.5) and titrate until the blue color just disappears. Calculate the normality (N_s) of the stock sodium thiosulfate solution as follows:

$$N_s = \frac{W}{M} \times 2.80 \qquad (2)$$

where:

M = volume of thiosulfate required in mL, and

W = weight of potassium iodate in g (recorded weight in Section 8.2.7).

$$2.80 = \frac{10^3(\text{conversion of g to mg}) \times 0.1(\text{fraction iodate used})}{35.67(\text{equivalent weight of potassium iodate})}$$

8.2.9 *Working sodium thiosulfate titrant* (0.01 N): Accurately pipet 100 mL of stock sodium thiosulfate solution (Section 8.2.8) into a 1,000-mL volumetric flask and dilute to volume with freshly boiled, cooled, distilled water. Calculate the normality of the working sodium thiosulfate titrant (N_T) as follows:

$$N_T = N_s \times 0.100 \qquad (3)$$

8.2.10 *Standardized sulfite solution for the preparation of working sulfite-TCM solution:* Dissolve 0.30 g sodium metabisulfite ($Na_2S_2O_5$) or 0.40 g sodium sulfite (Na_2SO_3) in 500 mL of recently boiled, cooled, distilled water. (Sulfite solution is unstable; it is therefore important to use water of the highest purity to minimize this instability.) This solution contains the equivalent of 320 to 400 μg SO_2/mL. The actual concentration of the solution is determined by adding

excess iodine and back-titrating with standard sodium thiosulfate solution. To back-titrate, pipet 50 mL of the 0.01 N iodine solution (Section 8.2.4) into each of two 500-mL iodine flasks (A and B). To flask A (blank) add 25 mL distilled water, and to flask B (sample) pipet 25 mL sulfite solution. Stopper the flasks and allow to stand for 5 minutes. Prepare the working sulfite-TCM solution (Section 8.2.11) immediately prior to adding the iodine solution to the flasks. Using a buret containing standardized 0.01 N thiosulfate titrant (Section 8.2.9), titrate the solution in each flask to a pale yellow color. Then add 5 mL starch solution (Section 8.2.5) and continue the titration until the blue color just disappears.

8.2.11 *Working sulfite-TCM solution:* Accurately pipet 5 mL of the standard sulfite solution (Section 8.2.10) into a 250-mL volumetric flask and dilute to volume with 0.04 M TCM. Calculate the concentration of sulfur dioxide in the working solution as follows:

$$C_{TCM/SO2}(\mu g\ SO_2/mL) = \frac{(A-B)(N_T)(32{,}000)}{25} \times 0.02 \qquad (4)$$

where:

A = volume of thiosulfate titrant required for the blank, mL;
B = volume of thiosulfate titrant required for the sample, mL;
N_T = normality of the thiosulfate titrant, from equation (3);
32,000 = milliequivalent weight of SO_2, μg;
25 = volume of standard sulfite solution, mL; and
0.02 = dilution factor.

This solution is stable for 30 days if kept at 5° C.(16) If not kept at 5° C, prepare fresh daily.

8.2.12 *Purified pararosaniline (PRA) stock solution* (0.2% nominal):

8.2.12.1 *Dye specifications—*

- The dye must have a maximum absorbance at a wavelength of 540 nm when assayed in a buffered solution of 0.1 M sodium acetate-acetic acid;
- The absorbance of the reagent blank, which is temperature sensitive (0.015 absorbance unit/° C), must not exceed 0.170 at 22° C with a 1-cm optical path length when the blank is prepared according to the specified procedure;
- The calibration curve (Section 10.0) must have a slope equal to 0.030±0.002 absorbance unit/μg SO_2 with a 1-cm optical path length when the dye is pure and the sulfite solution is properly standardized.

8.2.12.2 *Preparation of stock PRA solution*—A specially purified (99 to 100 percent pure) solution of pararosaniline, which meets the above specifications, is commercially available in the required 0.20 percent concentration (Harleco Co.). Alternatively, the dye may be purified, a stock solution prepared, and then assayed according to the procedure as described below.(*10*)

8.2.12.3 *Purification procedure for PRA—*

1. Place 100 mL each of 1-butanol and 1 N HCl in a large separatory funnel (250-mL) and allow to equilibrate. Note: Certain batches of 1-butanol contain oxidants that create an SO_2 demand. Before using, check by placing 20 mL of 1-butanol and 5 mL of 20 percent potassium iodide (KI) solution in a 50-mL separatory funnel and shake thoroughly. If a yellow color appears in the alcohol phase, redistill the 1-butanol from silver oxide and collect the middle fraction or purchase a new supply of 1-butanol.

2. Weigh 100 mg of pararosaniline hydrochloride dye (PRA) in a small beaker. Add 50 mL of the equilibrated acid (drain in acid from the bottom of the separatory funnel in 1.) to the beaker and let stand for several minutes. Discard the remaining acid phase in the separatory funnel.

3. To a 125-mL separatory funnel, add 50 mL of the equilibrated 1-butanol (draw the 1-butanol from the top of the separatory funnel in 1.). Transfer the acid solution (from 2.) containing the dye to the funnel and shake carefully to extract. The violet impurity will transfer to the organic phase.

4. Transfer the lower aqueous phase into another separatory funnel, add 20 mL of equilibrated 1-butanol, and extract again.

5. Repeat the extraction procedure with three more 10-mL portions of equilibrated 1-butanol.

6. After the final extraction, filter the acid phase through a cotton plug into a 50-mL volumetric flask and bring to volume with 1 N HCl. This stock reagent will be a yellowish red.

7. To check the purity of the PRA, perform the assay and adjustment of concentration (Section 8.2.12.4) and prepare a reagent blank (Section 11.2); the absorbance of this reagent blank at 540 nm should be less than 0.170 at 22° C. If the absorbance is greater than 0.170 under these conditions, further extractions should be performed.

8.2.12.4 *PRA assay procedure*—The concentration of pararosaniline hydrochloride (PRA) need be assayed only once after purification. It is also recommended that commercial solutions of pararosaniline be assayed when first purchased. The assay procedure is as follows:(*10*)

1. Prepare 1 M acetate-acetic acid buffer stock solution with a pH of 4.79 by dissolving 13.61 g of sodium acetate trihydrate in distilled water in a 100-mL volumetric flask. Add 5.70 mL of glacial acetic acid and dilute to volume with distilled water.

2. Pipet 1 mL of the stock PRA solution obtained from the purification process or from a commercial source into a 100-mL volumetric flask and dilute to volume with distilled water.

3. Transfer a 5-mL aliquot of the diluted PRA solution from 2. into a 50-mL volumetric flask. Add 5mL of 1 M acetate-acetic acid buffer solution from 1. and dilute the mixture to volume with distilled water. Let the mixture stand for 1 hour.

4. Measure the absorbance of the above solution at 540 nm with a spectrophotometer against a distilled water reference. Compute the percentage of nominal concentration of PRA by

$$\%\,\text{PRA} = \frac{A \times K}{W} \qquad (5)$$

where:

A=measured absorbance of the final mixture (absorbance units);

W=weight in grams of the PRA dye used in the assay to prepare 50 mL of stock solution (for example, 0.100 g of dye was used to prepare 50 mL of solution in the purification procedure; when obtained from commercial sources, use the stated concentration to compute W; for 98% PRA, W=.098 g.); and

K=21.3 for spectrophotometers having a spectral bandwidth of less than 15 nm and a path length of 1 cm.

8.2.13 *Pararosaniline reagent:* To a 250-mL volumetric flask, add 20 mL of stock PRA solution. Add an additional 0.2 mL of stock solution for each percentage that the stock assays below 100 percent. Then add 25 mL of 3 M phosphoric acid and dilute to volume with distilled water. The reagent is stable for at least 9 months. Store away from heat and light.

9.0 *Sampling Procedure.*

9.1 *General Considerations.* Procedures are described for short-term sampling (30-minute and 1-hour) and for long-term sampling (24-hour). Different combinations of absorbing reagent volume, sampling rate, and sampling time can be selected to meet special needs. For combinations other than those specifically described, the conditions must be adjusted so that linearity is maintained between absorbance and concentration over the dynamic range. Absorbing reagent volumes less than 10 mL are not recommended. The collection efficiency is above 98 percent for the conditions described; however, the efficiency may be substantially lower when sampling concentrations below $25\mu g SO_2/m^3$.(*8, 9*)

9.2 *30-Minute and 1-Hour Sampling.* Place 10 mL of TCM absorbing reagent in a midget impinger and seal the impinger with a thin film of silicon stopcock grease (around the ground glass joint). Insert the sealed impinger into the sampling train as shown in Figure 1, making sure that all connections between the various components are leak tight. Greaseless ball joint fittings, heat shrinkable Teflon* tubing, or Teflon* tube fittings may be used to attain leakfree conditions for portions of the sampling train that come into contact with air containing SO_2. Shield the absorbing reagent from direct sunlight by covering the impinger with aluminum foil or by enclosing the sampling train in a light-proof box. Determine the flow rate according to Section 9.4.2. Collect the sample at 1±0.10 L/min for 30-minute sampling or 0.500±0.05 L/min for 1-hour sampling. Record the exact sampling time in minutes, as the sample volume will later be determined using the sampling flow rate and the sampling time. Record the atmospheric pressure and temperature.

9.3 *24-Hour Sampling.* Place 50 mL of TCM absorbing solution in a large absorber, close the cap, and, if needed, apply the heat shrink material as shown in Figure 3. Verify that the reagent level is at the 50 mL mark on the absorber. Insert the sealed absorber into the sampling train as shown in Figure 2. At this time verify that the absorber temperature is controlled to 15±10° C. During sampling, the absorber temperature must be controlled to prevent decomposition of the collected complex. From the onset of sampling until analysis, the absorbing solution must be protected from direct sunlight. Determine the flow rate according to Section 9.4.2. Collect the sample for 24 hours from midnight to midnight at a flow rate of 0.200±0.020 L/min. A start/stop timer is helpful for initiating and stopping sampling and an elapsed time meter will be useful for determining the sampling time.

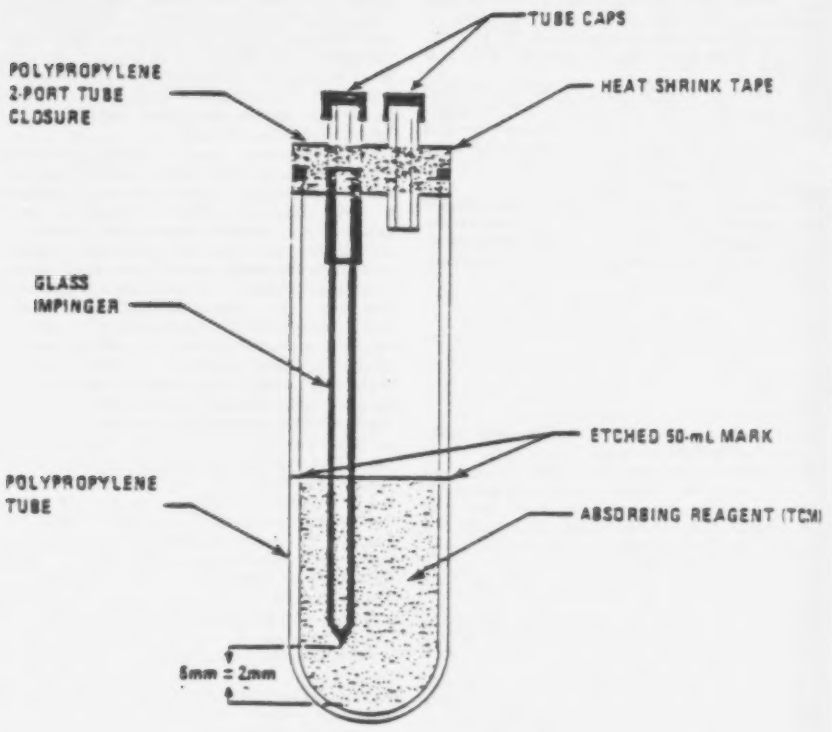

Figure 3. An absorber (24-hour sample) filled and assembled for shipment.

9.4 *Flow Measurement.*

9.4.1 *Calibration:* Flow measuring devices used for the on-site flow measurements required in 9.4.2 must be calibrated against a reliable flow or volume standard such as an NBS traceable bubble flowmeter or calibrated wet test meter. Rotameters or critical orifices used in the sampling train may be calibrated, if desired, as a quality control check, but such calibration shall not replace the on-site flow measurements required by 9.4.2. In-line rotameters, if they are to be calibrated, should be calibrated in situ, with the appropriate volume of solution in the absorber.

9.4.2 *Determination of flow rate at sampling site:* For short-term samples, the standard flow rate is determined at the sampling site at the initiation and completion of sample collection with a calibrated flow measuring device connected to the inlet of the absorber. For 24-hour samples, the standard flow rate is determined at the time the absorber is placed in the sampling train and again when the absorber is removed from the train for shipment to the analytical laboratory with a calibrated flow measuring device connected to the inlet of the sampling train. The flow rate determination must be made with all components of the sampling system in operation (e.g., the absorber temperature controller and any sample box heaters must also be operating). Equation 6 may be used to determine the standard flow rate when a calibrated positive displacement meter is used as the flow measuring device. Other types of calibrated flow measuring devices may also be used to determine the flow rate at the sampling site provided that the user applies any appropriate corrections to devices for which output is dependent on temperature or pressure.

$$Q_{std} = Q_{act} \times \frac{P_b - (1 - RH)\,P_{H_2O}}{P_{std}} \times \frac{298.16}{(T_{meter} + 273.16)} \qquad (6)$$

where:

Q_{std} = flow rate at standard conditions, std L/min (25° C and 760 mm Hg);

Q_{act} = flow rate at monitoring site conditions, L/min;

P_b = barometric pressure at monitoring site conditions, mm Hg or kPa;

RH = fractional relative humidity of the air being measured;

P_{H_2O} = vapor pressure of water at the temperature of the air in the flow or volume standard, in the same units as P_b, (for wet volume standards only, i.e., bubble flowmeter or wet test meter; for dry standards, i.e., dry test meter, $P_{H_2O} = 0$);

P_{std} = standard barometric pressure, in the same units as P_b (760 mm Hg or 101 kPa); and

T_{meter} = temperature of the air in the flow or volume standard, °C (e.g., bubble flowmeter).

If a barometer is not available, the following equation may be used to determine the barometric pressure:

$$P_b = 760 - .076(H) \text{ mm Hg}, \quad \text{or} \quad P_b = 101 - .01(H) \text{kPa} \qquad (7)$$

where:

H = sampling site elevation above sea level in meters.

If the initial flow rate (Q_i) differs from the flow rate of the critical orifice or the flow rate indicated by the flowmeter in the sampling train (Q_c) by more than 5 percent as determined by equation (8), check for leaks and redetermine Q_i.

$$\% \text{ Diff} = \frac{Q_i - Q_c}{Q_c} \times 100 \qquad (8)$$

Invalidate the sample if the difference between the initial (Q_i) and final (Q_f) flow rates is more than 5 percent as determined by equation (9):

$$\% \text{ Diff} = \frac{Q_i - Q_f}{Q_f} \times 100 \qquad (9)$$

9.5 *Sample Storage and Shipment.* Remove the impinger or absorber from the sampling train and stopper immediately. Verify that the temperature of the absorber is not above 25° C. Mark the level of the solution with a temporary (e.g., grease pencil) mark. If the sample will not be analyzed within 12 hours of sampling, it must be stored at 5° ±5° C until analysis. Analysis must occur within 30 days. If the sample is transported or shipped for a period exceeding 12 hours, it is recommended that thermal coolers using eutectic ice packs, refrigerated shipping containers, etc., be used for periods up to 48 hours. (*17*) Measure the temperature of the absorber solution when the shipment is received. Invalidate the sample if the temperature is above 10° C. Store the sample at 5° ±5° C until it is analyzed.

10.0 *Analytical Calibration.*

10.1 *Spectrophotometer Cell Matching.* If unmatched spectrophotometer cells are used, an absorbance correction factor must be determined as follows:

1. Fill all cells with distilled water and designate the one that has the lowest absorbance at 548 nm as the reference. (This reference cell should be marked as such and continually used for this purpose throughout all future analyses.)

2. Zero the spectrophotometer with the reference cell.

3. Determine the absorbance of the remaining cells (A_c) in relation to the reference cell and record these values for future use. Mark all cells in a manner that adequately identifies the correction.

The corrected absorbance during future analyses using each cell is determining as follows:

$$A = A_{obs} - A_c \quad (10)$$

where:

A = corrected absorbance,
A_{obs} = uncorrected absorbance, and
A_c = cell correction.

10.2 *Static Calibration Procedure* (Option 1). Prepare a dilute working sulfite-TCM solution by diluting 10 mL of the working sulfite-TCM solution (Section 8.2.11) to 100 mL with TCM absorbing reagent. Following the table below, accurately pipet the indicated volumes of the sulfite-TCM solutions into a series of 25-mL volumetric flasks. Add TCM absorbing reagent as indicated to bring the volume in each flask to 10 mL.

Sulfite-TCM solution	Volume of sulfite-TCM solution	Volume of TCM, mL	Total μg SO_2 (approx.)*
Working	4.0	6.0	28.8
Working	3.0	7.0	21.6
Working	2.0	8.0	14.4
Dilute working	10.0	0.0	7.2
Dilute working	5.0	5.0	3.6
	0.0	10.0	0.0

*Based on working sulfite-TCM solution concentration of 7.2 μg SO_2/mL; the actual total μg SO_2 must be calculated using equation 11 below.

To each volumetric flask, add 1 mL 0.6% sulfamic acid (Section 8.2.1), accurately pipet 2 mL 0.2% formaldehyde solution (Section 8.2.2), then add 5 mL pararosaniline solution (Section 8.2.13). Start a laboratory timer that has been set for 30 minutes. Bring all flasks to volume with recently boiled and cooled distilled water and mix thoroughly. The color must be developed (during the 30-minute period) in a temperature environment in the range of 20° to 30° C, which is controlled to ±1° C. For increased precision, a constant temperature bath is recommended during the color development step. After 30 minutes, determine the corrected absorbance of each standard at 548 nm against a distilled water reference (Section 10.1). Denote this absorbance as (A). Distilled water is used in the reference cell rather than the reagant blank because of the temperature sensitivity of the reagent blank. Calculate the total micrograms SO_2 in each solution:

$$\mu g\ SO_2 = V_{TCM/SO_2} \times C_{TCM/SO_2} \times D \quad (11)$$

where:

V_{TCM/SO_2} = volume of sulfite-TCM solution used, mL;
C_{TCM/SO_2} = concentration of sulfur dioxide in the working sulfite-TCM, μg SO_2/mL (from equation 4); and
D = dilution factor (D=1 for the working sulfite-TCM solution; D=0.1 for the diluted working sulfite-TCM solution).

A calibration equation is determined using the method of linear least squares (Section 12.1). The total micrograms SO_2 contained in each solution is the x variable, and the corrected absorbance (eq. 10) associated with each solution is the y variable. For the calibration to be valid, the slope must be in the range of 0.030 ±0.002 absorbance unit/μg SO_2, the intercept as determined by the least squares method must be equal to or less than 0.170 absorbance unit when the color is developed at 22° C (add 0.015 to this 0.170 specification for each °C above 22° C) and the correlation coefficient must be greater than 0.998. If these criteria are not met, it may be the result of an impure dye and/or an improperly standardized sulfite-TCM solution. A calibration factor (B_s) is determined by calculating the reciprocal of the slope and is subsequently used for calculating the sample concentration (Section 12.3).

10.3 *Dynamic Calibration Procedures* (Option 2). Atmospheres containing accurately known concentrations of sulfur dioxide are prepared using permeation devices. In the systems for generating these atmospheres, the permeation device emits gaseous SO_2 at a known, low, constant rate, provided the temperature of the device is held constant (±0.1° C) and the device has been accurately calibrated at the temperature of use. The SO_2 permeating from the device is carried by a low flow of dry carrier gas to a mixing chamber where it is diluted with SO_2-free air to the desired concentration and supplied to a vented manifold. A typical system is shown schematically in Figure 4 and this system and other similar systems have been described in detail by O'Keeffe

and Ortman; (*19*) Scaringelli, Frey, and Saltzman, (*20*) and Scaringelli, O'Keeffe, Rosenberg, and Bell. (*21*) Permeation devices may be prepared or purchased and in both cases must be traceable either to a National Bureau of Standards (NBS) Standard Reference Material (SRM 1625, SRM 1626, SRM 1627) or to an NBS/EPA-approved commercially available Certified Reference Material (CRM). CRM's are described in Reference 22, and a list of CRM sources is available from the address shown for Reference 22. A recommended protocol for certifying a permeation device to an NBS SRM or CRM is given in Section 2.0.7 of Reference 2. Device permeation rates of 0.2 to 0.4 μg/min, inert gas flows of about 50 mL/min, and dilution air flow rates from 1.1 to 15 L/min conveniently yield standard atmospheres in the range of 25 to 600 μg SO_2/m^3 (0.010 to 0.230 ppm).

10.3.1 *Calibration Option 2A* (30-minute and 1-hour samples): Generate a series of six standard atmospheres of SO_2 (e.g., 0, 50, 100, 200, 350, 500, 750 $\mu g/m^3$) by adjusting the dilution flow rates appropriately. The concentration of SO_2 in each atmosphere is calculated as follows:

$$C_a = \frac{P_r \times 10^3}{Q_d + Q_p} \qquad (12)$$

where:

C_a = concentration of SO_2 at standard conditions, $\mu g/m^3$;
P_r = permeation rate, μg/min;
Q_d = flow rate of dilution air, std L/min; and
Q_p = flow rate of carrier gas across permeation device, std L/min.

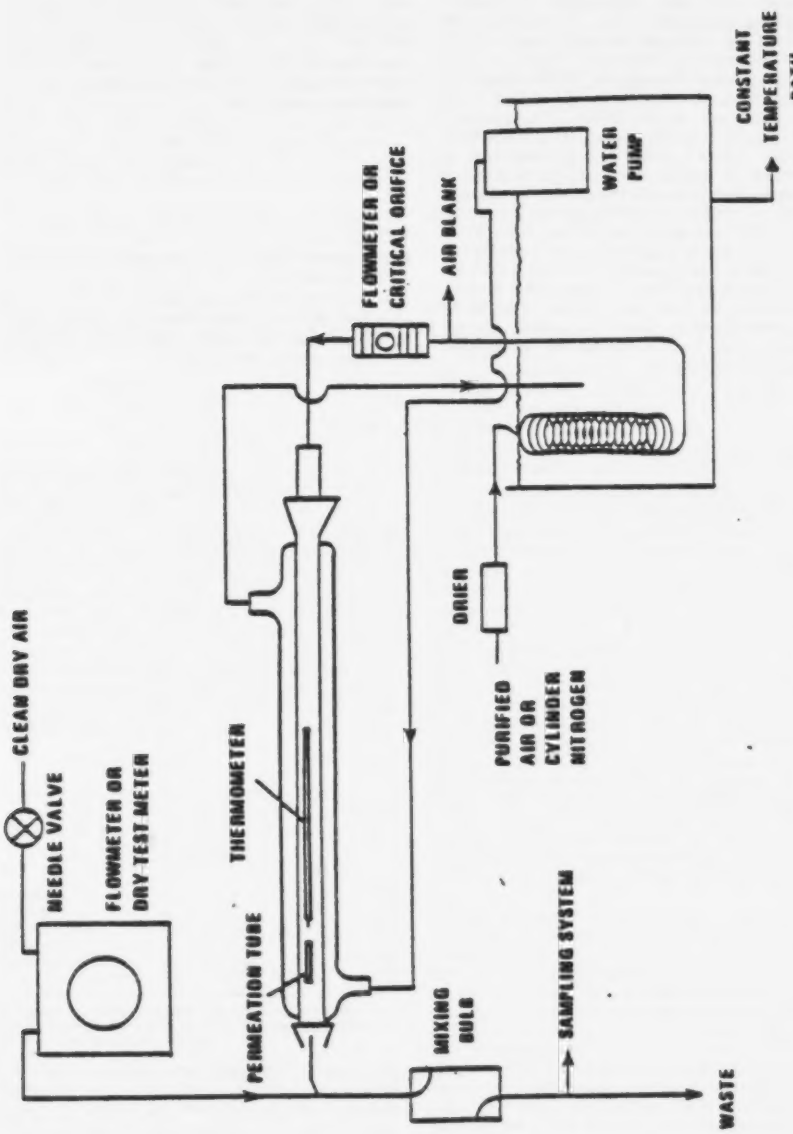

Figure 4. Permeation tube schematic for laboratory use.

Be sure that the total flow rate of the standard exceeds the flow demand of the sample train, with the excess flow vented at atmospheric pressure. Sample each atmosphere using similar apparatus as shown in Figure 1 and under the same conditions as field sampling (i.e., use same absorbing reagent volume and sample same volume of air at an equivalent flow rate). Due to the length of the sampling periods required, this method is not recommended for 24-hour sampling. At the completion of sampling, quantitatively transfer the contents of each impinger to one of a series of 25-mL volumetric flasks (if 10 mL of absorbing solution was used) using small amounts of distilled water for rinse (<5mL). If >10 mL of absorbing solution was used, bring the absorber solution in each impinger to orginal volume with distilled H_2O and pipet 10-mL portions from each impinger into a series of 25-mL volumetric flasks. If the color development steps are not to be started within 12 hours of sampling, store the solutions at 5° ± 5° C. Calculate the total micrograms SO_2 in each solution as follows:

$$\mu g SO_2 = \frac{C_s \times Q_s \times t \times V_a \times 10^{-3}}{V_b} \quad (13)$$

where:

C_s=concentration of SO_2 in the standard atmosphere, $\mu g/m^3$;
Q_s=sampling flow rate, std L/min;
t=sampling time, min;
V_a=volume of absorbing solution used for color development (10 mL); and
V_b=volume of absorbing solution used for sampling, mL.

Add the remaining reagents for color development in the same manner as in Section 10.2 for static solutions. Calculate a calibration equation and a calibration factor (B_s) according to Section 10.2, adhering to all the specified criteria.

10.3.2 Calibration Option 2B (24-hour samples): Generate a standard atmosphere containing approximately 1,050 μg SO_2/m^3 and calculate the exact concentration according to equation 12. Set up a series of six absorbers according to Figure 2 and connect to a common manifold for sampling the standard atmosphere. Be sure that the total flow rate of the standard exceeds the flow demand at the sample manifold, with the excess flow vented at atmospheric pressure. The absorbers are then allowed to sample the atmosphere for varying time periods to yield solutions containing 0, 0.2, 0.6, 1.0, 1.4, 1.8, and 2.2 μg SO_2/mL solution. The sampling times required to attain these solution concentrations are calculated as follows:

$$t = \frac{V_b \times C_s}{C_a \times Q_s \times 10^{-3}} \quad (14)$$

where:

t=sampling time, min;
V_b=volume of absorbing solution used for sampling (50 mL);
C_s=desired concentration of SO_2 in the absorbing solution, μg/mL;
C_a=concentration of the standard atmosphere calculated according to equation 12, $\mu g/m^3$; and
Q_s=sampling flow rate, std L/min.

At the completion of sampling, bring the absorber solutions to original volume with distilled water. Pipet a 10-mL portion from each absorber into one of a series of 25-mL volumetric flasks. If the color development steps are not to be started within 12 hours of sampling, store the solutions at 5° ± 5° C. Add the remaining reagents for color development in the same manner as in Section 10.2 for static solutions. Calculate the total μg SO_2 in each standard as follows:

$$\mu g SO_2 = \frac{C_s \times Q_s \times t \times V_a \times 10^{-3}}{V_b} \quad (15)$$

where:

V_a=volume of absorbing solution used for color development (10 mL).
All other parameters are defined in equation 14.

Calculate a calibration equation and a calibration factor (B_s) according to Section 10.2 adhering to all the specified criteria.

11.0 *Sample Preparation and Analysis.*

11.1 *Sample Preparation.* Remove the samples from the shipping container. If the shipment period exceeded 12 hours from the completion of sampling, verify that the temperature is below 10° C. Also, compare the solution level to the temporary level mark on the absorber. If either the temperature is above 10° C or there was significant loss (more than 10 mL) of the sample during shipping, make an appropriate notation in

the record and invalidate the sample. Prepare the samples for analysis as follows:

1. For 30-minute or 1-hour samples: Quantitatively transfer the entire 10 mL amount of absorbing solution to a 25-mL volumetric flask and rinse with a small amount (<5 mL) of distilled water.

2. For 24-hour samples: If the volume of the sample is less than the original 50-mL volume (permanent mark on the absorber), adjust the volume back to the original volume with distilled water to compensate for water lost to evaporation during sampling. If the final volume is greater than the original volume, the volume must be measured using a graduated cylinder. To analyze, pipet 10 mL of the solution into a 25-mL volumetric flask.

11.2 *Sample Analysis.* For each set of determinations, prepare a reagent blank by adding 10 mL TCM absorbing solution to a 25-mL volumetric flask, and two control standards containing approximately 5 and 15 μg SO_2, respectively. The control standards are prepared according to Section 10.2 or 10.3. The analysis is carried out as follows:

1. Allow the sample to stand 20 minutes after the completion of sampling to allow any ozone to decompose (if applicable).

2. To each 25-mL volumetric flask containing reagent blank, sample, or control standard, add 1 mL of 0.6% sulfamic acid (Section 8.2.1) and allow to react for 10 min.

3. Accurately pipet 2 mL of 0.2% formaldehyde solution (Section 8.2.2) and then 5 mL of pararosaniline solution (Section 8.2.13) into each flask. Start a laboratory timer set at 30 minutes.

4. Bring each flask to volume with recently boiled and cooled distilled water and mix thoroughly.

5. During the 30 minutes, the solutions must be in a temperature controlled environment in the range of 20° to 30° C maintained to ± 1° C. This temperature must also be within 1° C of that used during calibration.

6. After 30 minutes and before 60 minutes, determine the corrected absorbances (equation 10) of each solution at 548 nm using 1-cm optical path length cells against a distilled water reference (Section 10.1). (*Distilled water is used as a reference instead of the reagent blank because of the sensitivity of the reagent blank to temperature.*)

7. Do not allow the colored solution to stand in the cells because a film may be deposited. Clean the cells with isopropyl alcohol after use.

8. The reagent blank must be within 0.03 absorbance units of the intercept of the calibration equation determined in Section 10.

11.3 *Absorbance range.* If the absorbance of the sample solution ranges between 1.0 and 2.0, the sample can be diluted 1:1 with a portion of the reagent blank and the absorbance redetermined within 5 minutes. Solutions with higher absorbances can be diluted up to sixfold with the reagent blank in order to obtain scale readings of less than 1.0 absorbance unit. However, it is recommended that a smaller portion (<10 mL) of the original sample be reanalyzed (if possible) if the sample requires a dilution greater than 1:1.

11.4 *Reagent disposal.* All reagents containing mercury compounds must be stored and disposed of using one of the procedures contained in Section 13. Until disposal, the discarded solutions can be stored in closed glass containers and should be left in a fume hood.

12.0 *Calculations.*

12.1 *Calibration Slope, Intercept, and Correlation Coefficient.* The method of least squares is used to calculate a calibration equation in the form of:

$$y = mx + b \tag{16}$$

where:

y = corrected absorbance,
m = slope, absorbance unit/μg SO_2.
x = micrograms of SO_2.
b = y intercept (absorbance units).

The slope (m), intercept (b), and correlation coefficient (r) are calculated as follows:

$$m = \frac{n\Sigma xy - (\Sigma x)(\Sigma y)}{n\Sigma x^2 - (\Sigma x)^2} \tag{17}$$

$$b = \frac{\Sigma y - m\Sigma x}{n} \tag{18}$$

$$r = \sqrt{\frac{m(\Sigma xy - \Sigma x\Sigma y/n)}{\Sigma y^2 - (\Sigma y)^2/n}} \tag{19}$$

where n is the number of calibration points.

A data form (Figure 5) is supplied for easily organizing calibration data when the slope, intercept, and correlation coefficient are calculated by hand.

12.2 *Total Sample Volume.* Determine the sampling volume at standard conditions as follows:

$$V_{std} = \frac{Q_i + Q_f}{2} \times t \tag{20}$$

where:

V_{std}=sampling volume in std L,
Q_i=standard flow rate determined at the initiation of sampling in std L/min,
Q_f=standard flow rate determined at the completion of sampling is std L/min, and
t=total sampling time, min.

12.3 *Sulfur Dioxide Concentration.* Calculate and report the concentration of each sample as follows:

$$\mu g\ SO_2/m^3 = \frac{(A-A_o)(B_s)(10^3)}{V_{std}} \times \frac{V_b}{V_a} \quad (21)$$

where:
A=corrected absorbance of the sample solution, from equation (10);
A_o=corrected absorbance of the reagent blank, using equation (10);
B_s=calibration factor equal to B_a, B_g, or B_t depending on the calibration procedure used, the reciprocal of the slope of the calibration equation;
V_a=volume of absorber solution analyzed, mL;
V_b=total volume of solution in absorber (see 11.1-2), mL; and
V_{std}=standard air volume sampled, std L (from Section 12.2).

DATA FORM

[For hand calculations]

Calibration point no.	Micrograms SO_2	Absorbance units			
	(x)	(y)	x^2	xy	y^2
1					
2					
3					
4					
5					
6					

Σx=_____ Σy=_____ Σx^2=_____
Σxy_____ Σy^2 _____
n=_____ (number of pairs of coordinates.)

FIGURE 5. Data form for hand calculations.

12.4 Control Standards. Calculate the analyzed micrograms of SO_2 in each control standard as follows:

$$C_s=(A-A_o)\times B_s \quad (22)$$

where:
C_s=analyzed μg SO_2 in each control standard,
A=corrected absorbance of the control standard, and
A_o=corrected absorbance of the reagent blank.

The difference between the true and analyzed values of the control standards must not be greater than 1 μg. If the difference is greater than 1 μg, the source of the discrepancy must be identified and corrected.

12.5 Conversion of $\mu g/m^3$ to ppm (v/v). If desired, the concentration of sulfur dioxide at reference conditions can be converted to ppm SO_2 (v/v) as follows:

$$ppm\ SO_2 = \frac{\mu g\ SO_2}{m^3} \times 3.82 \times 10^{-4} \quad (23)$$

13.0 The TCM absorbing solution and any reagents containing mercury compounds must be treated and disposed of by one of the methods discussed below. Both methods remove greater than 99.99 percent of the mercury.

13.1 *Disposal of Mercury-Containing Solutions.*

13.2 *Method for Forming an Amalgam.*

1. Place the waste solution in an uncapped vessel in a hood.

2. For each liter of waste solution, add approximately 10 g of sodium carbonate until neutralization has occurred (NaOH may have to be used).

3. Following neutralization, add 10 g of granular zinc or magnesium.

4. Stir the solution in a hood for 24 hours. Caution must be exercised as hydrogen gas is evolved by this treatment process.

5. After 24 hours, allow the solution to stand without stirring to allow the mercury amalgam (solid black material) to settle to the bottom of the waste receptacle.

6. Upon settling, decant and discard the supernatant liquid.

7. Quantitatively transfer the solid material to a container and allow to dry.

8. The solid material can be sent to a mercury reclaiming plant. It must not be discarded.

13.3 *Method Using Aluminum Foil Strips.*

1. Place the waste solution in an uncapped vessel in a hood.

2. For each liter of waste solution, add approximately 10 g of aluminum foil strips. If all the aluminum is consumed and no gas is evolved, add an additional 10 g of foil. Repeat until the foil is no longer consumed and allow the gas to evolve for 24 hours.

3. Decant the supernatant liquid and discard.

4. Transfer the elemental mercury that has settled to the bottom of the vessel to a storage container.

5. The mercury can be sent to a mercury reclaiming plant. It must not be discarded.

14.0 *References for SO_2 Method.*

1. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I, Principles. EPA-600/9-76-005, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1976.

2. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Specific Methods. EPA-600/4-77-027a, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1977.

3. Dasqupta, P. K., and K. B. DeCesare. Stability of Sulfur Dioxide in Formaldehyde and Its Anomalous Behavior in Tetrachloromercurate (II). Submitted for publication in *Atmospheric Environment*, 1982.

4. West, P. W., and G. C. Gaeke. Fixation of Sulfur Dioxide as Disulfitomercurate (II) and Subsequent Colorimetric Estimation. Anal. Chem., 28:1816, 1956.

5. Ephraim, F. Inorganic Chemistry. P. C. L. Thorne and E. R. Roberts, Eds., 5th Edition, Interscience, 1948, p. 562.

6. Lyles, G. R., F. B. Dowling, and V. J. Blanchard. Quantitative Determination of Formaldehyde in the Parts Per Hundred Million Concentration Level. J. Air. Poll. Cont. Assoc., Vol. 15(106), 1965.

7. McKee, H. C., R. E. Childers, and O. Saenz, Jr. Collaborative Study of Reference Method for Determination of Sulfur Dioxide in the Atmosphere (Pararosaniline Method). EPA-APTD-0903, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, September 1971.

8. Urone, P., J. B. Evans, and C. M. Noyes. Tracer Techniques in Sulfur—Air Pollution Studies Apparatus and Studies of Sulfur Dioxide Colorimetric and Conductometric Methods. Anal. Chem., 37: 1104, 1965.

9. Bostrom, C. E. The Absorption of Sulfur Dioxide at Low Concentrations (pphm) Studied by an Isotopic Tracer Method. Intern. J. Air Water Poll., 9:333, 1965.

10. Scaringeili, F. P., B. E. Saltzman, and S. A. Frey. Spectrophotometric Determination of Atmospheric Sulfur Dioxide. Anal. Chem., 39: 1709, 1967.

11. Pate, J. B., B. E. Ammons, G. A. Swanson, and J. P. Lodge, Jr. Nitrite Interference in Spectrophotometric Determination of Atmospheric Sulfur Dioxide. Anal. Chem., 37:942, 1965.

12. Zurlo, N., and A. M. Griffini. Measurement of the Sulfur Dioxide Content of the Air in the Presence of Oxides of Nitrogen and Heavy Metals. Medicina Lavoro, 53:330, 1962.

13. Rehme, K. A., and F. P. Scaringelli. Effect of Ammonia on the Spectrophotometric Determination of Atmospheric Concentrations of Sulfur Dioxide. Anal. Chem., 47:2474, 1975.

14. McCoy, R. A., D. E. Camann, and H. C. McKee. Collaborative Study of Reference Method for Determination of Sulfur Dioxide in the Atmosphere (Pararosaniline Method) (24-Hour Sampling). EPA-650/4-74-027, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, December 1973.

15. Fuerst, R. G. Improved Temperature Stability of Sulfur Dioxide Samples Collected by the Federal Reference Method. EPA-600/4-78-018, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, April 1978.

16. Scaringelli, F. P., L. Elfers, D. Norris, and S. Hochheiser. Enhanced Stability of Sulfur Dioxide in Solution. Anal. Chem., 42:1818, 1970.

17. Martin, B. E. Sulfur Dioxide Bubbler Temperature Study. EPA-600/4-77-040, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, August 1977.

18. American Society for Testing and Materials. ASTM Standards, Water; Atmospheric Analysis. Part 23. Philadelphia, PA, October 1968, p. 226.

19. O'Keeffe, A. E., and G. C. Ortman. Primary Standards for Trace Gas Analysis. Anal. Chem., 38:760, 1966.

20. Scaringelli, F. P., S. A. Frey, and B. E. Saltzman. Evaluation of Teflon Permeation Tubes for Use with Sulfur Dioxide. Amer. Ind. Hygiene Assoc. J., 28:260, 1967.

21. Scaringelli, F. P., A. E. O'Keeffe, E. Rosenberg, and J. P. Bell, Preparation of Known Concentrations of Gases and Vapors With Permeation Devices Calibrated Gravimetrically. Anal. Chem., 42:871, 1970.

22. A Procedure for Establishing Traceability of Gas Mixtures to Certain National Bureau of Standards Standard Reference Materials. EPA-600/7-81-010, U.S. Environmental Protection Agency, Environmental Monitoring Systems Laboratory (MD-77), Research Triangle Park, NC 27711, January 1981.

[47 FR 54899, Dec. 6, 1982; 48 FR 17355, Apr. 22, 1983]

Appendix B—Reference Method for the Determination of Suspended Particulate Matter in the Atmosphere (High-Volume Method)

1.0 *Applicability.*

1.1 This method provides a measurement of the mass concentration of total suspended particulate matter (TSP) in ambient air for determining compliance with the primary and secondary national ambient air quality standards for particulate matter as specified in § 50.6 and § 50.7 of this chapter. The measurement process is nondestructive, and the size of the sample collected is usually adequate for subsequent chemical analysis. Quality assurance procedures and guidance are provided in Part 58, Appendixes A and B, of this chapter and in References 1 and 2.

2.0 *Principle.*

2.1 An air sampler, properly located at the measurement site, draws a measured quantity of ambient air into a covered housing and through a filter during a 24-hr (nominal) sampling period. The sampler flow rate and the geometry of the shelter favor the collection of particles up to 25–50 μm (aerodynamic diameter), depending on wind speed and direction.(*3*) The filters used are specified to have a minimum collection efficiency of 99 percent for 0.3 μm (DOP) particles (see Section 7.1.4).

2.2 The filter is weighed (after moisture equilibration) before and after use to determine the net weight (mass) gain. The total volume of air sampled, corrected to EPA standard conditions (25° C, 760 mm Hg [101 kPa]), is determined from the measured flow rate and the sampling time. The concentration of total suspended particulate matter in the ambient air is computed as the mass of collected particles divided by the volume of air sampled, corrected to standard conditions, and is expressed in micrograms per standard cubic meter (μg/std m^3). For samples collected at temperatures and pressures significantly different than standard conditions, these corrected concentrations may differ substantially from actual concentrations (micrograms per actual cubic meter), particularly at high elevations. The actual particulate matter concentration can be calculated from the corrected concentration using the actual temperature and pressure during the sampling period.

3.0 *Range.*

3.1 The approximate concentration range of the method is 2 to 750 μg/std m^3. The upper limit is determined by the point at which the sampler can no longer maintain the specified flow rate due to the increased pressure drop of the loaded filter. This point is affected by particle size distribution, moisture content of the collected particles, and variability from filter to filter, among other things. The lower limit is determined by the sensitivity of the balance (see Section 7.10) and by inherent sources of error (see Section 6).

3.2 At wind speeds between 1.3 and 4.5 m/sec (3 and 10 mph), the high-volume air sampler has been found to collect particles up to 25 to 50 μm, depending on wind speed and direction.(*3*) For the filter specified in Section 7.1, there is effectively no lower limit on the particle size collected.

4.0 *Precision.*

4.1 Based upon collaborative testing, the relative standard deviation (coefficient of variation) for single analyst precision (repeatability) of the method is 3.0 percent. The corresponding value for interlaboratory precision (reproducibility) is 3.7 percent.(*4*)

5.0 *Accuracy.*

5.1 The absolute accuracy of the method is undefined because of the complex nature of atmospheric particulate matter and the difficulty in determining the "true" particulate matter concentration. This method provides a measure of particulate matter concentration suitable for the purpose specified under Section 1.0, Applicability.

6.0 *Inherent Sources of Error.*

6.1 *Airflow variation.* The weight of material collected on the filter represents the (integrated) sum of the product of the instantaneous flow rate times the instantaneous particle concentration. Therefore, dividing this weight by the average flow rate over the sampling period yields the true particulate matter concentration only when the flow rate is constant over the period. The error resulting from a nonconstant flow rate depends on the magnitude of the instantaneous changes in the flow rate and in the particulate matter concentration. Normally, such errors are not large, but they can be greatly reduced by equipping the sampler with an automatic flow controlling mechanism that maintains constant flow during the sampling period. Use of a contant flow controller is recommended.*

6.2 *Air volume measurement.* If the flow rate changes substantially or nonuniformly during the sampling period, appreciable error in the estimated air volume may result from using the average of the presampling and postsampling flow rates. Greater air volume measurement accuracy may be achieved by (1) equipping the sampler with a flow controlling mechanism that maintains constant air flow during the sampling period,* (2) using a calibrated, continuous flow rate recording device to record the

*At elevated altitudes, the effectiveness of automatic flow controllers may be reduced because of a reduction in the maximum sampler flow.

actual flow rate during the samping period and integrating the flow rate over the period, or (3) any other means that will accurately measure the total air volume sampled during the sampling period. Use of a continuous flow recorder is recommended, particularly if the sampler is not equipped with a constant flow controller.

6.3 *Loss of volatiles.* Volatile particles collected on the filter may be lost during subsequent sampling or during shipment and/or storage of the filter prior to the postsampling weighing.(5) Although such losses are largely unavoidable, the filter should be reweighed as soon after sampling as practical.

6.4 *Artifact particulate matter.* Artifact particulate matter can be formed on the surface of alkaline glass fiber filters by oxidation of acid gases in the sample air, resulting in a higher than true TSP determination.(6 7) This effect usually occurs early in the sample period and is a function of the filter pH and the presence of acid gases. It is generally believed to account for only a small percentage of the filter weight gain, but the effect may become more significant where relatively small particulate weights are collected.

6.5 *Humidity.* Glass fiber filters are comparatively insensitive to changes in relative humidity, but collected particulate matter can be hygroscopic.(8) The moisture conditioning procedure minimizes but may not completely eliminate error due to moisture.

6.6 *Filter handling.* Careful handling of the filter between the presampling and postsampling weighings is necessary to avoid errors due to loss of fibers or particles from the filter. A filter paper cartridge or cassette used to protect the filter can minimize handling errors. (See Reference 2, Section 2).

6.7 *Nonsampled particulate matter.* Particulate matter may be deposited on the filter by wind during periods when the sampler is inoperative. (9) It is recommended that errors from this source be minimized by an automatic mechanical device that keeps the filter covered during nonsampling periods, or by timely installation and retrieval of filters to minimize the nonsampling periods prior to and following operation.

6.8 *Timing errors.* Samplers are normally controlled by clock timers set to start and stop the sampler at midnight. Errors in the nominal 1,440-min sampling period may result from a power interruption during the sampling period or from a discrepancy between the start or stop time recorded on the filter information record and the actual start or stop time of the sampler. Such discrepancies may be caused by (1) poor resolution of the timer set-points, (2) timer error due to power interruption, (3) missetting of the timer, or (4) timer malfunction. In general, digital electronic timers have much better set-point resolution than mechanical timers, but require a battery backup system to maintain continuity of operation after a power interruption. A continuous flow recorder or elapsed time meter provides an indication of the sampler run-time, as well as indication of any power interruption during the sampling period and is therefore recommended.

6.9 *Recirculation of sampler exhaust.* Under stagnant wind conditions, sampler exhaust air can be resampled. This effect does not appear to affect the TSP measurement substantially, but may result in increased carbon and copper in the collected sample. (10) This problem can be reduced by ducting the exhaust air well away, preferably downwind, from the sampler.

7.0 *Apparatus.*

(See References 1 and 2 for quality assurance information.)

NOTE: Samplers purchased prior to the effective date of this amendment are not subject to specifications preceded by (†).

7.1 *Filter.* (Filters supplied by the Environmental Protection Agency can be assumed to meet the following criteria. Additional specifications are required if the sample is to be analyzed chemically.)

7.1.1 *Size:* $20.3 \pm 0.2 \times 25.4 \pm 0.2$ cm (nominal 8×10 in).

7.1.2 *Nominal exposed area:* 406.5 cm^2 (63 in^2).

7.1.3. *Material:* Glass fiber or other relatively inert, nonhygroscopic material. (8)

7.1.4 *Collection efficiency:* 99 percent minimum as measured by the DOP test (ASTM–2986) for particles of 0.3 μm diameter.

7.1.5 *Recommended pressure drop range:* 42–54 mm Hg (5.6–7.2 kPa) at a flow rate of 1.5 std m^3/min through the nominal exposed area.

7.1.6 *pH:* 6 to 10. (11)

7.1.7 *Integrity:* 2.4 mg maximum weight loss. (11)

7.1.8 *Pinholes:* None.

7.1.9 *Tear strength:* 500 g minimum for 20 mm wide strip cut from filter in weakest dimension. (See ASTM Test D828–60).

7.1.10 *Brittleness:* No cracks or material separations after single lengthwise crease.

7.2 *Sampler.* The air sampler shall provide means for drawing the air sample, via reduced pressure, through the filter at a uniform face velocity.

7.2.1 The sampler shall have suitable means to:

a. Hold and seal the filter to the sampler housing.

b. Allow the filter to be changed conveniently.

c. Preclude leaks that would cause error in the measurement of the air volume passing through the filter.

d. (†) Manually adjust the flow rate to accommodate variations in filter pressure drop and site line voltage and altitude. The adjustment may be accomplished by an automatic flow controller or by a manual flow adjustment device. Any manual adjustment device must be designed with positive detents or other means to avoid unintentional changes in the setting.

7.2.2 *Minimum sample flow rate, heavily loaded filter:* 1.1 m^3/min (39 ft^3/min).††

7.2.3 *Maximum sample flow rate, clean filter:* 1.7 m^3/min (60 ft^3/min).††

7.2.4 *Blower Motor:* The motor must be capable of continuous operation for 24-hr periods.

7.3 *Sampler shelter.*

7.3.1 The sampler shelter shall:

a. Maintain the filter in a horizontal position at least 1 m above the sampler supporting surface so that sample air is drawn downward through the filter.

b. Be rectangular in shape with a gabled roof, similar to the design shown in Figure 1.

c. Cover and protect the filter and sampler from precipitation and other weather.

d. Discharge exhaust air at least 40 cm from the sample air inlet.

e. Be designed to minimize the collection of dust from the supporting surface by incorporating a baffle between the exhaust outlet and the supporting surface.

7.3.2 The sampler cover or roof shall overhang the sampler housing somewhat, as shown in Figure 1, and shall be mounted so as to form an air inlet gap between the cover and the sampler housing walls. †This sample air inlet should be approximately uniform on all sides of the sampler. †The area of the sample air inlet must be sized to provide an effective particle capture air velocity of between 20 and 35 cm/sec at the recommended operational flow rate. The capture velocity is the sample air flow rate divided by the inlet area measured in a horizontal plane at the lower edge of the cover. †Ideally, the inlet area and operational flow rate should be selected to obtain a capture air velocity of 25 ±2 cm/sec.

7.4 *Flow rate measurement devices.*

7.4.1 The sampler shall incorporate a flow rate measurement device capable of indicating the total sampler flow rate. Two common types of flow indicators covered in the calibration procedure are (1) an electronic mass flowmeter and (2) an orifice or orifices located in the sample air stream together with a suitable pressure indicator such as a manometer, or aneroid pressure gauge. A pressure recorder may be used with an orifice to provide a continuous record of the flow. Other types of flow indicators (including rotameters) having comparable precision and accuracy are also acceptable.

7.4.2 † The flow rate measurement device must be capable of being calibrated and read in units corresponding to a flow rate which is readable to the nearest 0.02 std m^3/min over the range 1.0 to 1.8 std m^3/min.

7.5 *Thermometer,* to indicate the approximate air temperature at the flow rate measurement orifice, when temperature corrections are used.

7.5.1 *Range:* −40° to +50° C (223–323 K).

7.5.2 *Resolution:* 2° C (2 K).

7.6 *Barometer,* to indicate barometric pressure at the flow rate measurement orifice, when pressure corrections are used.

7.6.1 *Range:* 500 to 800 mm Hg (66–106 kPa).

7.6.2 *Resolution:* ±5 mm Hg (0.67 kPa).

7.7 *Timing/control device.*

7.7.1 The timing device must be capable of starting and stopping the sampler to obtain an elapsed run-time of 24 hr ±1 hr (1,440 ±60 min).

7.7.2 *Accuracy of time setting:* ±30 min, or better. (See Section 6.8).

7.8 *Flow rate transfer standard,* traceable to a primary standard. (See Section 9.2.)

7.8.1 *Approximate range:* 1.0 to 1.8 m^3/min.

7.8.2 *Resolution:* 0.02 m^3/min.

7.8.3 *Reproducibility:* ±2 percent (2 times coefficient of variation) over normal ranges of ambient temperature and pressure for the stated flow rate range. (See Reference 2, Section 2.)

7.8.4 *Maximum pressure drop at 1.7 std m^3/min;* 50 cm H_2O (5 kPa).

7.8.5 The flow rate transfer standard must connect without leaks to the inlet of the sampler and measure the flow rate of the total air sample.

7.8.6 The flow rate transfer standard must include a means to vary the sampler flow rate over the range of 1.0 to 1.8 m^3/min (35–64 ft^3/min) by introducing various levels of flow resistance between the sampler and the transfer standard inlet.

7.8.7 The conventional type of flow transfer standard consists of: An orifice unit with adapter that connects to the inlet of the sampler, a manometer or other device to measure orifice pressure drop, a means to vary the flow through the sampler unit, a thermometer to measure the ambient tem-

(†) See note at beginning of Section 7 of this appendix.

†† These specifications are in actual air volume units; to convert to EPA standard air volume units, multiply the specifications by $(P_b/P_{std})(298/T)$ where P_b and T are the barometric pressure in mm Hg (or kPa) and the temperature in K at the sampler, and P_{std} is 760 mm Hg (or 101 kPa).

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perature, and a barometer to measure ambient pressure. Two such devices are shown in Figures 2a and 2b. Figure 2a shows multiple fixed resistance plates, which necessitate disassembly of the unit each time the flow resistance is changed. A preferable design, illustrated in Figure 2b, has a variable flow restriction that can be adjusted externally without disassembly of the unit. Use of a conventional, orifice-type transfer standard is assumed in the calibration procedure (Section 9). However, the use of other types of transfer standards meeting the above specifications, such as the one shown in Figure 2c, may be approved; see the note following Section 9.1.

7.9 *Filter conditioning environment*

7.9.1 *Controlled temperature:* between 15° and 30° C with less than ±3° C variation during equilibration period.

7.9.2 *Controlled humidity:* Less than 50 percent relative humidity, constant within ±5 percent.

7.10 *Analytical balance.*

7.10.1 *Sensitivity:* 0.1 mg.

7.10.2 Weighing chamber designed to accept an unfolded 20.3 x 25.4 cm (8 x 10 in) filter.

7.11 *Area light source,* similar to X-ray film viewer, to backlight filters for visual inspection.

7.12 *Numbering device,* capable of printing identification numbers on the filters before they are placed in the filter conditioning environment, if not numbered by the supplier.

8.0 *Procedure.*

(See References 1 and 2 for quality assurance information.)

8.1 Number each filter, if not already numbered, near its edge with a unique identification number.

8.2 Backlight each filter and inspect for pinholes, particles, and other imperfections; filters with visible imperfections must not be used.

8.3 Equilibrate each filter in the conditioning environment for at least 24-hr.

8.4 Following equilibration, weigh each filter to the nearest milligram and record this tare weight (W_i) with the filter identification number.

8.5 Do not bend or fold the filter before collection of the sample.

8.6 Open the shelter and install a numbered, preweighed filter in the sampler, following the sampler manufacturer's instructions. During inclement weather, precautions must be taken while changing filters to prevent damage to the clean filter and loss of sample from or damage to the exposed filter. Filter cassettes that can be loaded and unloaded in the laboratory may be used to minimize this problem (See Section 6.6).

8.7 Close the shelter and run the sampl for at least 5 min to establish run-temper ture conditions.

8.8 Record the flow indicator readi and, if needed, the barometric pressure (P and the ambient temperature (T_a) a NOTE following step 8.12). Stop the sa pler. Determine the sampler flow rate (s Section 10.1); if it is outside the acceptab range (1.1 to 1.7 m^3/min [39-60 ft^3/min use a different filter, or adjust the sampl flow rate. Warning: Substantial flow adju ments may affect the calibration of the or fice-type flow indicators and may neces tate recalibration.

8.9 Record the sampler identification i formation (filter number, site location identification number, sample date, a starting time).

8.10 Set the timer to start and stop t sampler such that the sampler runs 24-h from midnight to midnight (local time).

8.11 As soon as practical following t sampling period, run the sampler for a least 5 min to again establish run-temper ture conditions.

8.12 Record the flow indicator readi and, if needed, the barometric pressure (P and the ambient temperature (T_a).

NOTE: No onsite pressure or temperatu measurements are necessary if the sampl flow indicator does not require pressure temperature corrections (e.g., a mass flo meter) or if average barometric pressu and seasonal average temperature for th site are incorporated into the sampler ca bration (see step 9.3.9). For individual pre sure and temperature corrections, the amb ent pressure and temperature can be o tained by onsite measurements or from nearby weather station. Barometric pre sure readings obtained from airports mu be station pressure, not corrected to s level, and may need to be corrected for di ferences in elevation between the sampl site and the airport. For samplers hav flow recorders but not constant flow co trollers, the average temperature and pre sure at the site *during the sampling perio* should be estimated from weather bureau other available data.

8.13 Stop the sampler and carefull remove the filter, following the sampl manufacturer's instructions. Touch only th outer edges of the filter. See the precau tions in step 8.6.

8.14 Fold the filter in half lengthwise that only surfaces with collected particula matter are in contact and place it in th filter holder (glassine envelope or manil folder).

8.15 Record the ending time or elapse time on the filter information record, eith from the stop set-point time, from a elapsed time indicator, or from a continu

flow record. The sample period must be 1,440 ± 60 min. for a valid sample.

8.16 Record on the filter information record any other factors, such as meteorological conditions, construction activity, fires or dust storms, etc., that might be pertinent to the measurement. If the sample is known to be defective, void it at this time.

8.17 Equilibrate the exposed filter in the conditioning environment for at least 24-hrs.

8.18 Immediately after equilibration, reweigh the filter to the nearest milligram and record the gross weight with the filter identification number. See Section 10 for TSP concentration calculations.

9.0 *Calibration.*

9.1 Calibration of the high volume sampler's flow indicating or control device is necessary to establish traceability of the field measurement to a primary standard via a flow rate transfer standard. Figure 3a illustrates the certification of the flow rate transfer standard and Figure 3b illustrates its use in calibrating a sampler flow indicator. Determination of the corrected flow rate from the sampler flow indicator, illustrated in Figure 3c, is addressed in Section 10.1

NOTE: The following calibration procedure applies to a conventional orifice-type flow transfer standard and an orifice-type flow indicator in the sampler (the most common types). For samplers using a pressure recorder having a square-root scale, 3 other acceptable calibration procedures are provided in Reference 12. Other types of transfer standards may be used if the manufacturer or user provides an appropriately modified calibration procedure that has been approved by EPA under Section 2.8 of Appendix C to Part 58 of this chapter.

9.2 *Certification of the flow rate transfer standard.*

9.2.1 *Equipment required:* Positive displacement standard volume meter traceable to the National Bureau of Standards (such as a Roots meter or equivalent), stop-watch, manometer, thermometer, and barometer.

9.2.2 Connect the flow rate transfer standard to the inlet of the standard volume meter. Connect the manometer to measure the pressure at the inlet of the standard volume meter. Connect the orifice manometer to the pressure tap on the transfer standard. Connect a high-volume air pump (such as a high-volume sampler blower) to the outlet side of the standard volume meter. See Figure 3a.

9.2.3 Check for leaks by temporarily clamping both manometer lines (to avoid fluid loss) and blocking the orifice with a large-diameter rubber stopper, wide cellophane tape, or other suitable means. Start the high-volume air pump and note any change in the standard volume meter reading. The reading should remain constant. If the reading changes, locate any leaks by listening for a whistling sound and/or retightening all connections, making sure that all gaskets are properly installed.

9.2.4 After satisfactorily completing the leak check as described above, unclamp both manometer lines and zero both manometers.

9.2.5 Achieve the appropriate flow rate through the system, either by means of the variable flow resistance in the transfer standard or by varying the voltage to the air pump. (Use of resistance plates as shown in Figure 1a is discouraged because the above leak check must be repeated each time a new resistance plate is installed.) At least five different but constant flow rates, evenly distributed, with at least three in the specified flow rate interval (1.1 to 1.7 m^3/min [39–60 ft^3/min]), are required.

9.2.6 Measure and record the certification data on a form similar to the one illustrated in Figure 4 according to the following steps.

9.2.7 Observe the barometric pressure and record as P_i (item 8 in Figure 4).

9.2.8 Read the ambient temperature in the vicinity of the standard volume meter and record it as T_i (item 9 in Figure 4).

9.2.9 Start the blower motor, adjust the flow, and allow the system to run for at least 1 min for a constant motor speed to be attained.

9.2.10 Observe the standard volume meter reading and simultaneously start a stopwatch. Record the initial meter reading (V_i) in column 1 of Figure 4.

9.2.11 Maintain this constant flow rate until at least 3 m^3 of air have passed through the standard volume meter. Record the standard volume meter inlet pressure manometer reading as ΔP (column 5 in Figure 4), and the orifice manometer reading as ΔH (column 7 in Figure 4). Be sure to indicate the correct units of measurement.

9.2.12 After at least 3 m^3 of air have passed through the system, observe the standard volume meter reading while simultaneously stopping the stopwatch. Record the final meter reading (V_f) in column 2 and the elapsed time (t) in column 3 of Figure 4.

9.2.13 Calculate the volume measured by the standard volume meter at meter conditions of temperature and pressures as $V_m = V_f - V_i$. Record in column 4 of Figure 4.

9.2.14 Correct this volume to standard volume (std m^3) as follows:

$$V_{std} = V_m \frac{P_i - \Delta P}{P_{std}} \frac{T_{std}}{T_i}$$

where:

V_{std} = standard volume, std m^3;

V_m=actual volume measured by the standard volume meter;
P_1=barometric pressure during calibration, mm Hg or kPa;
ΔP=differential pressure at inlet to volume meter, mm Hg or kPa;
P_{std}=760 mm Hg or 101 kPa;
T_{std}=298 K;
T_1=ambient temperature during calibration, K.

Calculate the standard flow rate (std m^3/min) as follows:

$$Q_{std} = \frac{V_{std}}{t}$$

where:
Q_{std}=standard volumetric flow rate, std m^3/min
t=elapsed time, minutes.

Record Q_{std} to the nearest 0.01 std m^3/min in column 6 of Figure 4.

9.2.15 Repeat steps 9.2.9 through 9.2.14 for at least four additional constant flow rates, evenly spaced over the approximate range of 1.0 to 1.8 std m^3/min (35-64 ft^3/min).

9.2.16 For each flow, compute

$$\sqrt{\Delta\Delta H}\,(P_1/P_{std})(298/T_1)$$

(column 7a of Figure 4) and plot these value against Q_{std} as shown in Figure 3a. Be sure to use consistent units (mm Hg or kPa) for barometric pressure. Draw the orifice transfer standard certification curve or calculate the linear least squares slope (m) and intercept (b) of the certification curve:

$$\sqrt{\Delta\Delta H}\,(P_1/P_{std})(298/T_1)$$

$=mQ_{std}+b$. See Figures 3 and 4. A certification graph should be readable to 0.02 std m^3/min.

9.2.17 Recalibrate the transfer standard annually or as required by applicable quality control procedures. (See Reference 2.)

9.3 *Calibration of sampler flow indicator.*

NOTE: For samplers equipped with a flow controlling device, the flow controller must be disabled to allow flow changes during calibration of the sampler's flow indicator, or the alternate calibration of the flow controller given in 9.4 may be used. For samplers using an orifice-type flow indicator downstream of the motor, do not vary the flow rate by adjusting the voltage or power supplied to the sampler.

9.3.1 A form similar to the one illustrated in Figure 5 should be used to record the calibration data.

9.3.2 Connect the transfer standard to the inlet of the sampler. Connect the orifice manometer to the orifice pressure tap, as illustrated in Figure 3b. Make sure there are no leaks between the orifice unit and the sampler.

9.3.3 Operate the sampler for at least 5 minutes to establish thermal equilibrium prior to the calibration.

9.3.4 Measure and record the ambient temperature, T_2, and the barometric pressure, P_2, during calibration.

9.3.5 Adjust the variable resistance or, if applicable, insert the appropriate resistance plate (or no plate) to achieve the desired flow rate.

9.3.6 Let the sampler run for at least 2 min to re-establish the run-temperature conditions. Read and record the pressure drop across the orifice (ΔH) and the sampler flow rate indication (I) in the appropriate columns of Figure 5.

9.3.7 Calculate $\sqrt{\Delta H(P_2/P_{std})(298/T_2)}$ and determine the flow rate at standard conditions (Q_{std}) either graphically from the certification curve or by calculating Q_{std} from the least square slope and intercept of the transfer standard's transposed certification curve: $Q_{std}=1/m\ \sqrt{\Delta H(P_2/P_{std})(298/T_2)}-b$. Record the value of Q_{std} on Figure 5.

9.3.8 Repeat steps 9.3.5, 9.3.6, and 9.3.7 for several additional flow rates distributed over a range that includes 1.1 to 1.7 std m^3/min.

9.3.9 Determine the calibration curve by plotting values of the appropriate expression involving I, selected from Table 1, against Q_{std}. The choice of expression from Table 1 depends on the flow rate measurement device used (see Section 7.4.1) and also on whether the calibration curve is to incorporate geographic average barometric pressure (P_a) and seasonal average temperature (T_a) for the site to approximate actual pressure and temperature. Where P_a and T_a can be determined for a site for a seasonal period such that the actual barometric pressure and temperature at the site do not vary by more than ±60 mm Hg (8 kPa) from P_a or ±15° C from T_a, respectively, then using P_a and T_a avoids the need for subsequent pressure and temperature calculation when the sampler is used. The geographic average barometric pressure (P_a) may be estimated from an altitude-pressure table or by making an (approximate) elevation correction of −26 mm Hg (−3.46 kPa) for each 300 m (1,000 ft) above sea level (760 mm Hg or 101 kPa). The seasonal average temperature (T_a) may be estimated from weather station or other records. Be sure to use consistent units (mm Hg or kPa) for barometric pressure.

9.3.10 Draw the sampler calibration curve or calculate the linear least squares slope (m), intercept (b), and correlation coefficient of the calibration curve: [Expression from Table 1]= $mQ_{std}+b$. See Figures 3 and 5. Calibration curves should be readable to 0.02 std m^3/min.

9.3.11 For a sampler equipped with a flow controller, the flow controlling mechanism should be re-enabled and set to a flow near the lower flow limit to allow maximum control range. The sample flow rate should be verified at this time with a clean filter installed. Then add two or more filters to the sampler to see if the flow controller maintains a constant flow; this is particularly important at high altitudes where the range of the flow controller may be reduced.

9.4 Alternate calibration of flow-controlled samplers. A flow-controlled sampler may be calibrated solely at its controlled flow rate, provided that previous operating history of the sampler demonstrates that the flow rate is stable and reliable. In this case, the flow indicator may remain uncalibrated but should be used to indicate any relative change between initial and final flows, and the sampler should be recalibrated more often to minimize potential loss of samples because of controller malfunction.

9.4.1 Set the flow controller for a flow near the lower limit of the flow range to allow maximum control range.

9.4.2 Install a clean filter in the sampler and carry out steps 9.3.2, 9.3.3, 9.3.4, 9.3.6, and 9.3.7.

9.4.3 Following calibration, add one or two additional clean filters to the sampler, reconnect the transfer standard, and operate the sampler to verify that the controller maintains the same calibrated flow rate; this is particularly important at high altitudes where the flow control range may be reduced.

TABLE 1. EXPRESSIONS FOR PLOTTING SAMPLER CALIBRATION CURVES

Type of sampler flow rate measuring device	Expression	
	For actual pressure and temperature corrections	For incorporation of geographic average pressure and seasonal average temperature
Mass flowmeter	I	I
Orifice and pressure indicator	$\sqrt{I\left(\frac{P_2}{P_{std}}\right)\left(\frac{298}{T_2}\right)}$	$\sqrt{I\left(\frac{P_2}{P_a}\right)\left(\frac{T_a}{T_2}\right)}$
Rotameter, or orifice and pressure recorder having square root scale*	$I\sqrt{\left(\frac{P_2}{P_{std}}\right)\left(\frac{298}{T_2}\right)}$	$I\sqrt{\left(\frac{P_2}{P_a}\right)\left(\frac{T_a}{T_2}\right)}$

*This scale is recognizable by its nonuniform divisions and is the most commonly available for high-volume samplers.

TABLE 2. EXPRESSIONS FOR DETERMINING FLOW RATE DURING SAMPLER OPERATION

Type of sampler flow rate measuring device	Expression	
	For actual pressure and temperature corrections	For use when geographic average pressure and seasonal average temperature have been incorporated into the sampler calibration
Mass flowmeter	I	I
Orifice and pressure indicator	$\sqrt{I\left(\frac{P_3}{P_{std}}\right)\left(\frac{298}{T_3}\right)}$	$\sqrt{I}$
Rotameter, or orifice and pressure recorder having square root scale*	$I\sqrt{\left(\frac{P_3}{P_{std}}\right)\left(\frac{298}{T_3}\right)}$	I

*This scale is recognizable by its nonuniform divisions and is the most commonly available for high-volume samplers.

10.0 *Calculations of TSP Concentration.*

10.1 Determine the average sampler flow rate during the sampling period according to either 10.1.1 or 10.1.2 below.

10.1.1 For a sampler without a continuous flow recorder, determine the appropriate expression to be used from Table 2 corresponding to the one from Table 1 used in step 9.3.9. Using this appropriate expression, determine Q_{std} for the initial flow rate from the sampler calibration curve, either graphically or from the transposed regression equation:

Q_{std} =

1/m ([Appropriate expression from Table 2] − b)

Similarly, determine Q_{std} from the final flow reading, and calculate the average flow Q_{std} as one-half the sum of the initial and final flow rates.

10.1.2 For a sampler with a continuous flow recorder, determine the average flow rate device reading, I, for the period. Determine the appropriate expression from Table 2 corresponding to the one from Table 1 used in step 9.3.9. Then using this expression and the average flow rate reading, determine Q_{std} from the sampler calibration curve, either graphically or from the transposed regression equation:

Q_{std} =

1/m ([Appropriate expression from Table 2] − b)

If the trace shows substantial flow change during the sampling period, greater accuracy may be achieved by dividing the sampling period into intervals and calculating an average reading before determining Q_{std}.

10.2 Calculate the total air volume sampled as:

$V = Q_{std} \times t$

where:

V = total air volume sampled, in standard volume units, std m^3;

Q_{std} = average standard flow rate, std m^3/min;

t = sampling time, min.

10.3 Calculate and report the particulate matter concentration as:

$$TSP = \frac{(W_f - W_i) \times 10^6}{V}$$

where:

TSP = mass concentration of total suspended particulate matter, μg/std m^3;

W_i = initial weight of clean filter, g;

W_f = final weight of exposed filter, g;

V = air volume sampled, converted to standard conditions, std m^3,

10^6 = conversion of g to μg.

10.4 If desired, the actual particulate matter concentration (see Section 2.2) can be calculated as follows:

$(TSP)_a = TSP\ (P_3/P_{std})(298/T_3)$

where:

$(TSP)_a$=actual concentration at field conditions, $\mu g/m^3$;

TSP=concentration at standard conditions, $\mu g/std\ m^3$;

P_a=average barometric pressure during sampling period, mm Hg;

P_{std}=760 mn Hg (or 101 kPa);

T_a=average ambient temperature during sampling period, K.

11.0 *References.*

1. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I, Principles. EPA-600/9-76-005, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1976.

2. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Specific Methods. EPA-600/4-77-027a, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1977.

3. Wedding, J. B., A. R. McFarland, and J. E. Cernak. Large Particle Collection Characteristics of Ambient Aerosol Samplers. Environ. Sci. Technol. *11*:387-390, 1977.

4. McKee, H. C., et al. Collaborative Testing of Methods to Measure Air Pollutants, I. The High-Volume Method for Suspended Particulate Matter. J. Air Poll. Cont. Assoc., 22 (342), 1972.

5. Clement, R. E., and F. W. Karasek. Sample Compbsition Changes in Sampling and Analysis of Organic Compounds in Aerosols. The Intern. J. Environ. Anal. Chem., 7:109, 1979.

6. Lee, R. E., Jr., and J. Wagman. A Sampling Anomaly in the Determination of Atmospheric Sulfuric Concentration. Am. Ind. Hygiene Assoc. J., 27:266, 1966.

7. Appel, B. R., et al. Interference Effects in Sampling Particulate Nitrate in Ambient Air. Atmospheric Environment, 13:319, 1979.

8. Tierney, G. P., and W. D. Conner. Hygroscopic Effects on Weight Determinations of Particulates Collected on Glass-Fiber Filters. Am. Ind. Hygiene Assoc. J., 28:363, 1967.

9. Chahal, H. S., and D. J. Romano. High-Volume Sampling Effect of Windborne Particulate Matter Deposited During Idle Periods. J. Air Poll. Cont. Assoc., Vol. 26 (885), 1976.

10. Patterson, R. K. Aerosol Contamination from High-Volume Sampler Exhaust. J. Air Poll. Cont. Assoc., Vol. 30 (169), 1980.

11. EPA Test Procedures for Determining pH and Integrity of High-Volume Air Filters. QAD/M-80.01. Available from the Methods Standardization Branch, Quality Assurance Division, Environmental Monitoring Systems Laboratory (MD-77), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1980.

12. Smith, F., P. S. Wohlschlegel, R. S. C. Rogers, and D. J. Mulligan. Investigation of Flow Rate Calibration Procedures Associated with the High-Volume Method for Determination of Suspended Particulates. EPA-600/4-78-047, U.S. Environmental Protection Agency, Research Triangle Park, NC, June 1978.

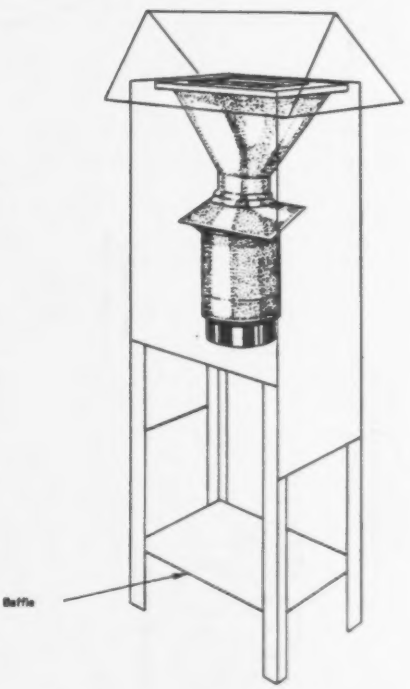

Figure 1. High-volume sampler in shelter.

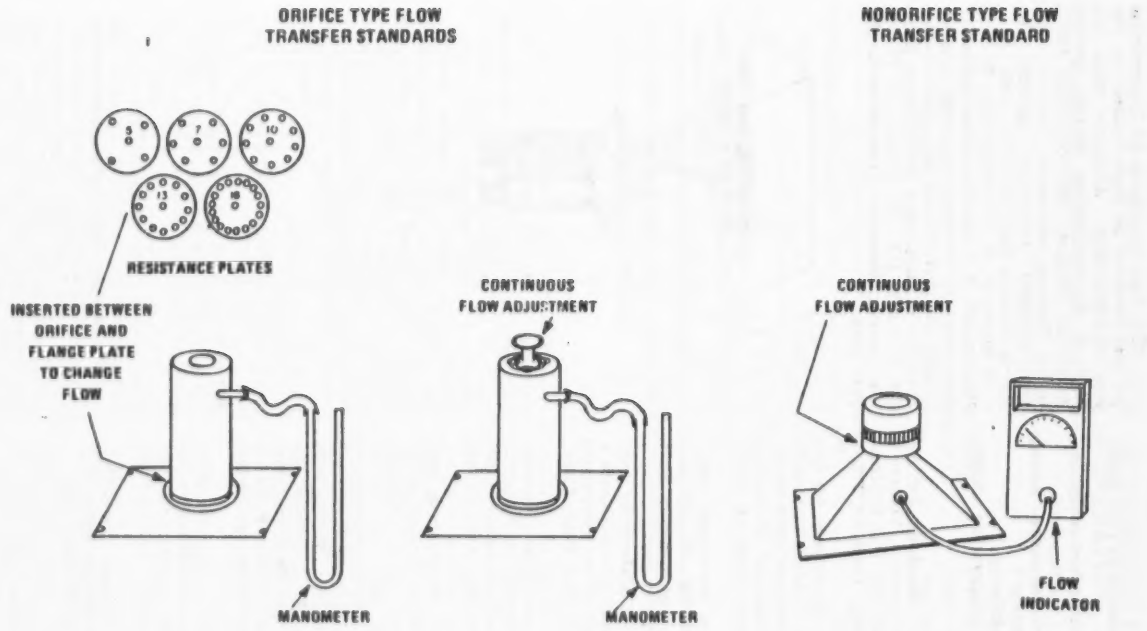

Figure 2. Various types of flow transfer standards. Note that all devices are designed to mount to the filter inlet area of the sampler.

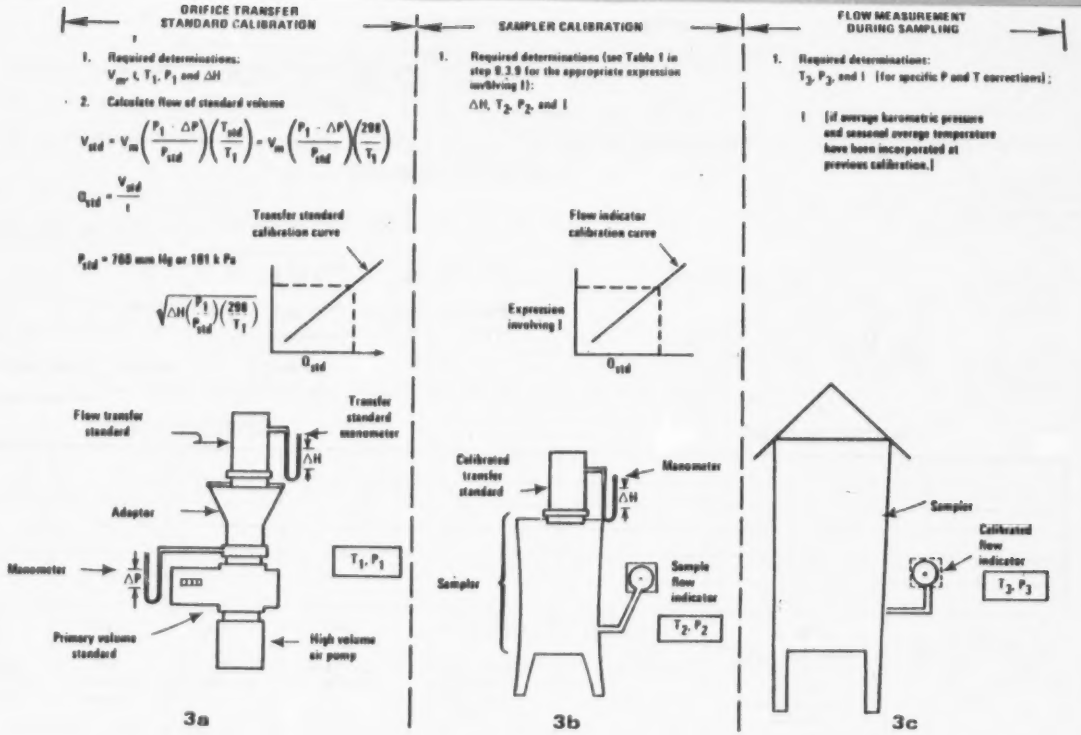

Figure 3. Illustration of the 3 steps in the flow measurement process.

ORIFICE TRANSFER STANDARD CERTIFICATION WORKSHEET

Run No.	(1) Meter reading start V_i (m^3)	(2) Meter reading stop V_f (m^3)	(3) Sampling time t (min)	(4) Volume measured V_m (m^3)	(5) Differential pressure (at inlet to volume meter) ΔP (mm Hg or kPa)	(6) (X) Flow rate Q_{std} (std m^3/min)	(7) Pressure drop across orifice ΔH ☐ (in) or ☐ (cm) of water	(7a) (Y) $\sqrt{\Delta H\left(\frac{P_i}{P_{std}}\right)\left(\frac{298}{T_i}\right)}$
1								
2								
3								
4								
5								
6								

RECORDED CALIBRATION DATA

Standard volume meter no. _____

Transfer standard type: ☐ orifice ☐ other

Model No. _____ Serial No. _____

(8) P_i: _____ mm Hg (or kPa) (10) P_{std}: 760 mm Hg (or 101 kPa)

(9) T_i: _____ K (11) T_{std}: 298 K

Calibration performed by: _____

Date: _____

CALCULATION EQUATIONS

(1) $V_m = V_f - V_i$

(2) $V_{std} = V_m\left(\frac{P_i - \Delta P}{P_{std}}\right)\left(\frac{T_{std}}{T_i}\right)$

(3) $Q_{std} = \frac{V_{std}}{t}$

LEAST SQUARES CALCULATIONS

Linear ($Y = mX + b$) regression equation of $Y = \sqrt{\Delta H(P_i/P_{std})(298/T_i)}$ on $X = Q_{std}$ for Orifice Calibration Unit (i.e., $\sqrt{\Delta H(P_i/P_{std})(298/T_i)} = mQ_{std} + b$)

Slope (m) = _____ Intercept (b) = _____ Correlation coefficient (r) = _____

To use for subsequent calibration: $X = \frac{1}{m}(Y-b)$; $\boxed{Q_{std} = \frac{1}{m}\left(\sqrt{\Delta H\left(\frac{P_i}{P_{std}}\right)\left(\frac{298}{T_i}\right)} - b\right)}$

Figure 4. Example of orifice transfer standard certification worksheet.

HIGH-VOLUME AIR SAMPLER CALIBRATION WORKSHEET

Site Location: _____

Date: _____ Barometric Pressure, P_a mm Hg (or kPa) _____

Calibrated By: _____ Temperature, T_a (K) _____

Sampler No. _____ Serial No. _____

Transfer std. type: _____ Serial No. _____

Optional:

P_{std} = 760 mm Hg (or 101 kPa)

Average barometric pressure: P_a = _____

Seasonal average temperature: T_a = _____

No.	ΔH Pressure drop across orifice ☐(in) or ☐(cm) of water	$\sqrt{\Delta H\left(\frac{P_a}{P_{std}}\right)\left(\frac{298}{T_a}\right)}$	(X) Q_{std} (from orifice certification) std m^3/min	I Sampler flow rate indication (arbitrary)	(Y) For specific pressure and temperature corrections (see Table 1) ☐ I or ☐ $\sqrt{I\left(\frac{P_a}{P_{std}}\right)\left(\frac{298}{T_a}\right)}$ or ☐ $I\sqrt{\left(\frac{P_a}{P_{std}}\right)\left(\frac{298}{T_a}\right)}$	(Y) For incorporation of average pressure and seasonal average temperature (see Table 1) ☐ I or ☐ $\sqrt{I\left(\frac{P_a}{P_a}\right)\left(\frac{T_a}{T_a}\right)}$ or ☐ $I\sqrt{\left(\frac{P_a}{P_a}\right)\left(\frac{T_a}{T_a}\right)}$
1						
2						
3						
4						
5						
6						

LEAST SQUARES CALCULATIONS

Linear regression of Y on X: Y = mX + b; Y = appropriate expression from Table 1; X = Q_{std}

Slope (m) = ____ Intercept (b) = ____ Correlation Coeff. (r) = _____

To determine subsequent flow rate during use: $X = \frac{1}{m}(Y-b)$; $\boxed{Q_{std} = \frac{1}{m}([\text{appropriate expression from Table 2}] - b)}$

Figure 5. Example of high-volume air sampler calibration worksheet.

[47 FR 54912, Dec. 6, 1982; 48 FR 17355, Apr. 22, 1983]

APPENDIX C—MEASUREMENT PRINCIPLE AND CALIBRATION PROCEDURE FOR THE MEASUREMENT OF CARBON MONOXIDE IN THE ATMOSPHERE (NON-DISPERSIVE INFRARED PHOTOMETRY)

Measurement Principle

1. Measurements are based on the absorption of infrared radiation by carbon monoxide (CO) in a non-dispersive photometer. Infrared energy from a source is passed through a cell containing the gas sample to be analyzed, and the quantitative absorption of energy by CO in the sample cell is measured by a suitable detector. The photometer is sensitized to CO by employing CO gas in either the detector or in a filter cell in the optical path, thereby limiting the measured absorption to one or more of the characteristic wavelengths at which CO strongly absorbs. Optical filters or other means may also be used to limit sensitivity of the photometer to a narrow band of interest. Various schemes may be used to provide a suitable zero reference for the photometer. The measured absorption is converted to an electrical output signal, which is related to the concentration of CO in the measurement cell.

2. An analyzer based on this principle will be considered a reference method only if it has been designated as a reference method in accordance with Part 53 of this chapter.

3. Sampling considerations.

The use of a particle filter on the sample inlet line of an NDIR CO analyzer is optional and left to the discretion of the user or the manufacturer. Use of filter should depend on the analyzer's susceptibility to interference, malfunction, or damage due to particles.

Calibration Procedure

1. *Principle.* Either of two methods may be used for dynamic multipoint calibration of CO analyzers:

(1) One method uses a single certified standard cylinder of CO, diluted as necessary with zero air, to obtain the various calibration concentrations needed.

(2) The other method uses individual certified standard cylinders of CO for each concentration needed. Additional information on calibration may be found in Section 2.0.9 of Reference 1.

2. *Apparatus.* The major components and typical configurations of the calibration systems for the two calibration methods are shown in Figures 1 and 2.

2.1 Flow controller(s). Device capable of adjusting and regulating flow rates. Flow rates for the dilution method (Figure 1) must be regulated to ± 1%.

2.2 Flow meter(s). Calibrated flow meter capable of measuring and monitoring flow rates. Flow rates for the dilution method (Figure 1) must be measured with an accuracy of ± 2% of the measured value.

2.3 Pressure regulator(s) for standard CO cylinder(s). Regulator must have nonreactive diaphragm and internal parts and a suitable delivery pressure.

2.4 Mixing chamber. A chamber designed to provide thorough mixing of CO and diluent air for the dilution method.

2.5 Output manifold. The output manifold should be of sufficient diameter to insure an insignificant pressure drop at the analyzer connection. The system must have a vent designed to insure atmospheric pressure at the manifold and to prevent ambient air from entering the manifold.

3. *Reagents.*

3.1 CO concentration standard(s). Cylinder(s) of CO in air containing appropriate concentrations(s) of CO suitable for the selected operating range of the analyzer under calibration; CO standards for the dilution method may be contained in a nitrogen matrix if the zero air dilution ratio is not less than 100:1. The assay of the cylinder(s) must be traceable either to a National Bureau of Standards (NBS) CO in air Standard Reference Material (SRM) or to an NBS/EPA-approved commercially available Certified Reference Material (CRM). CRM's are described in Reference 2, and a list of CRM sources is available from the address shown for Reference 2. A recommended protocol for certifying CO gas cylinders against either a CO SRM or a CRM is given in Reference 1. CO gas cylinders should be recertified on a regular basis as determined by the local quality control program.

3.2 Dilution gas (zero air). Air, free of contaminants which will cause a detectable response on the CO analyzer. The zero air should contain <0.1 ppm CO. A procedure for generating zero air is given in Reference 1.

4. *Procedure Using Dynamic Dilution Method.*

4.1 Assemble a dynamic calibration system such as the one shown in Figure 1. All calibration gases including zero air must be introduced into the sample inlet of the analyzer system. For specific operating instructions refer to the manufacturer's manual.

4.2 Insure that all flowmeters are properly calibrated, under the conditions of use, as appropriate, against an authoritative standard such as a soap-bubble meter or wet-test meter. All volumetric flowrates should be corrected to 25° C and 760 mm Hg (101 kPa). A discussion on calibration of flowmeters is given in Reference 1.

4.3 Select the operating range of the CO analyzer to be calibrated.

4.4 Connect the signal output of the CO analyzer to the input of the strip chart recorder or other data collection device. All adjustments to the analyzer should be based on the appropriate strip chart or data device readings. References to analyzer responses in the procedure given below refer to recorder or data device responses.

4.5 Adjust the calibration system to deliver zero air to the output manifold. The total air flow must exceed the total demand of the analyzer(s) connected to the output manifold to insure that no ambient air is pulled into the manifold vent. Allow the analyzer to sample zero air until a stable respose is obtained. After the response has stabilized, adjust the analyzer zero control. Offsetting the analyzer zero adjustments to +5 percent of scale is recommended to facilitate observing negative zero drift. Record the stable zero air response as Z_{CO}.

4.6 Adjust the zero air flow and the CO flow from the standard CO cylinder to provide a diluted CO concentration of approximately 80 percent of the upper range limit (URL) of the operating range of the analyzer. The total air flow must exceed the total demand of the analyzer(s) connected to the output manifold to insure that no ambient air is pulled into the manifold vent. The exact CO concentration is calculated from:

$$[CO]_{OUT} = \frac{[CO]_{STD} \times F_{CO}}{F_D + F_{CO}} \quad (1)$$

Where:

$[CO]_{OUT}$=diluted CO concentration at the output manifold, ppm;

$[CO]_{STD}$=concentration of the undiluted CO standard, ppm;

F_{CO}=flow rate of the CO standard corrected to 25° C and 760 mm Hg, (101 kPa), L/min; and

F_D=flow rate of the dilution air corrected to 25° C and 760 mm Hg, (101 kPa), L/min.

Sample this CO concentration until a stable response is obtained. Adjust the analyzer span control to obtain a recorder response as indicated below:

Recorder response (percent scale)=

$$\frac{[CO]_{OUT}}{URL} \times 100 + Z_{CO} \quad (2)$$

Where:

URL=nominal upper range limit of the analyzer's operating range, and

Z_{CO}=analyzer response to zero air, % scale.

If substantial adjustment of the analyzer span control is required, it may be necessary to recheck the zero and span adjustments by repeating Steps 4.5 and 4.6. Record the CO concentration and the analyzer's response. 4.7 Generate several additional concentrations (at least three evenly spaced points across the remaining scale are suggested to verify linearity) by decreasing F_{CO} or increasing F_D. Be sure the total flow exceeds the analyzer's total flow demand. For each concentration generated, calculate the exact CO concentration using Equation (1). Record the concentration and the analyzer's response for each concentration. Plot the analyzer responses versus the corresponding CO concentrations and draw or calculate the calibration curve.

5. *Procedure Using Multiple Cylinder Method.* Use the procedure for the dynamic dilution method with the following changes:

5.1 Use a multi-cylinder system such as the typical one shown in Figure 2.

5.2 The flowmeter need not be accurately calibrated, provided the flow in the output manifold exceeds the analyzer's flow demand.

5.3 The various CO calibration concentrations required in Steps 4.6 and 4.7 are obtained without dilution by selecting the appropriate certified standard cylinder.

References

1. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II—Ambient Air Specific Methods, EPA-600/4-77-027a, U.S. Environmental Protection Agency, Environmental Monitoring Systems Laboratory, Research Triangle Park, NC 27711, 1977.

2. A procedure for Establishing Traceability of Gas Mixtures to Certain National Bureau of Standards Standard Reference Materials. EPA-600/7-81-010, U.S. Environmental Protection Agency, Environmental Monitoring Systems Laboratory (MD-77), Research Triangle Park, NC 27711, January 1981.

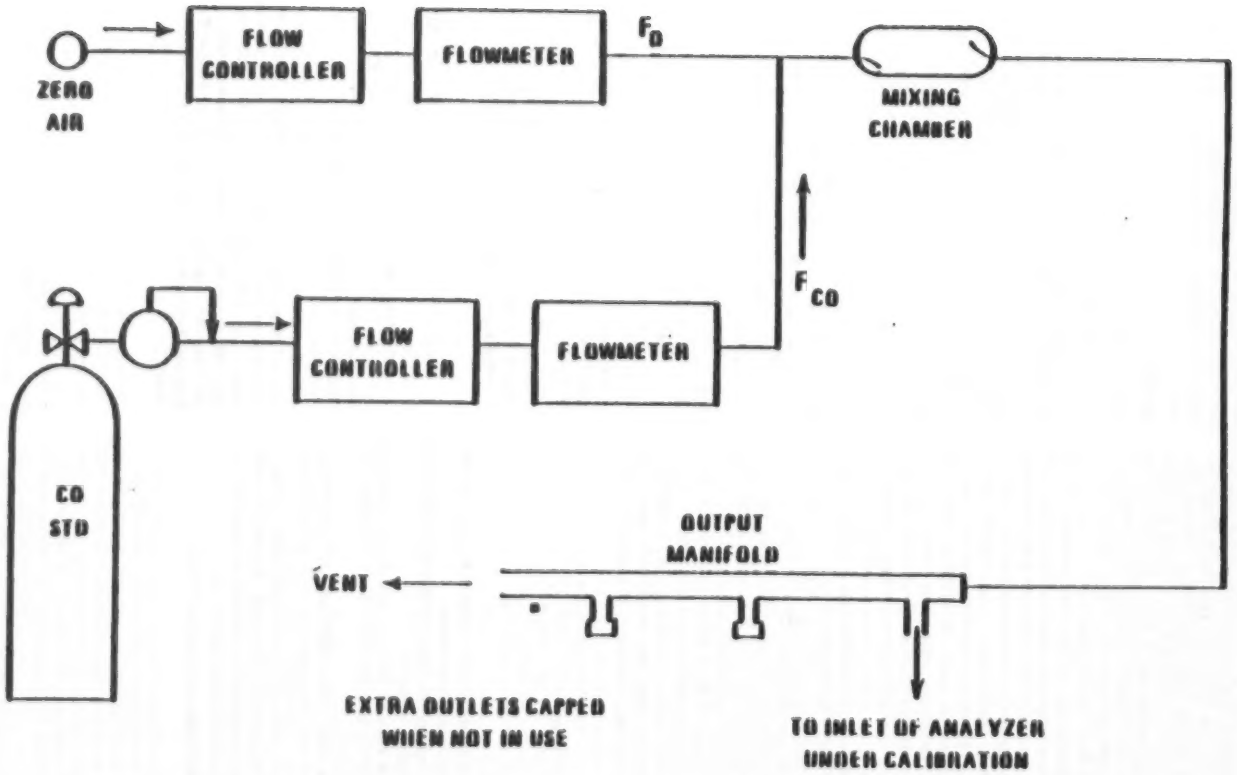

Figure 1. Dilution method for calibration of CO analyzers.

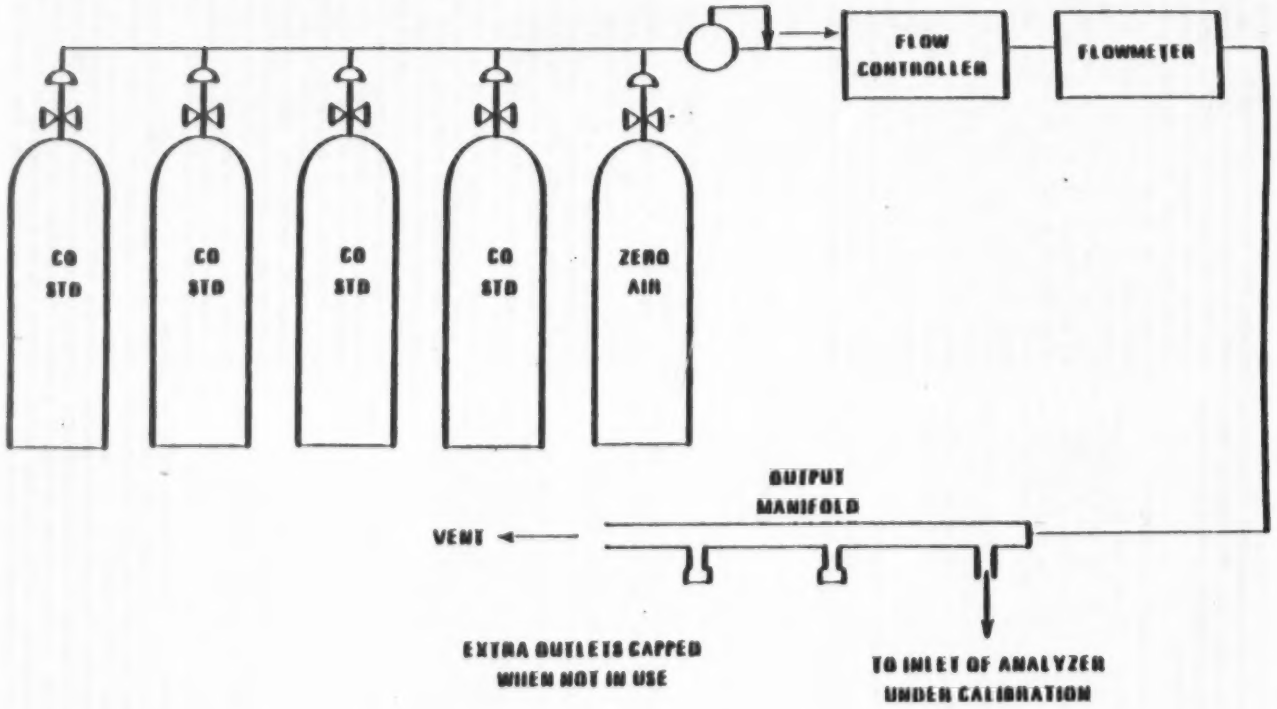

Figure 2. Multiple cylinder method for calibration of CO analyzers.

[47 FR 54922, Dec. 6, 1982; 48 FR 17355, Apr. 22, 1983]

Appendix D—Measurement Principle and Calibration Procedure for the Measurement of Ozone in the Atmosphere

Measurement Principle

1. Ambient air and ethylene are delivered simultaneously to a mixing zone where the ozone in the air reacts with the ethylene to emit light, which is detected by a photomultiplier tube. The resulting photocurrent is amplified and is either read directly or displayed on a recorder.

2. An analyzer based on this principle will be considered a reference method only if it has been designated as a reference method in accordance with Part 53 of this chapter and calibrated as follows:

Calibration Procedure

1. *Principle.* The calibration procedure is based on the photometric assay of ozone (O_3) concentrations in a dynamic flo system. The concentration of O_3 in an ab sorption cell is determined from a measure ment of the amount of 254 nm light ab sorbed by the sample. This determinatio requires knowledge of (1) the absorption co efficient (α) of O_3 at 254 nm, (2) the optica path length (l) through the sample, (3) the transmittance of the sample at a wave length of 254 nm, and (4) the temperature (T) and pressure (P) of the sample. The transmittance is defined as the ratio I/I_o where I is the intensity of light which passes through the cell and is sensed by the detector when the cell contains an O_3 sample, and I_o is the intensity of light which passes through the cell and is sensed by the detector when the cell contains zero air. It is assumed that all conditions of the system, except for the contents of the absorption cell, are identical during measurement of I and I_o. The quantities defined above are related by the Beer-Lambert absorption law,

$$\text{Transmittance} = \frac{I}{I_o} = e^{-\alpha c l} \quad (1)$$

where:

α = absorption coefficient of O_3 at 254 nm = 308 ± 4 atm^{-1} cm^{-1} at 0°C and 760 torr.[1 2 3 4 5 6 7]

c = O_3 concentration in atmospheres

l = optical path length in cm

In practice, a stable O_3 generator is used to produce O_3 concentrations over the required range. Each O_3 concentration is determined from the measurement of the transmittance (I/I_o) of the sample at 254 nm with a photometer of path length l and calculated from the equation,

$$c(\text{atm}) = -\frac{1}{\alpha l}(\ln I/I_o) \quad (2a)$$

or,

$$c(\text{ppm}) = -\frac{10^6}{\alpha l}(\ln I/I_o) \quad (2b)$$

The calculated O_3 concentrations must be corrected for O_3 losses which may occur in the photometer and for the temperature and pressure of the sample.

2. *Applicability.* This procedure is applicable to the calibration of ambient air O_3 analyzers, either directly or by means of a transfer standard certified by this procedure. Transfer standards must meet the requirements and specifications set forth in Reference 8.

3. *Apparatus.* A complete UV calibration system consists of an ozone generator, an output port or manifold, a photometer, an appropriate source of zero air, and other components as necessary. The configuration must provide a stable ozone concentration at the system output and allow the photometer to accurately assay the output concentration to the precision specified for the photometer (3.1). Figure 1 shows a commonly used configuration and serves to illustrate the calibration procedure which follows. Other configurations may require appropriate variations in the procedural steps. All connections between components in the calibration system downstream of the O_3 generator should be of glass, Teflon, or other relatively inert materials. Additional information regarding the assembly of a UV photometric calibration apparatus is given in Reference 9. For certification of transfer standards which provide their own source of O_3, the transfer standard may replace the O_3 generator and possibly other components shown in Figure 1; see Reference 8 for guidance.

3.1 *UV photometer.* The photometer consists of a low-pressure mercury discharge lamp, (optional) collimation optics, an absorption cell, a detector, and signal-processing electronics, as illustrated in Figure 1. It must be capable of measuring the transmittance, I/I_o, at a wavelength of 254 nm with sufficient precision such that the standard

deviation of the concentration measurements does not exceed the greater of 0.005 ppm or 3% of the concentration. Because the low-pressure mercury lamp radiates at several wavelengths, the photometer must incorporate suitable means to assure that no O_3 is generated in the cell by the lamp, and that at least 99.5% of the radiation sensed by the detector is 254 nm radiation. (This can be readily achieved by prudent selection of optical filter and detector response characteristics.) The length of the light path through the absorption cell must be known with an accuracy of at least 99.5%. In addition, the cell and associated plumbing must be designed to minimize loss of O_3 from contact with cell walls and gas handling components. See Reference 9 for additional information.

3.2 *Air flow controllers.* Devices capable of regulating air flows as necessary to meet the output stability and photometer precision requirements.

3.3 *Ozone generator.* Device capable of generating stable levels of O_3 over the required concentration range.

3.4 *Output manifold.* The output manifold should be constructed of glass, Teflon, or other relatively inert material, and should be of sufficient diameter to insure a negligible pressure drop at the photometer connection and other output ports. The system must have a vent designed to insure atmospheric pressure in the manifold and to prevent ambient air from entering the manifold.

3.5 *Two-way valve.* Manual or automatic valve, or other means to switch the photometer flow between zero air and the O_3 concentration.

3.6 *Temperature indicator.* Accurate to ±1°C.

3.7 *Barometer or pressure indicator.* Accurate to ±2 torr.

4. *Reagents.*

4.1 *Zero air.* The zero air must be free of contaminants which would cause a detectable response from the O_3 analyzer, and it should be free of NO, C_2H_4, and other species which react with O_3. A procedure for generating suitable zero air is given in Reference 9. As shown in Figure 1, the zero air supplied to the photometer cell for the I_0 reference measurement must be derived from the same source as the zero air used for generation of the ozone concentration to be assayed (I measurement). When using the photometer to certify a transfer standard having its own source of ozone, see Reference 8 for guidance on meeting this requirement.

5. *Procedure.*

5.1 *General operation.* The calibration photometer must be dedicated exclusively to use as a calibration standard. It should always be used with clean, filtered calibration gases, and never used for ambient air sampling. Consideration should be given to locating the calibration photometer in a clean laboratory where it can be stationary, protected from physical shock, operated by a responsible analyst, and used as a common standard for all field calibrations via transfer standards.

5.2 *Preparation.* Proper operation of the photometer is of critical importance to the accuracy of this procedure. The following steps will help to verify proper operation. The steps are not necessarily required prior to each use of the photometer. Upon initial operation of the photometer, these steps should be carried out frequently, with all quantitative results or indications recorded in a chronological record either in tabular form or plotted on a graphical chart. As the performance and stability record of the photometer is established, the frequency of these steps may be reduced consistent with the documented stability of the photometer.

5.2.1 *Instruction manual:* Carry out all set up and adjustment procedures or checks as described in the operation or instruction manual associated with the photometer.

5.2.2 *System check:* Check the photometer system for integrity, leaks, cleanliness, proper flowrates, etc. Service or replace filters and zero air scrubbers or other consumable materials, as necessary.

5.2.3 *Linearity:* Verify that the photometer manufacturer has adequately established that the linearity error of the photometer is less than 3%, or test the linearity by dilution as follows: Generate and assay an O_3 concentration near the upper range limit of the system (0.5 or 1.0 ppm), then accurately dilute that concentration with zero air and reassay it. Repeat at several different dilution ratios. Compare the assay of the original concentration with the assay of the diluted concentration divided by the dilution ratio, as follows

$$E = \frac{A_1 - A_2/R}{A_1} \times 100\% \qquad (3)$$

where:

E = linearity error, percent
A_1 = assay of the original concentration
A_2 = assay of the diluted concentration
R = dilution ratio = flow of original concentration divided by the total flow

The linearity error must be less than 5%. Since the accuracy of the measured flowrates will affect the linearity error as measured this way, the test is not necessarily conclusive. Additional information on verifying linearity is contained in Reference 9.

5.2.4 *Intercomparison:* When possible, the photometer should be occasionally intercompared, either directly or via transfer

standards, with calibration photometers used by other agencies or laboratories.

5.2.5 *Ozone losses:* Some portion of the O_3 may be lost upon contact with the photometer cell walls and gas handling components. The magnitude of this loss must be determined and used to correct the calculated O_3 concentration. This loss must not exceed 5%. Some guidelines for quantitatively determining this loss are discussed in Reference 9.

5.3 *Assay of* O_3 concentrations.

5.3.1 Allow the photometer system to warm up and stabilize.

5.3.2 Verify that the flowrate through the photometer absorption cell, F allows the cell to be flushed in a reasonably short period of time (2 liter/min is a typical flow). The precision of the measurements is inversely related to the time required for flushing, since the photometer drift error increases with time.

5.3.3 Insure that the flowrate into the output manifold is at least 1 liter/min greater than the total flowrate required by the photometer and any other flow demand connected to the manifold.

5.3.4 Insure that the flowrate of zero air, F_z, is at least 1 liter/min greater than the flowrate required by the photometer.

5.3.5 With zero air flowing in the output manifold, actuate the two-way valve to allow the photometer to sample first the manifold zero air, then F_z. The two photometer readings must be equal ($I = I_o$).

NOTE: In some commercially available photometers, the operation of the two-way valve and various other operations in section 5.3 may be carried out automatically by the photometer.

5.3.6 Adjust the O_3 generator to produce an O_3 concentration as needed.

5.3.7 Actuate the two-way valve to allow the photometer to sample zero air until the absorption cell is thoroughly flushed and record the stable measured value of I_o.

5.3.8 Actuate the two-way valve to allow the photometer to sample the ozone concentration until the absorption cell is thoroughly flushed and record the stable measured value of I.

5.3.9 Record the temperature and pressure of the sample in the photometer absorption cell. (See Reference 9 for guidance.)

5.3.10 Calculate the O_3 concentration from equation 4. An average of several determinations will provide better precision.

$$[O_3]_{OUT} = \left(\frac{-1}{\alpha l} \ln \frac{I}{I_o}\right) \left(\frac{T}{273}\right) \left(\frac{760}{P}\right) \times \frac{10^6}{L} \quad (4)$$

where:

$[O_3]_{OUT}$ = O_3 concentration, ppm
α = absorption coefficient of O_3 at 254 nm = 308 $atm^{-1}\ cm^{-1}$ at 0°C and 760 torr
l = optical path length, cm
T = sample temperature, K
P = sample pressure, torr
L = correction factor for O_3 losses from 5.2.5 = (1-fraction O_3 lost).

NOTE: Some commercial photometers may automatically evaluate all or part of equation 4. It is the operator's responsibility to verify that all of the information required for equation 4 is obtained, either automatically by the photometer or manually. For "automatic" photometers which evaluate the first term of equation 4 based on a linear approximation, a manual correction may be required, particularly at higher O_3 levels. See the photometer instruction manual and Reference 9 for guidance.

5.3.11 Obtain additional O_3 concentration standards as necessary by repeating steps 5.3.6 to 5.3.10 or by Option 1.

5.4 *Certification of transfer standards.* A transfer standard is certified by relating the output of the transfer standard to one or more ozone standards as determined according to section 5.3. The exact procedure varies depending on the nature and design of the transfer standard. Consult Reference 8 for guidance.

5.5 *Calibration of ozone analyzers.* Ozone analyzers are calibrated as follows, using ozone standards obtained directly according to section 5.3 or by means of a certified transfer standard.

5.5.1 Allow sufficient time for the O_3 analyzer and the photometer or transfer standard to warmup and stabilize.

5.5.2 Allow the O_3 analyzer to sample zero air until a stable response is obtained and adjust the O_3 analyzer's zero control. Offsetting the analyzer's zero adjustment to +5% of scale is recommended to facilitate observing negative zero drift. Record the stable zero air response as "Z".

5.5.3 Generate an O_3 concentration standard of approximately 80% of the desired upper range limit (URL) of the O_3 analyzer. Allow the O_3 analyzer to sample this O_3 concentration standard until a stable response is obtained.

5.5.4 Adjust the O_3 analyzer's span control to obtain a convenient recorder response as indicated below:

recorder response(%scale) =

$$\left(\frac{[O_3]_{OUT}}{URL} \times 100 \right) + Z \qquad (5)$$

where:

URL=upper range limit of the O_3 analyzer, ppm
Z=recorder response with zero air, % scale

Record the O_3 concentration and the corresponding analyzer response. If substantial adjustment of the span control is necessary, recheck the zero and span adjustments by repeating steps 5.5.2 to 5.5.4.

5.5.5 Generate several other O_3 concentration standards (at least 5 others are recommended) over the scale range of the O_3 analyzer by adjusting the O_3 source or by Option 1. For each O_3 concentration standard, record the O_3 and the corresponding analyzer response.

5.5.6 Plot the O_3 analyzer responses versus the corresponding O_3 concentrations and draw the O_3 analyzer's calibration curve or calculate the appropriate response factor.

5.5.7 *Option 1:* The various O_3 concentrations required in steps 5.3.11 and 5.5.5 may be obtained by dilution of the O_3 concentration generated in steps 5.3.6 and 5.5.3. With this option, accurate flow measurements are required. The dynamic calibration system may be modified as shown in Figure 2 to allow for dilution air to be metered in downstream of the O_3 generator. A mixing chamber between the O_3 generator and the output manifold is also required. The flowrate through the O_3 generator (F_o) and the dilution air flowrate (F_D) are measured with a reliable flow or volume standard traceable to NBS. Each O_3 concentration generated by dilution is calculated from:

$$[O_3]'_{OUT} = [O_3]_{OUT} \left(\frac{F_o}{F_o + F_D} \right) \qquad (6)$$

where:

$[O_3]'_{OUT}$=diluted O_3 concentration, ppm
F_o=flowrate through the O_3 generator, liter/min
F_D=diluent air flowrate, liter/min

REFERENCES

1. E.C.Y. Inn and Y. Tanaka, "Absorption coefficient of Ozone in the Ultraviolet and Visible Regions", *J. Opt. Soc. Am.*, *43*, 870 (1953).

2. A. G. Hearn, "Absorption of Ozone in the Ultraviolet and Visible Regions of the Spectrum", *Proc. Phys. Soc.* (London), *78*, 932 (1961).

3. W. B. DeMore and O. Raper, "Hartley Band Extinction Coefficients of Ozone in the Gas Phase and in Liquid Nitrogen, Carbon Monoxide, and Argon", *J. Phys. Chem.*, *68*, 412 (1964).

4. M. Griggs, "Absorption Coefficients of Ozone in the Ultraviolet and Visible Regions", *J. Chem. Phys.*, *49*, 857 (1968).

5. K. H. Becker, U. Schurath, and H. Seitz, "Ozone Olefin Reactions in the Gas Phase. 1. Rate Constants and Activation Energies", *Int'l Jour. of Chem. Kinetics*, VI, 725 (1974).

6. M. A. A. Clyne and J. A. Coxom, "Kinetic Studies of Oxy-halogen Radical Systems", *Proc. Roy. Soc.*, *A303*, 207 (1968).

7. J. W. Simons, R. J. Paur, H. A. Webster, and E. J. Bair, "Ozone Ultraviolet Photolysis. VI. The Ultraviolet Spectrum", *J. Chem. Phys.*, *59*, 1203 (1973).

8. "Transfer Standards for Calibration of Ambient Air Monitoring Analyzers for Ozone", EPA Publication available from EPA, Department E (MD-77), Research Triangle Park, NC 27711.

9. "Technical Assistance Document for the Calibration of Ambient Ozone Monitors", EPA Publication available from EPA, Department E (MD-77), Research Triangle Park, NC 27711.

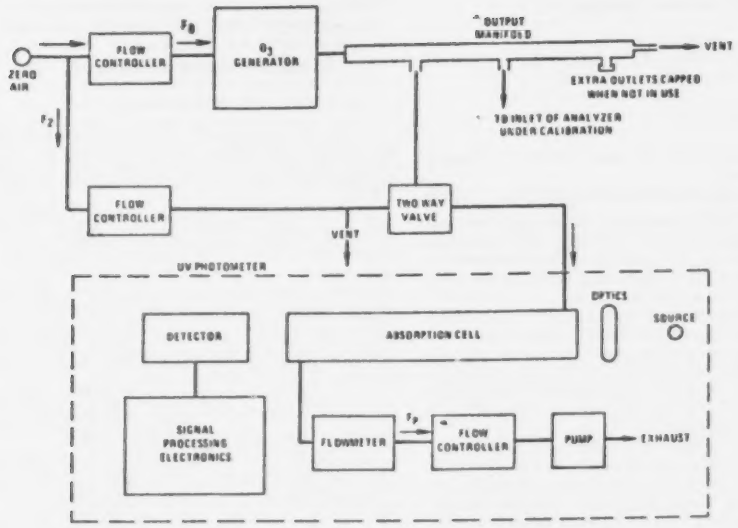

Figure 1 Schematic diagram of a typical UV photometric calibration system.

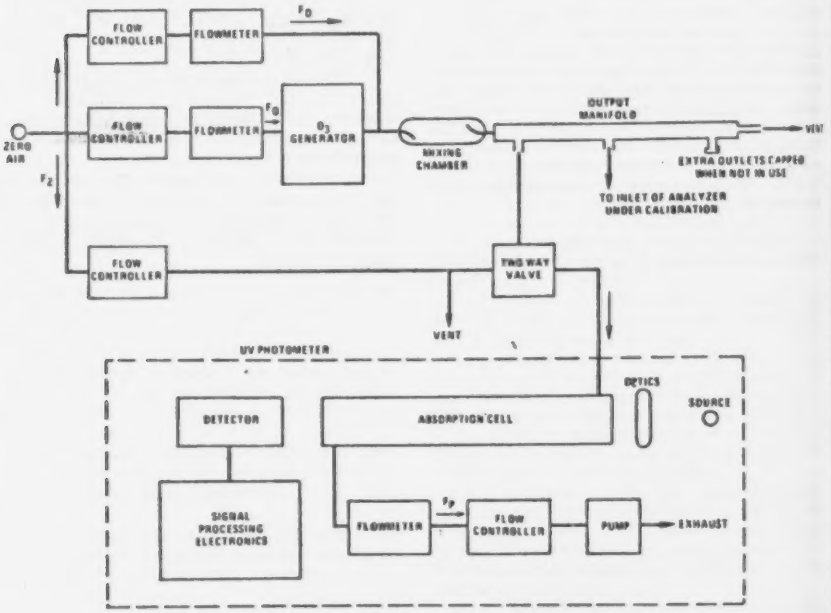

Figure 2. Schematic diagram of a typical UV photometric calibration system (OPTION 1)

Temporary Alternative Calibration procedure—(Boric Acid-Potassium Iodide). This procedure may be used as an alternative to the Ultraviolet Photometry procedure for direct calibration of ozone analyzers—but not to certify transfer standards—until [18 months after the date of final promulgation]. After that time this procedure can be used only as a transfer standard in accordance with the guidance and specifications set forth in Reference 4, "Transfer Standards for Calibration of Ambient Air Monitoring Analyzers for Ozone".

1. *Principle.* This calibration procedure (1) is based upon the reaction between ozone (O_3) and potassium iodide (KI) to release iodine (I_2) according to the stoichiometric equation: (2)

$$O_3 + 2I^- + 2H^+ \rightarrow I_2 + H_2O + O_2 \qquad (1)$$

The stoichiometry is such that the amount of I_2 released is equivalent to the amount of O_3, absorbed. Ozone is absorbed in a 0.1M boric acid (H_2BO_3) solution containing 1% KI, and the I_2 released reacts with excess iodide ion (I^-) to form triiodide ion (I^-_3) which is measured spectrophotometrically at a wavelength of 352 nm. The output of a stable O_3 generator is assayed in this manner, and the generator is immediately used to calibrate the O_3 analyzer. The O_3 generator must be used immediately after calibration and without physical movement, and it is recalibrated prior to each use. Alternatively, the O_3 analyzer may be calibrated by assaying the O_3 concentrations using the prescribed procedure while simultaneously measuring the corresponding O_3 analyzer responses. Ozone concentration standards may also be generated by an optional dilution technique. With this option, the highest O_3 concentration standard is assayed using the prescribed procedure. The additional O_3 concentration standards required are then obtained by dilution.

2. *Apparatus.* Figures 1 and 2 illustrate a typical BAKI O_3 calibration system and show the suggested configuration of the components listed below. All connections between components downstream of the O_3 generator should be of glass, Teflon or other relatively inert material.

2.1 *Air flow controller.* Device capable of maintaining a constant air flowrate through the O_3 generator within ±2%.

2.2 *Air flowmeter.* Calibrated flowmeter capable of measuring and monitoring the air flowrate through the O_3 generator within ±2%.

2.3 *Ozone generator.* Device capable of generating stable levels of O_3 over the required concentration range.

2.4 *Output manifold.* The output manifold should be constructed of glass, Teflon, or other relatively inert material and should be of sufficient diameter to insure a negligible pressure drop at the analyzer connection. The system must have a vent designed to insure atmospheric pressure in the manifold and to prevent ambient air from entering the manifold.

2.5 *Impingers.* All glass impingers with the specifications indicated in Figure 2 are recommended. The impingers may be purchased from most major glassware suppliers. Two impingers connected in series are used to insure complete collection of the sample.

2.6 *Air pump and flow controller.* Any pump and flow control device capable of maintaining a constant flowrate of 0.4–0.6 liter-min through the impingers may be used. A critical orifice as described by Lodge *et al.* (3) is recommended. The orifice should be protected against moisture and particulate matter with a membrane filter or moisture trap containing Drierite, silica gel, or glass wool. The air pump must be capable of maintaining a pressure differential of at least 0.6–0.7 atmospheres across the critical orifice. Alternatively, a needle valve could be used with the pump to adjust the flow through the impingers. A flowmeter is then recommended to monitor the flow. The needle valve-flowmeter combination should be protected against moisture and particulate matter with a membrane filter or moisture trap.

2.7 *Thermometer.* Accurate to ±1°C.

2.8 *Barometer.* Accurate to ±2 torr.

2.9 Volumetric flasks (Class A). 25, 100, 200, 500, 1000-ml.

2.10 Pipets (Class A). 1, 5, 10, 15, 20, and 25-ml volumetric; 1-ml or 10-ml graduated.

2.11 *Spectrometer.* Capable of measuring absorbance at 352 nm with an absolute accuracy of ±1% and linear response over the range of 0–1.0 absorbance units. The photometric accuracy may be checked using optical glass filters which have certified absorbance values at specified wavelengths. Matched 1-cm or 2-cm cells should be used for all absorbance determinations.

3. *Reagents.*

3.1 *Zero air.* The zero air must be free of contaminants which will cause a detectable response of the O_3 analyzer or which might react with 1% BAKI. Air meeting this requirement may be obtained by: (1) Passing it through silica gel for drying; (2) treating it with O_3 to convert any nitric oxide (NO) to nitrogen dioxide (NO_2); (3) passing it through activated charcoal (6–14 mesh) and molecular sieve (6–16 mesh, type 4A) to remove any NO_2, hydrocarbons, and traces of water vapor; and (4) passing it through a 2-micron filter to remove any particulate matter.

3.2 Boric acid (H_2BO_3), ACS reagent grade.

3.3 Potassium iodide (KI), ACS reagent grade.

3.4 Hydrogfen peroxide (H_2O_2), ACS reagent grade, 3% or 30%.

3.5 Potassium iodate (KIO_3), ACS reagent grade certified 0.1N.

3.6 Sulfuric acid (H_2SO_4), ACS reagent grade, 95% to 98%.

3.7 *Distilled water.* Used for preparation of all reagents.

3.8 *Absorbing reagent.* Dissolve 6.2 g of boric acid (H_3BO_3) in approximately 750 ml of distilled water in an amber 1000-ml volumetric flask. The flask may be heated gently to speed dissolution of the H_3BO_3, but the solution must then be cooled to room temperature or below before proceeding with the reagent preparation. [While the H_3BO_3 solution is cooling, prepare the hydrogen peroxide (H_2O_2) solution according to the directions in section 3.9.] When the H_3BO_3 solution has cooled, add 10 g of potassium iodide (KI) to the H_3BO_3 solution and dissolve. Add 1 ml of 0.0021% H_2O_2 solution (see 3.9) and mix thoroughly. Within 5 minutes after adding the peroxide, dilute to volume with distilled water, mix, and determine the absorbance of this BAKI solution at 352 nm against distilled water as the reference. The pH of the BAKI solution should be 5.1 ± 0.2.

Set the absorbing solution aside for 2 hours and then redetermine the absorbance at 352 nm against distilled water as the reference. If the resultant absorbance from this second determination is at least 0.008 absorbance units/cm greater than the first determination, the absorbing reagent is ready for use. If no increase or an increase of less than 0.008 absorbance units/cm is observed, the KI reagent probably contains an excessive amount of a reducing contaminant and *must be discarded.* In this event, prepare fresh absorbing reagent using a different numbered lot of KI. If unacceptable absorbing reagent results from different lots of KI, test the possibility of contamination in the H_3BO_3 by using a different numbered lot of H_3BO_3.

3.9 Hydrogen peroxide solution 0.0021%. Using a graduated pipet, add 0.7 ml of 30% or 7.0 ml of 3% hydrogen peroxide (H_2O_2) to approximately 200 ml of distilled water in a 500-ml volumetric flask, dilute to volume with distilled water and mix thoroughly. To prepare the 0.0021% solution, pipet 5 ml of the above solution into 50 ml of distilled water in a 100-ml volumetric flask, dilute to volume with distilled water, and mix thoroughly. This 0.0021% H_2O_2 solution must be prepared fresh each time a fresh batch of absorbing reagent is prepared. Therefore, the remaining contents of both volumetric flasks should be discarded after treatment of the BAKI absorbing reagent (see section 3.8).

3.10 Standard potassium iodate solution (0.1N). Use a commercial standard solution of potassium iodate (KIO_3) having a certified normality.

3.11 Sulfuric acid (1N). Dilute 28 ml of concentrated (95–98%) sulfuric acid (H_2SO_4) to volume in a 1000-ml volumetric flask.

4. *Procedure.*

4.1 Assemble an ozone calibration system such as shown in Figure 1.

4.2 Assemble the KI sampling train such as shown in Figure 2. All connections between the various components must be leak tight and may be made using grease-free ball joint fittings, heat-shrinkable Tefion tubing, or Teflon tube fittings. The connection to the O_3 output manifold should be made using 6 mm (¼ in.) Teflon tubing not to exceed 1.5 meters in length.

4.3 Calibrate all flowmeters and critical orfices under the conditions of use against a reliable flow or volume standard such as a NBS traceable bubble flowmeter or wet-test meter. Correct all volumetric flowrates to 25°C and 760 torr as follows:

$$F_R = F_S \times \frac{P_S - P_{H_2O}}{760} \times \frac{298}{T_S + 273} \quad (2)$$

where:

F_R = flowrate corrected to reference conditions (25° C and 760 torr), liter/min

F_S = flowrate at sampling conditions, liter/min

P_S = barometric pressure at sampling conditions, torr

P_{H_2O} = vapor pressure of H_2 at T_S, torr (For wet volume standard. For a dry standard, $P_{H_2O} = O$)

T_S = temperature at sampling conditions, °C

4.4 KI calibration curve.

4.4.1 Prepare iodine standards, fresh when needed, as follows:

A. Accurately pipet 10 ml of 0.1N standard potassium iodate (KIO_3) solution into a 100-ml volumetric flask containing approximately 50 ml of distilled water. Add 1 g of potassium iodide (KI) and 5 ml of 1N sulfuric acid (H_2SO_4), dilute to volume with distilled water, and mix thoroughly.

B. Immediately before use, pipet 10 ml of the iodine (I_2) solution prepared in step A above into a 100-ml volumetric flask and

dilute to volume with absorbing reagent. Then further dilute this solution by pipetting 10 ml of it into a 200-ml volumetric flask and diluting it to volume with absorbing reagent.

C. In turn, pipet 5, 10, 15, 20, and 25 ml aliquots of the final I_2 solution prepared in step B above into a series of 25-ml volumetric flasks. Dilute each to volume with absorbing reagent and mix thoroughly. To prevent I_2 losses by volatilization, the flasks should remain stoppered until absorbance measurements are made. Absorbance measurements (see 4.4.2) should be taken within 20 minutes after preparation of the I_2 standards.

4.4.2 Determine the absorbance of each I_2 standard at 352 nm. Also measure the absorbance of a sample of unexposed absorbing reagent. Determine the net absorbance of each I_2 standard as:

$$\text{net absorbance} = \left(\begin{matrix}\text{sample}\\ \text{absorbance}\end{matrix}\right) - \left(\begin{matrix}\text{unexposed}\\ \text{reagent}\\ \text{absorbance}\end{matrix}\right) \quad (3)$$

4.4.3 For each I_2 standard, calculate the net absorbance/cm as:

$$\text{net absorbance/cm} = \frac{\text{net absorbance}}{b} \quad (4)$$

where:

b=spectrophotometer cell path length, cm

4.4.4 For each I_2 standard, calculate the I_2 concentration in mole/liter as:

$$[I_2]_i = N_{KIO_3} \times \frac{1 \text{ equivalent } I_2}{1 \text{ equivalent } KIO_3} \times \frac{1 \text{ mole } I_2}{2 \text{ equivalent } I_2} \times \frac{10}{100} \times \frac{10}{100} \times \frac{10}{200} \times \frac{V_i}{25} \quad (5a)$$

$$[I_2]_i = N_{KIO_3} \times V_i \times 10^{-5} \quad (5b)$$

where:

$[I_2]_i$=concentration of each I_2 standard, mole I_2/liter

N_{KIO_3}=normality of KIO_3 (from 3.10), equivalent liter

V_i=volume of I_2 solution (from step 4.4.1.C)=5, 10, 15, 20, or 25 ml

4.4.5 Plot net absorbance/cm (y-axis) versus the mole I_2/liter (x-axis) for each I_2 standard and draw the KI calibration curve. Calculate the slope of the curve in liter $mole^{-1}$ cm^{-1} and record as S_s. The value of the slope should be [26,000±780. If the slope is not within this range, and the photometric accuracy of the spectrophotometer meets the specifications given in 2.11, repeat the procedure using freshly prepared I_2 standards. If the slope is still not within the specified range, repeat the procedure using a different lot of certified 0.1N KIO_3 to prepare the I_2 standards.

4.5 *Calibration of the ozone generator.*

4.5.1 Adjust the air flow through the O_3 generator to the desired flowrate and record as F_s. At all times the air flow through the generator must be greater than the total flow required by the sampling systems, to assure exhaust flow at the vent.

4.5.2 With the O_3 generator off, flush the system with zero air for at least 15 minutes to remove residual O_3. Pipet 10 ml of absorbing reagent into each of 2 impingers and connect them into the sampling train as shown in Figure 2. Draw air from the output manifold of the O_3 calibration system through the sampling train at 0.4–0.6 liter/min for 10 minutes. Immediately transfer the exposed solutions to clean spectrophotometer cells. Determine the net absorbance (sample absorbance-unexposed reagent absorbance) of each solution at 352 nm within three minutes. Add the net absorbances of the two solutions to obtain the total net absorbance. Calculate the indicated O_3 concentration (system blank) as equivalent O_3 concentration according to section 4.5.4. If the system blank is greater than 0.005 ppm O_3, continue flushing the O_3 generation system for an additional 30 minutes and redetermine the system blank. If the system blank is still greater than 0.005 ppm O_3, the zero air probably contains traces of an oxidizing contaminant, and the activated charcoal and molecular sieve (see section 3.1) should be replaced.

4.5.3 Adjust the O_3 generator to generate an O_3 concentration in the range of interest and allow the system to equilibrate for about 15 minutes. The uncalibrated O_3 analyzer to be calibrated can conveniently be used to indicate the stability of the O_3 generator output. When the O_3 generator output has stabilized, pipet 10 ml of absorbing reagent into each impinger. Draw O_3 from the output manifold of the O_3 calibration system through the sampling train at 0.4–0.6 liter/min. Use a sample time of between 10 and 30 minutes such that a total net absorbance between 0.1 and 1.0 absorbance units is obtained. (At an O_3 concentration of 0.1 ppm and a sampling rate of 0.5 liter/min, a total net absorbance >0.1 absorbance units should be obtained if a sampling time of 20 minutes and 1-cm spectrophotometer cells are used.) Immediately after collection, transfer the exposed solutions to clean spectrophotometer cells. Determine the net absorbance (sample absorbance—un-

exposed reagent absorbance) of each solution at 352 nm within three minutes. Add the net absorbances of the two solutions to obtain the total net absorbance.

4.5.4 *Calculation of ozone concentration.*

4.5.4.1 Calculate the total volume of air sampled, corrected to reference conditions of 25°C and 760 torr as:

$$V_R = F_R \times t_s \quad (6)$$

where:

V_R=volume of air sampled, corrected to reference conditions, liter

F_R=sampling flowrate corrected to reference conditions, liter/min

t_s=sampling time, min

4.5.4.2 Calculate the I_2 released in moles as:

$$\text{le } I_2 = \frac{\text{total net absorbance} \times 0.01}{S_c \times b} \quad (7)$$

where: Total net absorbance=sum of net absorbances for the two solutions

0.01=volume of absorbing reagent in each impinger, liter

S_c=slope of KI calibration curve, liter $mole^{-1} cm^{-1}$

b=spectrophotometer cell path length, cm

4.5.4.3 Calculate the μl of O_3 absorbed as:

$$1\ O_3 = \text{mole } I_2 \times \frac{1 \text{ mole } O_3}{1 \text{ mole } I_2} \times \frac{24.47\ 1\ O_3}{\text{mole } O_3} \times \frac{10^6\ \mu 1\ O_3}{1\ O_3} \quad (8a)$$

or,

$$\mu l\ O_3 = \text{mole } I_2\ 24.47 \times 10^6 \quad (8b)$$

4.5.4.4 Calculate the O_3 concentration in ppm as:

$$\text{ppm } O_3 = \frac{\mu l\ O_3}{V_R} \quad (9)$$

4.5.5 Repeat steps 4.5.3 and 4.5.4 at least one more time at the same O_3 generator setting. Average the two (or more) determinations and record the average along with the O_3 generator setting.

4.5.6 Adjust the O_3 generator to obtain other O_3 concentrations over the desired range. Determine each O_3 concentration using the procedure given above. Five or more O_3 concentrations are recommended. Plot the O_3 concentrations versus the corresponding O_3 generator settings and draw the O_3 generator calibration curve.

4.6 *Calibration of the ozone analyzer.*

4.6.1 Allow sufficient time for the O_3 analyzer to warm-up and stabilize.

4.6.2 Allow the O_3 analyzer to sample zero air until a stable response is obtained and adjust the O_3 analyzer's zero control. Offsetting the analyzer's zero adjustment to +5% of scale is recommended to facilitate observing negative zero drift. Record the stable zero air response as "Z".

4.6.3 Using the O_3 generator as calibrated above and the same F_R, generate an O_3 concentration near 80% of the desired upper range limit (URL) of the O_3 analyzer.

4.6.4 Allow the O_3 analyzer to sample this O_3 concentration until a stable response is obtained. Adjust the analyzer's span control to obtain a convenient recorder response as indicated below:

$$\text{recorder response (\% scale)} = \left(\frac{[O_3]_{OUT}}{URL} \times 100\right) + Z \quad (10)$$

$[O_3]_{OUT}$=O_3 concentration at the output manifold, ppm URL = upper range limit of the O_3 analyzer, ppm, Z = recorder response with zero air, % scale.

Record the O_3 concentration and the O_3 analyzer response. If substantial adjustment of the span control is necessary, recheck the zero and span adjustments by repeating steps 4.6.2 through 4.6.4.

4.6.5 Generate several other O_3 concentrations (at least 5 others are recommended) over the scale range of the O_3 analyzer by adjusting the O_3 generator settings (preferably the same settings as used in section 4.5) or by Option 1. For each O_3 concentration, allow for a stable analyzer response, then record the response and the corresponding O_3 concentration.

4.6.6 Plot the O_3 analyzer responses versus the corresponding O_3 concentrations and draw the O_3 analyzer's calibration curve or calculate the appropriate response factor.

4.6.7 *Option 1:* The various O_3 concentrations required in step 4.6.5 may be obtained by dilution of the O_3 concentration generated in section 4.6.3. With this option, accurate flow measurements are required. The dynamic calibration system must be modified as shown in Figure 3 to allow for dilution air to be metered in downstream of the O_3 generator. A mixing chamber between the O_3 generator and the output manifold is also required. The flowrate through the O_3 generator (F_o) and the dilution air flowrate (F_D) are measured with a reliable flow or volume standard traceable to NBS. The highest O_3 concentration standard required (80% URL) is assayed according to the procedure in section 4.5. Each O_3 concentration generated by dilution is calculated from:

$$[O_3]'_{OUT} = [O_3]_{OUT}\left(\frac{F_O}{F_O+F_D}\right) \quad (11)$$

where: $[O_3]'_{OUT}$ = diluted O_3 concentration, ppm; F_o = flowrate through the O_3 generator, liter/min; F_D = diluent air flowrate, liter/min.

NOTE: Direct calibration of the O_3 analyzer may also be accomplished by assaying the O_3 concentrations using the procedure in section 4.5 while simultaneously measuring the corresponding O_3 analyzer responses as specified in section 4.6.

REFERENCES

1. D. L. Flamm, "Analysis of Ozone at Low Concentrations with Boric Acid Buffered KI," *Environ. Sci. Technol., 11,* 978 (1977).

2. B. E. Saltzman and N. Gilbert, "Iodometric Microdetermination of Organic Oxidants and Ozone," *Anal. Chem., 31,* 1914 (1959).

3. J. P. Lodge, Jr., J. B. Pate, B. E. Ammons, and G. A. Swanson, "The Use of Hypodermic Needles as Critical Orifices in Air Sampling," *J. Air Poll. Control Assoc., 16,* 197 (1966).

4. "Transfer Standards for Calibration of Ambient Air Monitoring Analyzers for Ozone," EPA Publication available from EPA, Department E(MD-77), Research Triangle Park, NC 27711.

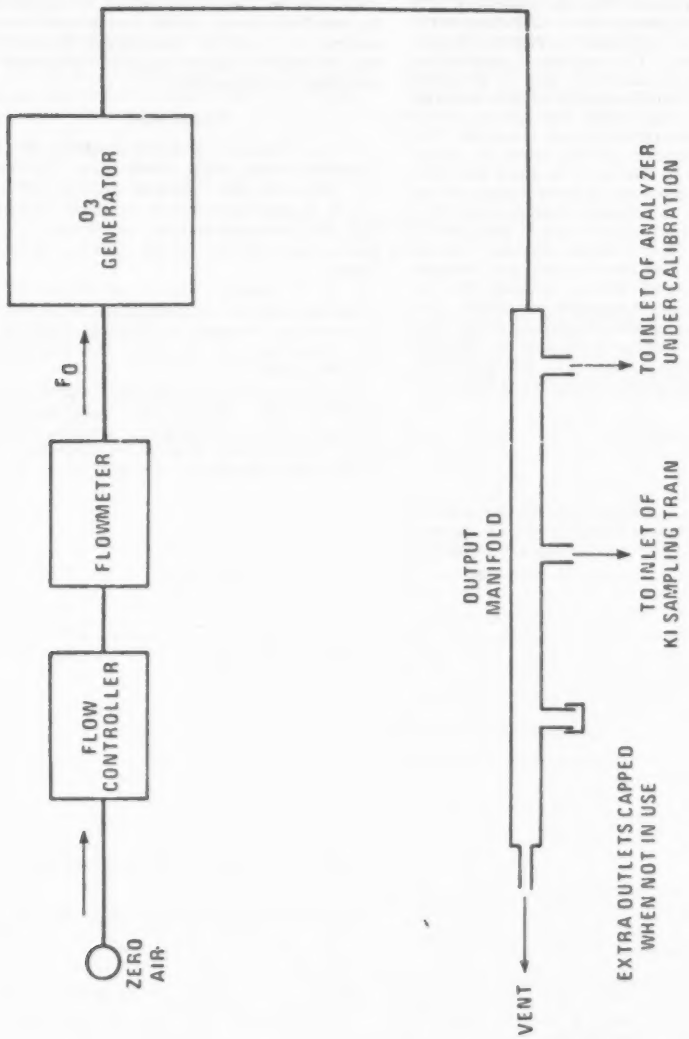

Figure 1. Schematic diagram of a typical BAKI calibration system.

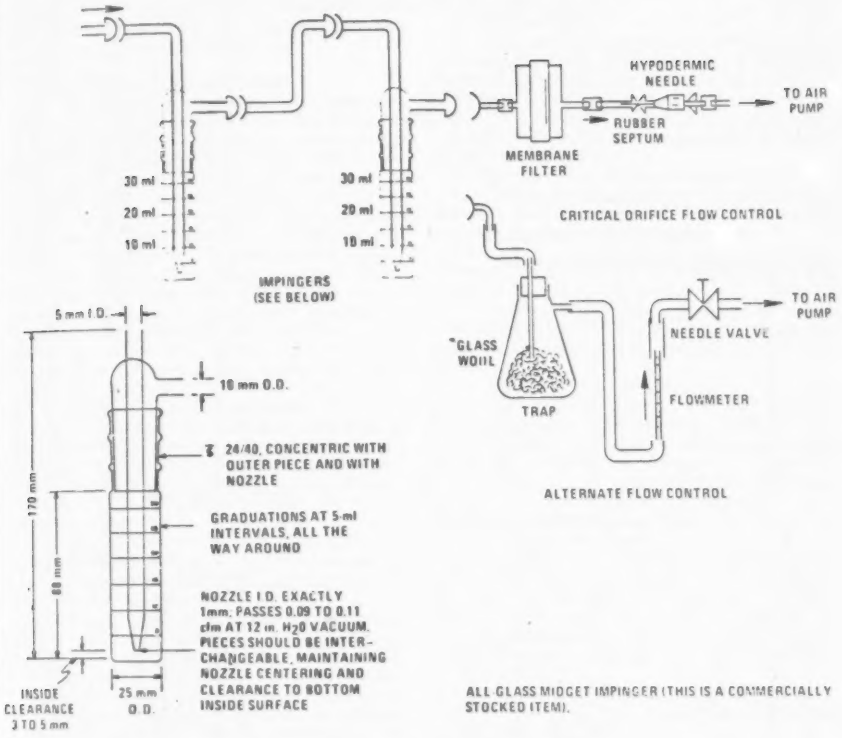
HYPODERMIC NEEDLE
TO AIR PUMP
RUBBER SEPTUM
MEMBRANE FILTER
30 ml
20 ml
10 ml
IMPINGERS (SEE BELOW)
CRITICAL ORIFICE FLOW CONTROL
TO AIR PUMP
NEEDLE VALVE
GLASS WOOL
TRAP
FLOWMETER
ALTERNATE FLOW CONTROL
5 mm I.D.
10 mm O.D.
24/40, CONCENTRIC WITH OUTER PIECE AND WITH NOZZLE
GRADUATIONS AT 5-ml INTERVALS, ALL THE WAY AROUND
170 mm
60 mm
NOZZLE I.D. EXACTLY 1mm, PASSES 0.09 TO 0.11 cfm AT 12 in. H_2O VACUUM. PIECES SHOULD BE INTERCHANGEABLE, MAINTAINING NOZZLE CENTERING AND CLEARANCE TO BOTTOM INSIDE SURFACE
INSIDE CLEARANCE 3 TO 5 mm
25 mm O.D.
ALL GLASS MIDGET IMPINGER (THIS IS A COMMERCIALLY STOCKED ITEM).

Figure 2. KI sampling train.

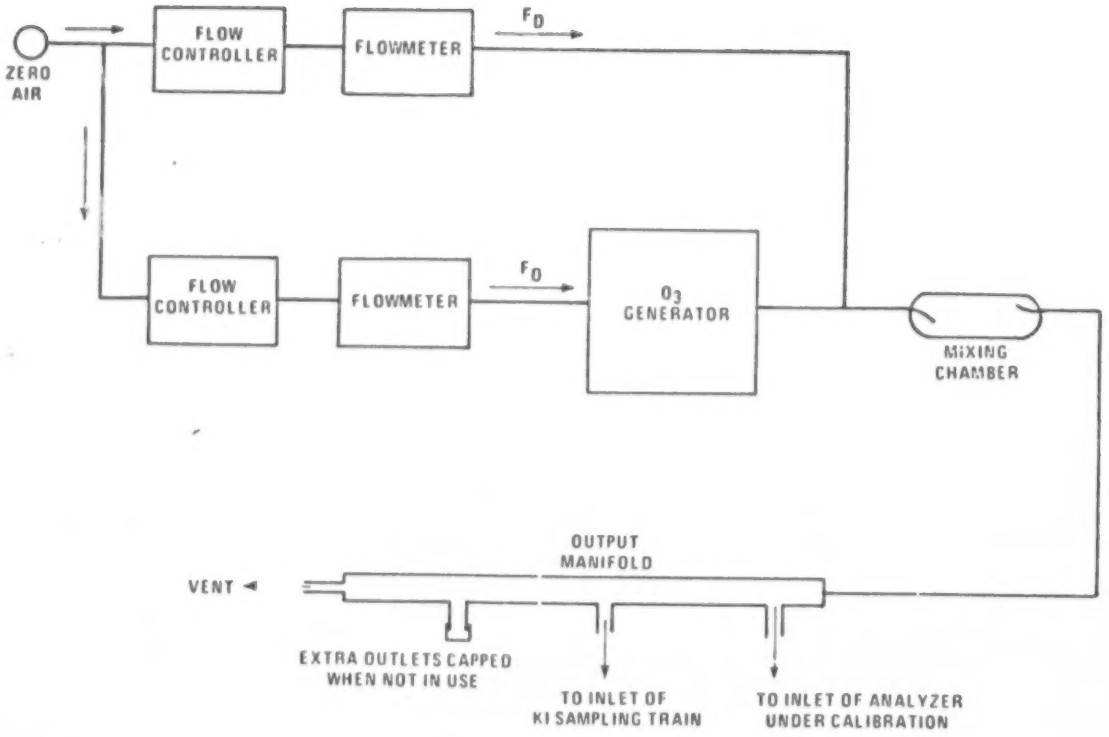

Figure 3. Schematic diagram of a typical BAKI calibration system (Option 1).

[44 FR 8224, Feb. 8, 1979]

Appendix E—Reference Method for Determination of Hydrocarbons Corrected for Methane

1. *Principle and Applicability.*

1.1 Measured volumes of air are delivered semicontinuously (4 to 12 times per hour) to a hydrogen flame ionization detector to measure its total hydrocarbon (THC) content. An aliquot of the same air sample is introduced into a stripper column which removes water, carbon dioxide, and hydrocarbons other than methane. Methane and carbon monoxide are passed quantitatively to a gas chromatographic column where they are separated. The methane is eluted first, and is passed unchanged through a catalytic reduction tube into the flame ionization detector. The carbon monoxide is eluted into the catalytic reduction tube where it is reduced to methane before passing through the flame ionization detector. Between analyses the stripper column is backflushed to prepare it for subsequent analysis. Hydrocarbon concentrations corrected for methane are determined by subtracting the methane value from the total hydrocarbon value.

Two modes of operation are possible: (1) A complete chromatographic analysis showing the continuous output from the detector for each sample injection;

(2) The system is programed for automatic zero and span to display selected band widths of the chromatogram. The peak height is then used as the measure of the concentration. The former operation is referred to as the chromatographic or spectro mode and the latter as the barographic or "normal" mode depending on the make of analyzer.

1.2 The method is applicable to the semicontinuous measurement of hydrocarbons corrected for methane in ambient air. The carbon monoxide measurement, which is simultaneously obtained in this method, is not required in making measurements of hydrocarbons corrected for methane and will not be dealt with here.

2. *Range and Sensitivity.*

2.1 Instruments are available with various range combinations. For atmospheric analysis the THC range is 0–13.1 mg./m.^{3} (0–20 p.p.m.) carbon (as CH_4) and the methane range is 0–6.55 mg./m.^{3} (0–10 p.p.m.). For special applications, lower ranges are available and in these applications the range for THC is 0–1.31 mg./m.^{3} (0–2 p.p.m.) carbon (as CH_4) and for methane the range is 0–1.31 mg./m.^{3} (0–2 p.p.m.).

2.2 For the higher, atmospheric analysis ranges the sensitivity for THC is 0.065 mg./m.^{3} (0.1 p.p.m.) carbon (as CH_4) and for methane the sensitivity is 0.033 mg./m.^{3} (0.05 p.p.m.). For the lower, special analysis ranges the sensitivity is 0.016 mg./m.^{3} (0.025 p.p.m.) for each gas.

3. *Interferences.*

3.1 No interference in the methane measurement has been observed. The THC measurement typically includes all or a portion of what is generally classified as the air peak interference. This effect is minimized by proper plumbing arrangements or is negated electronically.

4. *Precision, Accuracy, and Stability.*

4.1 Precision determined with calibration gases is ±0.5 percent of full scale in the higher, atmospheric analysis ranges.

4.2 Accuracy is dependent on instrument linearity and absolute concentration of the calibration gases. An accuracy of 1 percent of full scale in the higher, atmospheric analysis ranges and 2 percent of full scale in the lower, special analysis ranges can be obtained.

4.3 Variations in ambient room temperature can cause changes in performance characteristics. This is due to shifts in oven temperature, flow rates, and pressure with ambient temperature change. The instrument should meet performance specifications with room temperature changes of ±3° C. Baseline drift is automatically corrected in the barographic mode.

5. *Apparatus.* 5.1 *Commercially Available THC, CH_4, and CO Analyzer.* Instruments should be installed on location and demonstrated, preferably by the manufacturer, or his representative, to meet or exceed manufacturer's specifications and those described in this method.

5.2 *Sample Introduction System.* Pump, flow control valves, automatic switching valves, and flowmeter.

5.3 *Filter (In-line).* A binder-free, glass-fiber filter with a porosity of 3 to 5 microns should be immediately downstream from the sample pump.

5.4 *Stripper or Precolumn.* Located outside of the oven at ambient temperature. The column should be repacked or replaced after the equivalent of 2 months of continuous operation.

5.5 *Oven.* For containing the analytical column and catalytic converter. The oven should be capable of maintaining an elevated temperature constant within ±0.5° C. The specific temperature varies with instrument manufacturer.

6. *Reagents.*

6.1 *Combustion Gas.* Air containing less than 1.3 mg./m.^{3} (2 p.p.m.) hydrocarbon as methane.

6.2 *Fuel.* Hydrogen or a mixture of hydrogen and inert gas containing less than 0.065 mg./m.^{3} (0.1 p.p.m.) hydrocarbons as methane.

6.3 *Carrier Gas.* Helium, nitrogen, air or hydrogen containing less than 0.005 mg./m.^{3} (0.1 p.p.m.) hydrocarbons as methane.

6.4 *Zero Gas.* Air containing less than 0.065 mg./m.^{3} (0.1 p.p.m.) total hydrocarbons as methane.

6.5 *Calibration Gases.* Gases needed for linearity checks (peak heights) are determined by the ranges used. Calibration gases corresponding to 10, 20, 40, and 80 percent of full scale are needed. Gases must be provided with certification or guaranteed analysis. Methane is used for both the total hydrocarbon measurement and methane measurement.

6.6 *Span Gas.* The calibration gas corresponding to 80 percent of full scale is used to span the instrument.

7. *Procedure.*

7.1 Calibrate the instrument as described in 8.1. Introduce sample into the system under the same conditions of pressure and flow rates as are used in calibration. (The pump is bypassed only when pressurized cylinder gases are used.) Figure E1 shows a typical flow diagram; for specific operating instructions refer to manufacturer's manual.

8. *Calibration.*

8.1 *Calibration Curve.* Determine the linearity of the system for THC and methane in the barographic mode by introducing zero gas and adjusting the respective zeroing controls to indicate a recorder reading of zero. Introduce the span gas and adjust the span control to indicate the proper value on the recorder scale. Recheck zero and span until adjustments are no longer necessary. Introduce intermediate calibration gases and plot the values obtained. If a smooth curve is not obtained, calibration gases may need replacement.

9. *Calculation.*

9.1 Determine concentrations of total hydrocarbons (as CH_4) and CH_4, directly from the calibration curves. No calculations are necessary.

9.2 Determine concentration of hydrocarbons corrected for methane by subtracting the methane concentration from the total hydrocarbon concentration.

9.3 Conversion between p.p.m. and mg./m.^{3} values for total hydrocarbons (as CH_4) methane and hydrocarbons corrected for methane are made as follows:

$$\text{p.p.m. carbon (as } CH_4) = [\text{mg. carbon (as } CH_4)/\text{m.}^3] \times 1.53$$

10. *Bibliography.*

Fee, G., "Multi-Parameter Air Quality Analyzer", ISA Proceedings AID/CHEMPID Symposium, Houston, TX, April 19-21, 1971.

Villalobos, R., and Chapman, R. L., "A Gas Chromatographic Method for Automatic Monitoring of Pollutants in Ambient Air", ibid.

Stevens, R. K., "The Automated Gas Chromatograph as an Air Pollutant Monitor", 1970 Conference on Environmental Toxicology, U.S. Air Force, Wright-Patterson Air Force Base, Dayton, OH.

Stevens, R. K., and O'Keeffe, A. E., *Anal. Chem. 42*, 143A (1970).

Schuck, E. A., Altshuller, A. P., Barth, D. S. and Morgan, G. B., "Relationship of Hydrocarbons to Oxidants in Ambient Atmospheres", *J. Air Poll. Cont. Assoc. 20*, 297-302 (1970).

Stevens, R. K., O'Keeffe, A. E., and Ortman, G. C., "A Gas Chromatographic Approach to the Semi-Continuous Monitoring of Atmospheric Carbon Monoxide and Methane", Proceedings of 11th Conference on Methods in Air Pollution on Industrial Hygiene Studies, Berkeley, CA, March 30-April 1, 197(

Swinnerton, J. W., Linnenbom, V. J. and Check, C. H., *Environ. Sci. Technol. 3*, 836 (1969).

Williams, I. G., *Advances in Chromatography*, Giddings, J. C., and Keller, R. A., editors, Marcell Dekker, N.Y. (1968), pp. 173-182.

Altshuller, A. P., Kopcznski, S. L., Lonneman, W. A., Becker, T. L. and Slater, R., *Environ. Sci. Technol. 1*, 899 (1967).

Altshuller, A. P., Cohen, I. R., and Purcell, T. C., *Can. J. Chem., 44*, 2973 (1966).

DuBois, L., Zdrojewski, A., and Monkman, J. L., *J. Air Poll. Cont. Assoc. 16*, 135 (1966).

Ortman, G. C., *Anal. Chem. 38*, 644-646 (1966).

Porter, K., and Volman, D. H., *Anal. Chem. 34*, 748-749 (1962).

Crum, W. M., Proceedings, National Analysis Instrumentation Symposium ISA, 1962.

Schwink, A., Hochenberg, H., and Forderreuther, M., *Brennstoff-Chemie 72*, No. 9, 295 (1961).

Instruction Manual for Air Quality Chromatograph Model 6800, Beckman Instrument Co., Fullerton, CA.

Instruction Manual, Bendix Corp., Ronceverte, WV.

Instruction Manual, Byron Instrument Co., Raleigh, NC.

MSA Instruction Manual for GC Process Analyzer for Total Hydrocarbon, Methane and Carbon Monoxide, Pittsburgh, PA.

Monsanto Enviro-Chem System for Total Hydrocarbons, Methane and Carbon Monoxide Instruction Manual, Dayton, OH.

Union Carbide Instruction Manual for Model 3020 Gas Chromatograph for CO-CH_4-T/1, White Plains, NY.

Instruction Manual for 350 F Analyzer, Tracor Inc., Austin, TX.

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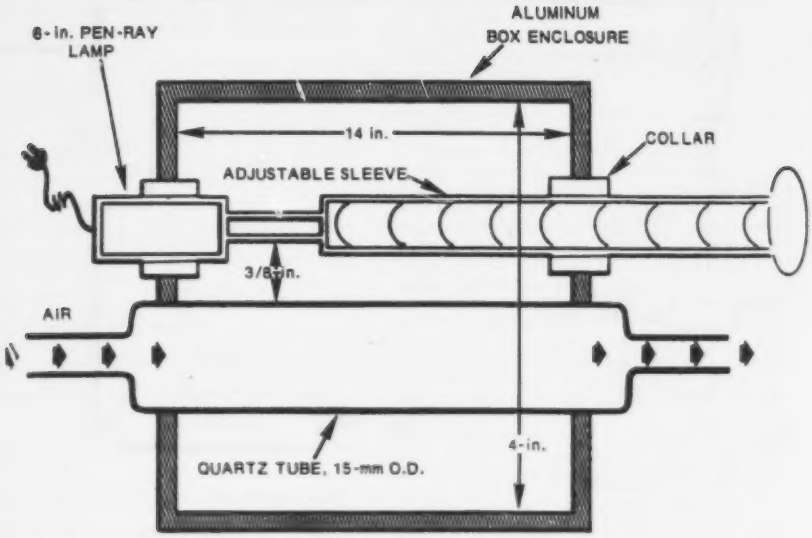

Figure D2. Ozone source.

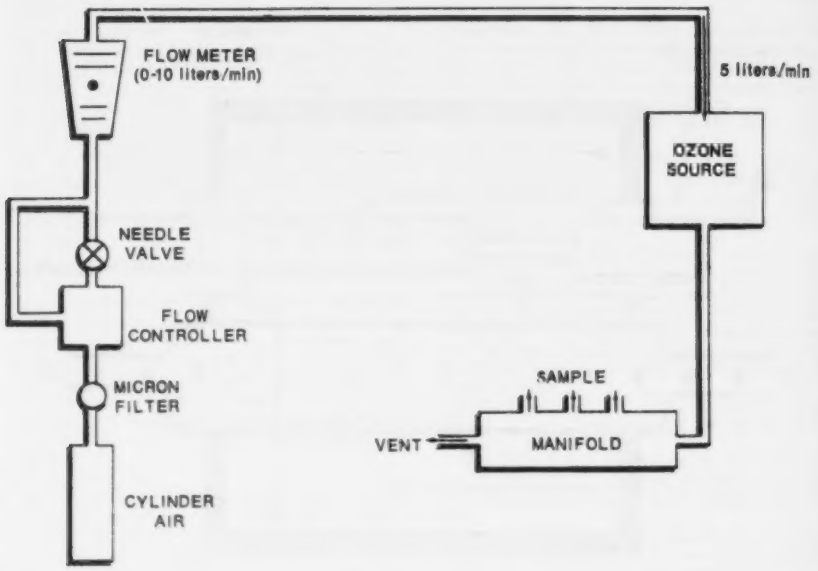

Figure D3. Ozone calibration air supply, source, and manifold system.

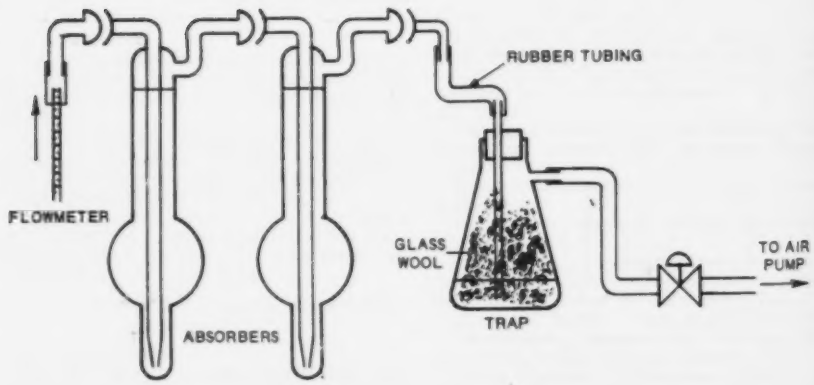

Figure D4. KI sampling train.

ADDENDA

A. *Suggested Performance Specifications for Atmospheric Analyzers for Hydrocarbons Corrected for Methane:*

Range (minimum)	0.3 mg./m.³ (0–5 p.p.m.) THC.
	0–3 mg./m.³ (0–5 p.p.m.) CH_4.
Output (minimum)	0–10 mv. full scale.
Minimum detectable sensitivity.	0.1 p.p.m. THC.
	0.1 p.p.m. CH_4.
Zero drift (maximum)	Not to exceed 1 percent/24 hours.
Span drift (maximum)	Not to exceed 1 percent/24 hours.
Precision (minimum)	±0.5 percent.
Operational period (minimum)	3 days.
Operating temperature range (minimum).	5–40° C.
Operating humidity range (minimum).	10–100 percent.
Linearity (maximum)	1 percent of full scale.

B. *Suggested Definitions of Performance Specifications:*

Range—The minimum and maximum measurement limits.

Output—Electrical signal which is proportional to the measurement; intended for connection to readout or data processing devices. Usually expressed as millivolts or milliamps full scale at a given impedence.

Full Scale—The maximum measuring limit for a given range.

Minimum Detectable Sensitivity—The smallest amount of input concentration that can be detected as the concentration approaches zero.

Accuracy—The degree of agreement between a measured value and the true value; usually expressed at ± percent of full scale.

Lag Time—The time interval from a step change in input concentration at the instrument inlet to the first corresponding change in the instrument output.

Time to 90 Percent Response—The time interval from a step change in the input concentration at the instrument inlet to a reading of 90 percent of the ultimate recorded concentration.

Rise Time (90 percent)—The interval between initial response time and time to 90 percent response after a step decrease in the inlet concentration.

Zero Drift—The change in instrument output over a stated time period, usually 24 hours, of unadjusted continuous operation, when the input concentration is zero; usually expressed as percent full scale.

Span Drift—The change in instrument output over a stated time period, usually 24 hours, of unadjusted continuous operation, when the input concentration is a stated upscale value; usually expressed as percent full scale.

Precision—The degree of agreement between repeated measurements of the same concentration. It is expressed as the average deviation of the single results from the mean.

Operational Period—The period of time over which the instrument can be expected to operate unattended within specifications.

Noise—Spontaneous deviations from a mean output not caused by input concentration changes.

Interference—An undesired positive or negative output caused by a substance other than the one being measured.

Interference Equivalent—The portion of indicated input concentration due to the presence of an interferent.

Operating Temperature Range—The range of ambient temperatures over which the instrument will meet all performance specifications.

Operating Humidity Range—The range of ambient relative humidity over which the instrument will meet all performance specifications.

Linearity—The maximum deviation between an actual instrument reading and the reading predicted by a straight line drawn between upper and lower calibration points.

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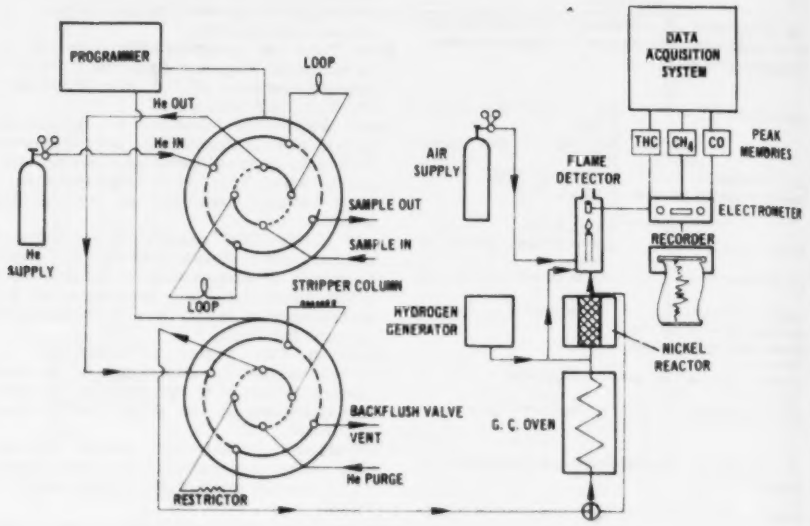

Figure E1. Typical flow diagram.

[36 FR 22394, Nov. 25, 1971]

Appendix F—Measurement Principle and Calibration Procedure for the Measurement of Nitrogen Dioxide in the Atmosphere (Gas Phase Chemiluminescence)

Principle and Applicability

1. Atmospheric concentrations of nitrogen dioxide (NO_2) are measured indirectly by photometrically measuring the light intensity, at wavelengths greater than 600 nanometers, resulting from the chemiluminescent reaction of nitric oxide (NO) with ozone (O_3). (*1,2,3*) NO_2 is first quantitatively reduced to NO(*4,5,6*) by means of a converter. NO, which commonly exists in ambient air together with NO_2, passes through the converter unchanged causing a resultant total NO_x concentration equal to $NO+NO_2$. A sample of the input air is also measured without having passed through the converted. This latter NO measurement is subtracted from the former measurement ($NO+NO_2$) to yield the final NO_2 measurement. The NO and $NO+NO_2$ measurements may be made concurrently with dual systems, or cyclically with the same system provided the cycle time does not exceed 1 minute.

2. *Sampling considerations.*

2.1 Chemiluminescence $NO/NO_x/NO_2$ analyzers will respond to other nitrogen containing compounds, such as peroxyacetyl nitrate (PAN), which might be reduced to NO in the thermal converter. (*7*) Atmospheric concentrations of these potential interferences are generally low relative to NO_2 and valid NO_2 measurements may be obtained. In certain geographical areas where the concentration of these potential interferences is known or suspected to be high relative to NO_2, the use of an equivalent method for the measurement of NO_2 is recommended.

2.2 The use of integrating flasks on the sample inlet line of chemiluminescence $NO/NO_x/NO_2$ analyzers is optional and left to couraged. The sample residence time between the sampling point and the analyzer should be kept to a minimum to avoid erroneous NO_2 measurements resulting from the reaction of ambient levels of NO and O_3 in the sampling system.

2.3 The use of particulate filters on the sample inlet line of chemiluminescence $NO/NO_x/NO_2$ analyzers is optional and left to the discretion of the user or the manufac-

turer. Use of the filter should depend on the analyzer's susceptibility to interference, malfunction, or damage due to particulates. Users are cautioned that particulate matter concentrated on a filter may cause erroneous NO_2 measurements and therefore filters should be changed frequently.

3. An analyzer based on this principle will be considered a reference method only if it has been designated as a reference method in accordance with Part 53 of this chapter.

Calibration

1. *Alternative A*—Gas phase titration (GPT) of an NO standard with O_3.

Major equipment required: Stable O_3 generator. Chemiluminescence $NO/NO_x/NO_2$ analyzer with strip chart recorder(s). NO concentration standard.

1.1 Principle. This calibration technique is based upon the rapid gas phase reaction between NO and O_3 to produce stoichiometric quantities of NO_2 in accordance with the following equation: (*8*)

$$NO + O_3 \rightarrow NO_2 + O_2 \qquad (1)$$

The quantitative nature of this reaction is such that when the NO concentration is known, the concentration of NO_2 can be determined. Ozone is added to excess NO in a dynamic calibration system, and the NO channel of the chemiluminescence $NO/NO_x/NO_2$ analyzer is used as an indicator of changes in NO concentration. Upon the addition of O_3, the decrease in NO concentration observed on the calibrated NO channel is equivalent to the concentration of NO_2 produced. The amount of NO_2 generated may be varied by adding variable amounts of O_3 from a stable uncalibrated O_3 generator. (*9*)

1.2 Apparatus. Figure 1, a schematic of a typical GPT apparatus, shows the suggested configuration of the components listed below. All connections between components in the calibration system downstream from the O_3 generator should be of glass, Teflon*, or other non-reactive material.

1.2.1 Air flow controllers. Devices capable of maintaining constant air flows within ±2% of the required flowrate.

1.2.2 NO flow controller. A device capable of maintaining constant NO flows within ±2% of the required flowrate. Component parts in contact with the NO should be of a non-reactive material.

1.2.3 Air flowmeters. Calibrated flowmeters capable of measuring and monitoring air flowrates with an accuracy of ±2% of the measured flowrate.

1.2.4 NO flowmeter. A calibrated flowmeter capable of measuring and monitoring NO flowrates with an accuracy of ±2% of the measured flowrate. (Rotameters have been reported to operate unreliably when measuring low NO flows and are not recommended.)

1.2.5 Pressure regulator for standard NO cylinder. This regulator must have a nonreactive diaphragm and internal parts and a suitable delivery pressure.

1.2.6 Ozone generator. The generator must be capable of generating sufficient and stable levels of O_3 for reaction with NO to generate NO_2 concentrations in the range required. Ozone generators of the electric discharge type may produce NO and NO_2 and are not recommended.

1.2.7 Valve. A valve may be used as shown in Figure 1 to divert the NO flow when zero air is required at the manifold. The valve should be constructed of glass, Teflon*, or other nonreactive material.

1.2.8 Reaction chamber. A chamber, constructed of glass, Teflon*, or other nonreactive material, for the quantitative reaction of O_3 with excess NO. The chamber should be of sufficient volume (V_{RC}) such that the residence time (t_R) meets the requirements specified in 1.4. For practical reasons, t_R should be less than 2 minutes.

1.2.9 Mixing chamber. A chamber constructed of glass, Teflon*, or other nonreactive material and designed to provide thorough mixing of reaction products and diluent air. The residence time is not critical when the dynamic parameter specification given in 1.4 is met.

1.2.10 Output manifold. The output manifold should be constructed of glass, Teflon*, or other non-reactive material and should be of sufficient diameter to insure an insignificant pressure drop at the analyzer connection. The system must have a vent designed to insure atmospheric pressure at the manifold and to prevent ambient air from entering the manifold.

1.3 Reagents.

1.3.1 NO concentration standard. Gas cylinder standard containing 50 to 100 ppm NO in N_2 with less than 1 ppm NO_2. This standard must be traceable to a National Bureau of Standards (NBS) NO in N_2 Standard Reference Material (SRM 1683 or SRM 1684), an NBS NO_2 Standard Reference Material (SRM 1629), or an NBS/EPA-approved commercially available Certified Reference Material (CRM). CRM's are described in Reference 14, and a list of CRM sources is available from the address shown for Reference 14. A recommended protocol for certifying NO gas cylinders against either an NO SRM or CRM is given in section 2.0.7 of Reference 15. Reference 13 gives procedures for certifying an NO gas cylinder against an NBS NO_2 SRM and for determining the amount of NO_2 impurity in an NO cylinder.

1.3.2 Zero air. Air, free of contaminants which will cause a detectable response on the $NO/NO_x/NO_2$ analyzer or which might react with either NO, O_3, or NO_2 in the gas

phase titration. A procedure for generating zero air is given in reference 13.

1.4 Dynamic parameter specification.

1.4.1 The O_3 generator air flowrate (F_o) and NO flowrate (F_{NO}) (see Figure 1) must be adjusted such that the following relationship holds:

$$P_R = [NO]_{RC} \times t_R \geq 2.75 \text{ ppm-minutes} \quad (2)$$

$$[NO]_{RC} = [NO]_{STD}\left(\frac{F_{NO}}{F_O + F_{NO}}\right) \quad (3)$$

$$t_R = \frac{V_{RC}}{F_O + F_{NO}} < 2 \text{ minutes} \quad (4)$$

where:

P_R = dynamic parameter specification, determined empirically, to insure complete reaction of the available O_3, ppm-minute

$[NO]_{RC}$ = NO concentration in the reaction chamber, ppm

t_R = residence time of the reactant gases in the reaction chamber, minute

$[NO]_{STD}$ = concentration of the undiluted NO standard, ppm

F_{NO} = NO flowrate, scm³/min

F_O = O_3 generator air flowrate, scm³/min

V_{RC} = volume of the reaction chamber, scm³

1.4.2 The flow conditions to be used in the GPT system are determined by the following procedure:

(a) Determine F_T, the total flow required at the output manifold (F_T = analyzer demand plus 10 to 50% excess).

(b) Establish $[NO]_{OUT}$ as the highest NO concentration (ppm) which will be required at the output manifold. $[NO]_{OUT}$ should be approximately equivalent to 90% of the upper range limit (*URL*) of the NO_x concentration range to be covered.

(c) Determine F_{NO} as

$$F_{NO} = \frac{[NO]_{OUT} \times F_T}{[NO]_{STD}} \quad (5)$$

(d) Select a convenient or available reaction chamber volume. Initially, a trial V_{RC} may be selected to be in the range of approximately 200 to 500 scm³.

(e) Compute FO as

$$F_O = \sqrt{\frac{[NO]_{STD} \times F_{NO} \times V_{RC}}{2.75}} - F_{NO} \quad (6)$$

(f) Compute t_R as

$$t_R = \frac{V_{RC}}{F_O + F_{NO}} \quad (7)$$

Verify that $t_R < 2$ minutes. If not, select a reaction chamber with a smaller V_{RC}.

(g) Compute the diluent air flowrate as

$$F_D = F_T - F_O - F_{NO} \quad (8)$$

where:

F_D = diluent air flowrate, scm³/min

(h) If F_O turns out to be impractical for the desired system, select a reaction chamber having a different V_{RC} and recompute F_O and F_D.

NOTE: A dynamic parameter lower than 2.75 ppm-minutes may be used if it can be determined empirically that quantitative reaction of O_3 with NO occurs. A procedure for making this determination as well as a more detailed discussion of the above requirements and other related considerations is given in reference 13.

1.5 *Procedure.*

1.5.1 Assemble a dynamic calibration system such as the one shown in Figure 1.

1.5.2 Insure that all flowmeters are calibrated under the conditions of use against a reliable standard such as a soap-bubble meter or wet-test meter. All volumetric flowrates should be corrected to 25° C and 760 mm Hg. A discussion on the calibration of flowmeters is given in reference 13.

1.5.3 Precautions must be taken to remove O_3 and other contaminants from the NO pressure regulator and delivery system prior to the start of calibration to avoid any conversion of the standard NO to NO_2. Failure to do so can cause significant errors in calibration. This problem may be minimized by (1) carefully evacuating the regulator, when possible, after the regulator has been connected to the cylinder and before opening the cylinder valve; (2) thoroughly flushing the regulator and delivery system with NO after opening the cylinder valve; (3) not removing the regulator from the cylinder between calibrations unless absolutely necessary. Further discussion of these procedures is given in reference 13.

1.5.4 Select the operating range of the $NO/NO_x/NO_2$ analyzer to be calibrated. In order to obtain maximum precision and accuracy for NO_2 calibration, all three channels of the analyzer should be set to the same range. If operation of the NO and NO_x channels on higher ranges is desired, subsequent recalibration of the NO and NO_x channels on the higher ranges is recommended.

NOTE: Some analyzer designs may require identical ranges for NO, NO_x, and NO_2 during operation of the analyzer.

1.5.5 Connect the recorder output cable(s) of the NO/NO_x/NO_2 analyzer to the input terminals of the strip chart recorder(s). All adjustments to the analyzer should be performed based on the appropriate strip chart readings. References to analyzer responses in the procedures given below refer to recorder responses.

1.5.6 Determine the GPT flow conditions required to meet the dynamic parameter specification as indicated in 1.4.

1.5.7 Adjust the diluent air and O_3 generator air flows to obtain the flows determined in section 1.4.2. The total air flow must exceed the total demand of the analyzer(s) connected to the output manifold to insure that no ambient air is pulled into the manifold vent. Allow the analyzer to sample zero air until stable NO, NO_x, and NO_2 responses are obtained. After the responses have stabilized, adjust the analyzer zero control(s).

NOTE: Some analyzers may have separate zero controls for NO, NO_x, and NO_2. Other analyzers may have separate zero controls only for NO and NO_x, while still others may have only one zero control common to all three channels.

Offsetting the analyzer zero adjustments to +5 percent of scale is recommended to facilitate observing negative zero drift. Record the stable zero air responses as Z_{NO}, Z_{NOX}, and Z_{NO_2}.

1.5.8 Preparation of NO and NO_x calibration curves.

1.5.8.1 Adjustment of NO span control. Adjust the NO flow from the standard NO cylinder to generate an NO concentration of approximately 80 percent of the upper range limit (*URL*) of the NO range. This exact NO concentration is calculated from:

$$[NO]_{OUT} = \frac{F_{NO} \times [NO]_{STD}}{F_{NO} + F_O + F_D} \quad (9)$$

where:

$[NO]_{OUT}$=diluted NO concentration at the output manifold, ppm

Sample this NO concentration until the NO and NO_x responses have stabilized. Adjust the NO span control to obtain a recorder response as indicated below:

recorder response (percent scale)=

$$\left(\frac{[NO]_{OUT}}{URL} \times 100 \right) + Z_{NO} \quad (10)$$

where:

URL=nominal upper range limit of the NO channel, ppm

NOTE: Some analyzers may have separate span controls for NO, NO_x, and NO_2. Other analyzers may have separate span controls only for NO and NO_x, while still others may have only one span control common to all three channels. When only one span control is available, the span adjustment is made on the NO channel of the analyzer.

If substantial adjustment of the NO span control is necessary, it may be necessary to recheck the zero and span adjustments by repeating steps 1.5.7 and 1.5.8.1. Record the NO concentration and the analyzer's NO response.

1.5.8.2 Adjustment of NO_x span control. When adjusting the analyzer's NO_x span control, the presence of any NO_2 impurity in the standard NO cylinder must be taken into account. Procedures for determining the amount of NO_2 impurity in the standard NO cylinder are given in reference 13. The exact NO_x concentration is calculated from:

$$[NO_x]_{OUT} = \frac{F_{NO} \times ([NO]_{STD} + [NO_2]_{IMP})}{F_{NO} + F_O + F_D} \quad (11)$$

where:

$[NO_x]_{OUT}$=diluted NO_x concentration at the output manifold, ppm

$[NO_2]_{IMP}$=concentration of NO_2 impurity in the standard NO cylinder, ppm

Adjust the NO_x span control to obtain a recorder response as indicated below:

recorder response (% scale)=

$$\left(\frac{[NO_x]_{OUT}}{URL} \times 100 \right) + Z_{NOx} \quad (12)$$

NOTE: If the analyzer has only one span control, the span adjustment is made on the NO channel and no further adjustment is made here for NO_x.

If substantial adjustment of the NO_x span control is necessary, it may be necessary to recheck the zero and span adjustments by repeating steps 1.5.7 and 1.5.8.2. Record the NO_x concentration and the analyzer's NO_x response.

1.5.8.3 Generate several additional concentrations (at least five evenly spaced

points across the remaining scale are suggested to verify linearity) by decreasing F_{NO} or increasing F_D. For each concentration generated, calculate the exact NO and NO_x concentrations using equations (9) and (11) respectively. Record the analyzer's NO and NO_x responses for each concentration. Plot the analyzer responses versus the respective calculated NO and NO_x concentrations and draw or calculate the NO and NO_x calibration curves. For subsequent calibrations where linearity can be assumed, these curves may be checked with a two-point calibration consisting of a zero air point and NO and NO_x concentrations of approximately 80% of the *URL*.

1.5.9 *Preparation of NO_2 calibration curve.*

1.5.9.1 Assuming the NO_2 zero has been properly adjusted while sampling zero air in step 1.5.7, adjust F_O and F_D as determined in section 1.4.2. Adjust F_{NO} to generate an NO concentration near 90% of the *URL* of the NO range. Sample this NO concentration until the NO and NO_x responses have stabilized. Using the NO calibration curve obtained in section 1.5.8, measure and record the NO concentration as $[NO]_{orig}$. Using the NO_x calibration curve obtained in section 1.5.8, measure and record the NO_x concentration as $[NO_x]_{orig}$.

1.5.9.2 Adjust the O_3 generator to generate sufficient O_3 to produce a decrease in the NO concentration equivalent to approximately 80% of the URL of the NO_2 range. The decrease must not exceed 90% of the NO concentration determined in step 1.5.9.1. After the analyzer responses have stabilized, record the resultant NO and NO_x concentrations as $[NO]_{rem}$ and $[NO_x]_{rem}$.

1.5.9.3 Calculate the resulting NO_2 concentration from:

$$[NO_2]_{OUT} = [NO]_{orig} - [NO]_{rem} + \frac{F_{NO} \times [NO_2]_{IMP}}{F_{NO} + F_O + F_D} \quad (13)$$

where:

$[NO_2]_{OUT}$ = diluted NO_2 concentration at the output manifold, ppm

$[NO]_{orig}$ = original NO concentration, prior to addition of O_3, ppm

$[NO]_{rem}$ = NO concentration remaining after addition of O_3, ppm

Adjust the NO_2 span control to obtain a recorder response as indicated below:

recorder response (% scale) =

$$\left(\frac{[NO_2]_{OUT}}{URL} \times 100 \right) + Z_{NO2} \quad (14)$$

NOTE: If the analyzer has only one or two span controls, the span adjustments are made on the NO channel or NO and NO_x channels and no further adjustment is made here for NO_2.

If substantial adjustment of the NO_2 span control is necessary, it may be necessary to recheck the zero and span adjustments by repeating steps 1.5.7 and 1.5.9.3. Record the NO_2 concentration and the corresponding analyzer NO_2 and NO_x responses.

1.5.9.4 Maintaining the same F_{NO}, F_O, and F_D as in section 1.5.9.1, adjust the ozone generator to obtain several other concentrations of NO_2 over the NO_2 range (at least five evenly spaced points across the remaining scale are suggested). Calculate each NO_2 concentration using equation (13) and record the corresponding analyzer NO_2 and NO_x responses. Plot the analyzer's NO_2 responses versus the corresponding calculated NO_2 concentrations and draw or calculate the NO_2 calibration curve.

1.5.10 *Determination of converter efficiency.*

1.5.10.1 For each NO_2 concentration generated during the preparation of the NO_2 calibration curve (see section 1.5.9) calculate the concentration of NO_2 converted from:

$$[NO_2]_{CONV} = [NO_2]_{OUT} - ([NO_x]_{orig} - [NO_x]_{rem}) \quad (15)$$

where:

$[NO_2]_{CONV}$ = concentration of NO_2 converted, ppm

$[NO_x]_{orig}$ = original NO_x concentration prior to addition of O_3, ppm

$[NO_x]_{rem}$ = NO_x concentration remaining after addition of O_3, ppm

NOTE: Supplemental information on calibration and other procedures in this method are given in reference 13.

Plot $[NO_2]_{CONV}$ (y-axis) versus $[NO_2]_{OUT}$ (x-axis) and draw or calculate the converter efficiency curve. The slope of the curve times 100 is the average converter efficiency, E_c. The average converter efficiency must be greater than 96%; if it is less than 96%, replace or service the converter.

2. *Alternative B*—NO_2 permeation device.

Major equipment required:

Stable O_3 generator.

Chemiluminescence NO/NO_2/NO_x analyzer with strip chart recorder(s).

NO concentration standard.

NO_2 concentration standard.

2.1 *Principle.* Atmospheres containing accurately known concentrations of nitrogen dioxide are generated by means of a

permeation device. (10) The permeation device emits NO_2 at a known constant rate provided the temperature of the device is held constant (±0.1° C) and the device has been accurately calibrated at the temperature of use. The NO_2 emitted from the device is diluted with zero air to produce NO_2 concentrations suitable for calibration of the NO_2 channel of the NO/NO_x/NO_2 analyzer. An NO concentration standard is used for calibration of the NO and NO_x channels of the analyzer.

2.2 *Apparatus.* A typical system suitable for generating the required NO and NO_2 concentrations is shown in Figure 2. All connections between components downstream from the permeation device should be of glass, Teflon®, or other non-reactive material.

2.2.1 *Air flow controllers.* Devices capable of maintaining constant air flows within ±2% of the required flowrate.

2.2.2 *NO flow controller.* A device capable of maintaining constant NO flows within ±2% of the required flowrate. Component parts in contact with the NO must be of a non-reactive material.

2.2.3 *Air flowmeters.* Calibrated flowmeters capable of measuring and monitoring air flowrates with an accuracy of ±2% of the measured flowrate.

2.2.4 *NO flowmeter.* A calibrated flowmeter capable of measuring and monitoring NO flowrates with an accuracy of ±2% of the measured flowrate. (Rotameters have been reported to operate unreliably when measuring low NO flows and are not recommended.)

2.2.5 *Pressure regulator for standard NO cylinder.* This regulator must have a non-reactive diaphragm and internal parts and a suitable delivery pressure.

2.2.6 *Drier.* Scrubber to remove moisture from the permeation device air system. The use of the drier is optional with NO_2 permeation devices not sensitive to moisture. (Refer to the supplier's instructions for use of the permeation device.)

2.2.7 *Constant temperature chamber.* Chamber capable of housing the NO_2 permeation device and maintaining its temperature to within ±0.1°C.

2.2.8 *Temperature measuring device.* Device capable of measuring and monitoring the temperature of the NO_2 permeation device with an accuracy of ±0.05°C.

2.2.9 *Valves.* A valve may be used as shown in Figure 2 to divert the NO_2 from the permeation device when zero air or NO is required at the manifold. A second valve may be used to divert the NO flow when zero air or NO_2 is required at the manifold.

The valves should be constructed of glass, Teflon®, or other nonreactive material.

2.2.10 *Mixing chamber.* A chamber constructed of glass, Teflon®, or other nonreactive material and designed to provide thorough mixing of pollutant gas streams and diluent air.

2.2.11 *Output manifold.* The output manifold should be constructed of glass, Teflon®, or other non-reactive material and should be of sufficient diameter to insure an insignificant pressure drop at the analyzer connection. The system must have a vent designed to insure atmospheric pressure at the manifold and to prevent ambient air from entering the manifold.

2.3 *Reagents.*

2.3.1 *Calibration standards.* Calibration standards are required for both NO and NO_2. The reference standard for the calibration may be either an NO or NO_2 standard, and must be traceable to a National Bureau of Standards (NBS) NO in N_2 Standard Reference Material (SRM 1683 or SRM 1684), and NBS NO_2 Standard Reference Material (SRM 1629), or an NBS/EPA-approved commercially available Certified Reference Material (CRM). CRM's are described in Reference 14, and a list of CRM sources is available from the address shown for Reference 14. Reference 15 gives recommended procedures for certifying an NO gas cylinder against an NO SRM or CRM and for certifying an NO_2 permeation device against an NO_2 SRM. Reference 13 contains procedures for certifying an NO gas cylinder against an NO_2 SRM and for certifying an NO_2 permeation device against an NO SRM or CRM. A procedure for determining the amount of NO_2 impurity in an NO cylinder is also contained in Reference 13. The NO or NO_2 standard selected as the reference standard must be used to certify the other standard to ensure consistency between the two standards.

2.3.1.1 *NO_2 Concentration standard.* A permeation device suitable for generating NO_2 concentrations at the required flowrates over the required concentration range. If the permeation device is used as the reference standard, it must be traceable to an SRM or CRM as specified in 2.3.1. If an NO cylinder is used as the reference standard, the NO_2 permeation device must be certified against the NO standard according to the procedure given in Reference 13. The use of the permeation device should be in strict accordance with the instructions supplied with the device. Additional information regarding the use of permeation devices is given by Scaringelli et al. (11) and Rook et al. (12).

2.3.1.2 *NO Concentration standard.* Gas cylinder containing 50 to 100 ppm NO in N_2 with less than 1 ppm NO_2. If this cylinder is used as the reference standard, the cylinder must be traceable to an SRM or CRM as specified in 2.3.1. If an NO_2 permeation device is used as the reference standard, the NO cylinder must be certified against the NO_2 standard according to the procedure

given in Reference 13. The cylinder should be recertified on a regular basis as determined by the local quality control program.

2.3.3 *Zero air.* Air, free of contaminants which might react with NO or NO_2 or cause a detectable response on the $NO/NO_x/NO_2$ analyzer. When using permeation devices that are sensitive to moisture, the zero air passing across the permeation device must be dry to avoid surface reactions on the device. (Refer to the supplier's instructions for use of the permeation device.) A procedure for generating zero air is given in reference 13.

2.4 *Procedure.*

2.4.1 Assemble the calibration apparatus such as the typical one shown in Figure 2.

2.4.2 Insure that all flowmeters are calibrated under the conditions of use against a reliable standard such as a soap bubble meter or wet-test meter. All volumetric flowrates should be corrected to 25° C and 760 mm Hg. A discussion on the calibration of flowmeters is given in reference 13.

2.4.3 Install the permeation device in the constant temperature chamber. Provide a small fixed air flow (200–400 scm^3/min) across the device. The permeation device should always have a continuous air flow across it to prevent large buildup of NO_2 in the system and a consequent restabilization period. Record the flowrate as FP. Allow the device to stabilize at the calibration temperature for at least 24 hours. The temperature must be adjusted and controlled to within ±0.1°C or less of the calibration temperature as monitored with the temperature measuring device.

2.4.4 Precautions must be taken to remove O_2 and other contaminants from the NO pressure regulator and delivery system prior to the start of calibration to avoid any conversion of the standard NO to NO_2. Failure to do so can cause significant errors in calibration. This problem may be minimized by

(1) Carefully evacuating the regulator, when possible, after the regulator has been connected to the cylinder and before opening the cylinder valve;

(2) Thoroughly flushing the regulator and delivery system with NO after opening the cylinder valve;

(3) Not removing the regulator from the cylinder between calibrations unless absolutely necessary. Further discussion of these procedures is given in reference 13.

2.4.5 Select the operating range of the NO/NO_xNO_2 analyzer to be calibrated. In order to obtain maximum precision and accuracy for NO_2 calibration, all three channels of the analyzer should be set to the same range. If operation of the NO and NO_x channels on higher ranges is desired, subsequent recalibration of the NO and NO_x channels on the higher ranges is recommended.

NOTE: Some analyzer designs may require identical ranges for NO, NO_x, and NO_x during operation of the analyzer.

2.4.6 Connect the recorder output cable(s) of the $NO/NO_x/NO_2$ analyzer to the input terminals of the strip chart recorder(s). All adjustments to the analyzer should be performed based on the appropriate strip chart readings. References to analyzer responses in the procedures given below refer to recorder responses.

2.4.7 Switch the valve to vent the flow from the permeation device and adjust the diluent air flowrate, F_D, to provide zero air at the output manifold. The total air flow must exceed the total demand of the analyzer(s) connected to the output manifold to insure that no ambient air is pulled into the manifold vent. Allow the analyzer to sample zero air until stable NO, NO_x, and NO_2 responses are obtained. After the responses have stabilized, adjust the analyzer zero control(s).

NOTE: Some analyzers may have separate zero controls for NO, NO_x, and NO_2. Other analyzers may have separate zero controls only for NO and NO_x, while still others may have only one zero common control to all three channels.

Offsetting the analyzer zero adjustments to +5% of scale is recommended to facilitate observing negative zero drift. Record the stable zero air responses as Z_{NO}, Z_{NOX}, and Z_{NO2}.

2.4.8 Preparation of NO and NO_x calibration curves.

2.4.8.1 Adjustment of NO span control. Adjust the NO flow from the standard NO cylinder to generate an NO concentration of approximately 80% of the upper range limit (URL) of the NO range. The exact NO concentration is calculated from:

$$[NO]_{OUT} = \frac{F_{NO} \times [NO]_{STD}}{F_{NO} + F_D} \quad (16)$$

where:

$[NO]_{OUT}$=diluted NO concentration at the output manifold, ppm
F_{NO}=NO flowrate, scm³/min
$[NO]_{STD}$=concentration of the undiluted NO standard, ppm
F_D=diluent air flowrate, scm³/min

Sample this NO concentration until the NO and NO_x responses have stabilized. Adjust the NO span control to obtain a recorder response as indicated below:

recorder response (% scale) =

$$= \left(\frac{[NO]_{OUT}}{URL} \times 100 \right) + Z_{NO} \quad (17)$$

where:

URL=nominal upper range limit of the NO channel, ppm

NOTE: Some analyzers may have separate span controls for NO, NO_x, and NO_2. Other analyzers may have separate span controls only for NO and NO_x, while still others may have only one span control common to all three channels. When only one span control is available, the span adjustment is made on the NO channel of the analyzer.

If substantial adjustment of the NO span control is necessary, it may be necessary to recheck the zero and span adjustments by repeating steps 2.4.7 and 2.4.8.1. Record the NO concentration and the analyzer's NO response.

2.4.8.2 *Adjustment of NO_x span control.* When adjusting the analyzer's NO_x span control, the presence of any NO_2 impurity in the standard NO cylinder must be taken into account. Procedures for determining the amount of NO_2 impurity in the standard NO cylinder are given in reference 13. The exact NO_x concentration is calculated from:

$$[NO_x]_{OUT} = \frac{F_{NO} \times ([NO]_{STD} + [NO_2]_{IMP})}{F_{NO} + F_D} \quad (18)$$

where:

$[NO_x]_{OUT}$=diluted NO_x cencentration at the output manifold, ppm
$[NO_2]_{IMP}$=concentration of NO_2 impurity in the standard NO cylinder, ppm

Adjust the NO_x span control to obtain a convenient recorder response as indicated below:

recorder response (% scale)

$$= \left(\frac{[NO_x]_{OUT}}{URL} \times 100 \right) + Z_N \quad (19)$$

or

NOTE: If the analyzer has only one span control, the span adjustment is made on the NO channel and no further adjustment is made here for NO_x.

If substantial adjustment of the NO_x span control is necessary, it may be necessary to recheck the zero and span adjustments by repeating steps 2.4.7 and 2.4.8.2. Record the NO_x concentration and the analyzer's NO_x response.

2.4.8.3 Generate several additional concentrations (at least five evenly spaced points across the remaining scale are suggested to verify linearity) by decreasing F_{NO} or increasing F_D. For each concentration generated, calculate the exact NO and NO_x concentrations using equations (16) and (18) respectively. Record the analyzer's NO and NO_x responses for each concentration. Plot the analyzer responses versus the respective calculated NO and NO_x concentrations and draw or calculate the NO and NO_x calibration curves. For subsequent calibrations where linearity can be assumed, these curves may be checked with a two-point calibration consisting of a zero point and NO and NO_x concentrations of approximately 80 percent of the URL.

2.4.9 Preparation of NO_2 calibration curve.

2.4.9.1 Remove the NO flow. Assuming the NO_2 zero has been properly adjusted while sampling zero air in step 2.4.7, switch the valve to provide NO_2 at the output manifold.

2.4.9.2 Adjust F_D to generate an NO_2 concentration of approximately 80 percent of the *URL* of the NO_2 range. The total air flow must exceed the demand of the analyzer(s) under calibration. The actual concentration of NO_2 is calculated from:

$$[NO_2]_{OUT} = \frac{R \times K}{F_P + F_D} \quad (20)$$

where:

$[NO_2]_{OUT}$ = diluted NO_2 concentration at the output manifold, ppm

R = permeation rate, μg/min

K = 0.532μl NO_2/μg NO_2 (at 25°C and 760 mm Hg)

F_P = air flowrate across permeation device, scm³/min

F_D = diluent air flowrate, scm³/min

Sample this NO_2 concentration until the NO_x and NO_2 responses have stabilized. Adjust the NO_2 span control to obtain a recorder response as indicated below:

recorder response (% scale)

$$= \left(\frac{[NO_2]_{OUT}}{URL} \times 100 \right) + Z_{NO2} \quad (21)$$

NOTE: If the analyzer has only one or two span controls, the span adjustments are made on the NO channel or NO and NO_x channels and no further adjustment is made here for NO_2.

If substantial adjustment of the NO_2 span control is necessary it may be necessary to recheck the zero and span adjustments by repeating steps 2.4.7 and 2.4.9.2. Record the NO_2 concentration and the analyzer's NO_2 response. Using the NO_x calibration curve obtained in step 2.4.8, measure and record the NO_x concentration as $[NO_x]_M$.

2.4.9.3 Adjust F_D to obtain several other concentrations of NO_2 over the NO_2 range (at least five evenly spaced points across the remaining scale are suggested). Calculate each NO_2 concentration using equation (20) and record the corresponding analyzer NO_2 and NO_x responses. Plot the analyzer's NO_2 responses versus the corresponding calculated NO_2 concentrations and draw or calculate the NO_2 calibration curve.

2.4.10 *Determination of converter efficiency.*

2.4.10.1 Plot $[NO_x]_M$ (y-axis) versus $[NO_2]_{OUT}$ (x-axis) and draw or calculate the converter efficiency curve. The slope of the curve times 100 is the average converter efficiency, E_C. The average converter efficiency must be greater than 96 percent; if it is less than 96 percent, replace or service the converter.

NOTE: Supplemental information on calibration and other procedures in this method are given in reference 13.

3. *Frequency of calibration.* The frequency of calibration, as well as the number of points necessary to establish the calibration curve and the frequency of other performance checks, will vary from one analyzer to another. The user's quality control program should provide guidelines for initial establishment of these variables and for subsequent alteration as operational experience is accumulated. Manufacturers of analyzers should include in their instruction/operation manuals information and guidance as to these variables and on other matters of operation, calibration, and quality control.

REFERENCES

1. A. Fontijn, A. J. Sabadell, and R. J. Ronco, "Homogeneous Chemiluminescent Measurement of Nitric Oxide with Ozone," Anal. Chem., 42, 575 (1970).

2. D. H. Stedman, E. E. Daby, F. Stuhl, and H. Niki, "Analysis of Ozone and Nitric Oxide by a Chemiluminiscent Method in Laboratory and Atmospheric Studies of Photochemical Smog," J. Air Poll. Control Assoc., 22, 260 (1972).

3. B. E. Martin, J. A. Hodgeson, and R. K. Stevens, "Detection of Nitric Oxide Chemiluminescence at Atmospheric Pressure," Presented at 164th National ACS Meeting, New York City, August 1972.

4. J. A. Hodgeson, K. A. Rehme, B. E. Martin, and R. K. Stevens, "Measurements for Atmospheric Oxides of Nitrogen and Ammonia by Chemiluminescence," Presented at 1972 APCA Meeting, Miami, FL, June 1972.

5. R. K. Stevens and J. A. Hodgeson, "Applications of Chemiluminescence Reactions to the Measurement of Air Pollutants," Anal. Chem., 45, 443A (1973).

6. L. P. Breitenbach and M. Shelef, "Development of a Method for the Analysis of NO_2 and NH_3 by NO-Measuring Instruments," J. Air Poll. Control Assoc., 23, 128 (1973).

7. A. M. Winer, J. W. Peters, J. P. Smith, and J. N. Pitts, Jr., "Response of Commercial Chemiluminescent NO-NO_2 Analyzers to Other Nitrogen-Containing Compounds," Environ. Sci. Technol., 8, 1118 (1974).

8. K. A. Rehme, B. E. Martin, and J. A. Hodgeson, Tentative Method for the Calibration of Nitric Oxide, Nitrogen Dioxide, and Ozone Analyzers by Gas Phase Titration," EPA-R2-73-246, March 1974.

9. J. A. Hodgeson, R. K. Stevens, and B. E. Martin, "A Stable Ozone Source Applicable as a Secondary Standard for Calibration of Atmospheric Monitors," ISA Transactions, 11, 161 (1972).

10. A. E. O'Keeffe and G. C. Ortman, "Primary Standards for Trace Gas Analysis," Anal. Chem., 38, 760 (1966).

11. F. P. Scaringelli, A. E. O'Keeffe, E. Rosenberg, and J. P. Bell, "Preparation of Known Concentrations of Gases and Vapors with Permeation Devices Calibrated Gravimetrically," Anal. Chem., 42, 871 (1970).

12. H. L. Rook, E. E. Hughes, R. S. Fuerst, and J. H. Margeson, "Operation Characteristics of NO_2 Permeation Devices," Presented at 167th National ACS Meeting, Los Angeles, CA, April 1974.

13. E. C. Ellis, "Technical Assistance Document for the Chemiluminescence Measurement of Nitrogen Dioxide," EPA-E600/4-75-003 (Available in draft form from the United States Environmental Protection Agency, Department E (MD-76), Environmental Monitoring and Support Laboratory, Research Triangle Park, NC 27711).

14. A Procedure for Establishing Traceability of Gas Mixtures to Certain National Bureau of Standards Standard Reference Materials. EPA-600/7-81-010, Joint publication by NBS and EPA. Available from the U.S. Environmental Protection Agency, Environmental Monitoring Systems Laboratory (MD-77), Research Triangle Park, NC 27711, May 1981.

15. *Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Specific Methods.* The U.S. Environmental Protection Agency, Environmental Monitoring Systems Laboratory, Research Triangle Park, NC 27711. Publication No. EAP-600/4-77-027a.

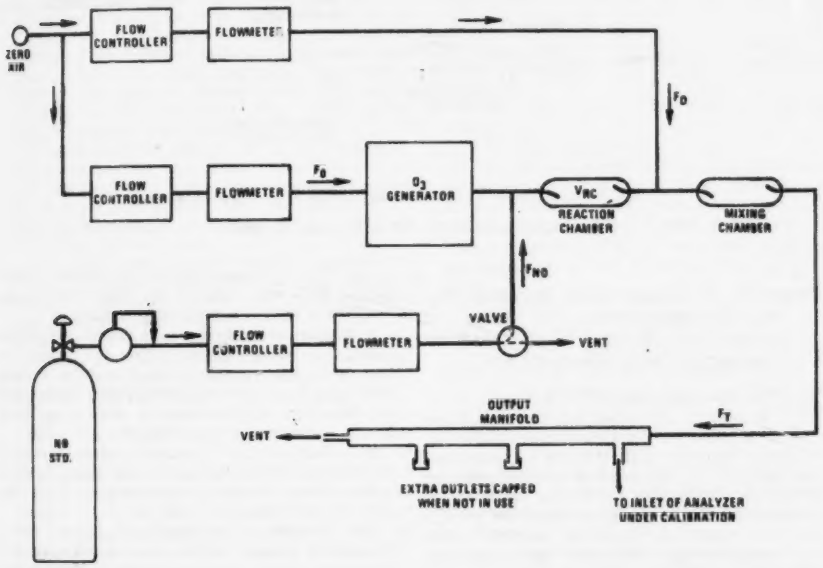

Figure 1. Schematic diagram of a typical GPT calibration system.

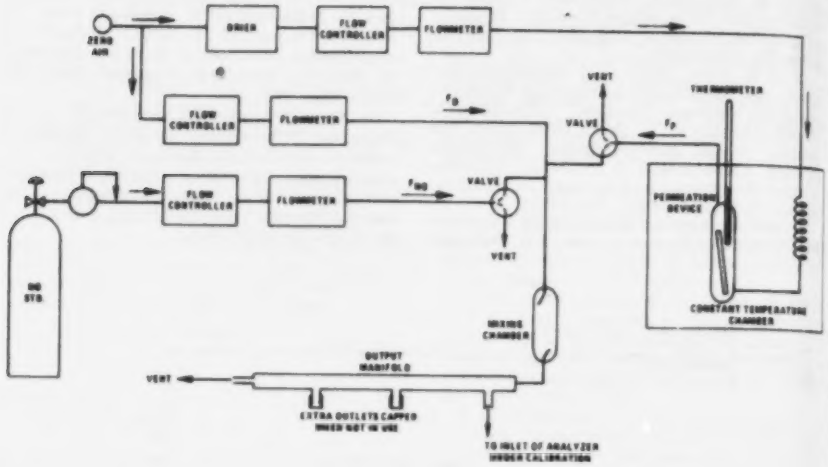

Figure 2. Schematic diagram of a typical calibration apparatus using an NO_2 permeation device.

[41 FR 52688, Dec. 1, 1976, as amended at 48 FR 2529, Jan 20, 1983]

Appendix G—Reference Method for the Determination of Lead in Suspended Particulate Matter Collected From Ambient Air

1. *Principle and applicability.*

1.1 Ambient air suspended particulate matter is collected on a glass-fiber filter for 24 hours using a high volume air sampler. The analysis of the 24-hour samples may be performed for either individual samples or composites of the samples collected over a calendar month or quarter, provided that the compositing procedure has been approved in accordance with section 2.8 of Appendix C to Part 58 of this chapter—*Modifications of methods by users.* (Guidance or assistance in requesting approval under Section 2.8 can be obtained from the address given in section 2.7 of Appendix C to Part 58 of this chapter.)

1.2 Lead in the particulate matter is solubilized by extraction with nitric acid (HNO_3), facilitated by heat or by a mixture of HNO_3 and hydrochloric acid (HCl) facilitated by ultrasonication.

1.3 The lead content of the sample is analyzed by atomic absorption spectrometry using an air-acetylene flame, the 283.3 or 217.0 nm lead absorption line, and the optimum instrumental conditions recommended by the manufacturer.

1.4 The ultrasonication extraction with HNO_3/HCl will extract metals other than lead from ambient particulate matter.

2. *Range, sensitivity, and lower detectable limit.* The values given below are typical of the methods capabilities. Absolute values will vary for individual situations depending on the type of instrument used, the lead line, and operating conditions.

2.1 *Range.* The typical range of the method is 0.07 to 7.5 μg Pb/m^3 assuming an upper linear range of analysis of 15 μg/ml and an air volume of 2,400 m^3.

2.2 *Sensitivity.* Typical sensitivities for a 1 percent change in absorption (0.0044 absorbance units) are 0.2 and 0.5 μg Pb/ml for the 217.0 and 283.3 nm lines, respectively.

2.3 *Lower detectable limit (LDL).* A typical LDL is 0.07 μg Pb/m^3. The above value was calculated by doubling the between-laboratory standard deviation obtained for the lowest measurable lead concentration in a collaborative test of the method.(*15*) An air volume of 2,400 m^3 was assumed.

3. *Interferences.* Two types of interferences are possible: chemical and light scattering.

3.1 *Chemical.* Reports on the absence (*1, 2, 3, 4, 5*) of chemical interferences far outweigh those reporting their presence, (*6*) therefore, no correction for chemical interferences is given here. If the analyst suspects that the sample matrix is causing a

chemical interference, the interference can be verified and corrected for by carrying out the analysis with and without the method of standard additions.(7)

3.2 *Light scattering.* Nonatomic absorption or light scattering, produced by high concentrations of dissolved solids in the sample, can produce a significant interference, especially at low lead concentrations. (2) The interference is greater at the 217.0 nm line than at the 283.3 nm line. No interference was observed using the 283.3 nm line with a similar method.(1)

Light scattering interferences can, however, be corrected for instrumentally. Since the dissolved solids can vary depending on the origin of the sample, the correction may be necessary, especially when using the 217.0 nm line. Dual beam instruments with a continuum source give the most accurate correction. A less accurate correction can be obtained by using a nonabsorbing lead line that is near the lead analytical line. Information on use of these correction techniques can be obtained from instrument manufacturers' manuals.

If instrumental correction is not feasible, the interference can be eliminated by use of the ammonium pyrrolidinecarbodithioate-methylisobutyl ketone, chelation-solvent extraction technique of sample preparation.(8)

4. *Precision and bias.*

4.1 The high-volume sampling procedure used to collect ambient air particulate matter has a between-laboratory relative standard deviation of 3.7 percent over the range 80 to 125 $\mu g/m^3$.(9) The combined extraction-analysis procedure has an average within-laboratory relative standard deviation of 5 to 6 percent over the range 1.5 to 15 μg Pb/ml, and an average between laboratory relative standard deviation of 7 to 9 percent over the same range. These values include use of either extraction procedure.

4.2 Single laboratory experiments and collaborative testing indicate that there is no significant difference in lead recovery between the hot and ultrasonic extraction procedures.(15)

5. *Apparatus.*

5.1 *Sampling.*

5.1.1 *High-Volume Sampler.* Use and calibrate the sampler as described in Appendix B to this part.

5.2 *Analysis.*

5.2.1 *Atomic absorption spectrophotometer.* Equipped with lead hollow cathode or electrodeless discharge lamp.

5.2.1.1 *Acetylene.* The grade recommended by the instrument manufacturer should be used. Change cylinder when pressure drops below 50–100 psig.

5.2.1.2 *Air.* Filtered to remove particulate, oil, and water.

5.2.2 *Glassware.* Class A borosilicate glassware should be used throughout the analysis.

5.2.2.1 *Beakers.* 30 and 150 ml. graduated, Pyrex.

5.2.2.2 *Volumetric flasks.* 100-ml.

5.2.2.3 *Pipettes.* To deliver 50, 30, 15, 8, 4, 2, 1 ml.

5.2.2.4 *Cleaning.* All glassware should be scrupulously cleaned. The following procedure is suggested. Wash with laboratory detergent, rinse, soak for 4 hours in 20 percent (w/w) HNO_3, rinse 3 times with distilled-deionized water, and dry in a dust free manner.

5.2.3 *Hot plate.*

5.2.4. *Ultrasonication water bath, unheated.* Commercially available laboratory ultrasonic cleaning baths of 450 watts or higher "cleaning power," i.e., actual ultrasonic power output to the bath have been found satisfactory.

5.2.5 *Template.* To aid in sectioning the glass-fiber filter. See figure 1 for dimensions.

5.2.6 *Pizza cutter.* Thin wheel. Thickness 1mm.

5.2.7 *Watch glass.*

5.2.8 *Polyethylene bottles.* For storage of samples. Linear polyethylene gives better storage stability than other polyethylenes and is preferred.

5.2.9 Parafilm "M".[1] American Can Co., Marathon Products, Neenah, Wis., or equivalent.

6. *Reagents.*

6.1 *Sampling.*

6.1.1 *Glass fiber filters.* The specifications given below are intended to aid the user in obtaining high quality filters with reproducible properties. These specifications have been met by EPA contractors.

6.1.1.1 *Lead content.* The absolute lead content of filters is not critical, but low values are, of course, desirable. EPA typically obtains filters with a lead content of 75 μg/filter.

It is important that the variation in lead content from filter to filter, within a given batch, be small.

6.1.1.2 *Testing.*

6.1.1.2.1 For large batches of filters (>500 filters) select at random 20 to 30 filters from a given batch. For small batches (>500 filters) a lesser number of filters may be taken. Cut one ¾"x8" strip from each filter anywhere in the filter. Analyze all strips, separately, according to the directions in sections 7 and 8.

6.1.1.2.2 Calculate the total lead in each filter as

[1] Mention of commercial products does not imply endorsement by the U.S. Environmental Protection Agency.

$$F_b = \mu g\ Pb/ml \times \frac{100\,ml}{strip} \times \frac{12\,strips}{filter}$$

where:

F_b = Amount of lead per 72 square inches of filter, μg.

6.1.1.2.3 Calculate the mean, F_b, of the values and the relative standard deviation (standard deviation/mean × 100). If the relative standard deviation is high enough so that, in the analysts opinion, subtraction of F_b, (section 10.3) may result in a significant error in the μg Pb/m^3 the batch should be rejected.

6.1.1.2.4 For acceptable batches, use the value of F_b to correct all lead analyses (section 10.3) of particulate matter collected using that batch of filters. If the analyses are below the LDL (section 2.3) no correction is necessary.

6.2 *Analysis.*

6.2.1 Concentrated (15.6 *M*) HNO_3. ACS reagent grade HNO_3 and commercially available redistilled HNO_3 has found to have sufficiently low lead concentrations.

6.2.2 Concentrated (11.7 *M*) HCl. ACS reagent grade.

6.2.3 *Distilled-deionized water.* (D.I. water).

6.2.4 3 *M* HNO_3. This solution is used in the hot extraction procedure. To prepare, add 192 ml of concentrated HNO_3 to D.I. water in a 1 *l* volumetric flask. Shake well, cool, and dilute to volume with D.I. water. *Caution:* Nitric acid fumes are toxic. Prepare in a well ventilated fume hood.

6.2.5 0.45 *M* HNO_3. This solution is used as the matrix for calibration standards when using the hot extraction procedure. To prepare, add 29 ml of concentrated HNO_3 to D.I. water in a 1 *l* volumetric flask. Shake well, cool, and dilute to volume with D.I. water.

6.2.6 2.6 *M* HNO_3+0 to 0.9 *M* HCl. This solution is used in the ultrasonic extraction procedure. The concentration of HCl can be varied from 0 to 0.9 *M*. Directions are given for preparation of a 2.6 *M* HNO_3+0.9 *M* HCl solution. Place 167 ml of concentrated HNO_3 into a 1 *l* volumetric flask and add 77 ml of concentrated HCl. Stir 4 to 6 hours, dilute to nearly 1 *l* with D.I. water, cool to room temperature, and dilute to 1 *l*.

6.2.7 0.40 *M* HNO_3 + X *M* HCl. This solution is used as the matrix for calibration standards when using the ultrasonic extraction procedure. To prepare, add 26 ml of concentrated HNO_3, plus the ml of HCl required, to a 1 *l* volumetric flask. Dilute to nearly 1 *l* with D.I. water, cool to room temperature, and dilute to 1 *l*. The amount of HCl required can be determined from the following equation:

$$y = \frac{77\,ml \times 0.15 \times}{0.9M}$$

where:

y = ml of concentrated HCl required.
x = molarity of HCl in 6.2.6.
0.15 = dilution factor in 7.2.2.

6.2.8 Lead nitrate, $Pb(NO_3)_2$. ACS reagent grade, purity 99.0 percent. Heat for 4 hours at 120° C and cool in a desiccator.

6.3 *Calibration standards.*

6.3.1 Master standard, 1000 μg Pb/ml in HNO_3. Dissolve 1.598 g of $Pb(NO_3)_2$ in 0.45 *M* HNO_3 contained in a 1 *l* volumetric flask and dilute to volume with 0.45 *M* HNO_3.

6.3.2 Master standard, 1000 μg Pb/ml in HNO_3/HCl. Prepare as in section 6.3.1 except use the HNO_3/HCl solution in section 6.2.7.

Store standards in a polyethylene bottle. Commercially available certified lead standard solutions may also be used.

7. *Procedure.*

7.1 *Sampling.* Collect samples for 24 hours using the procedure described in reference *10* with glass-fiber filters meeting the specifications in section 6.1.1. Transport collected samples to the laboratory taking care to minimize contamination and loss of sample. (*16*).

7.2 *Sample preparation.*

7.2.1 *Hot extraction procedure.*

7.2.1.1 Cut a ¾" x 8" strip from the exposed filter using a template and a pizza cutter as described in Figures 1 and 2. Other cutting procedures may be used.

Lead in ambient particulate matter collected on glass fiber filters has been shown to be uniformly distributed across the filter.[1,3,11] Another study [12] has shown that when sampling near a roadway, strip position contributes significantly to the overall variability associated with lead analyses. Therefore, when sampling near a roadway, additional strips should be analyzed to minimize this variability.

7.2.1.2 Fold the strip in half twice and place in a 150-ml beaker. Add 15 ml of 3 *M* HNO_3 to cover the sample. The acid should completely cover the sample. Cover the beaker with a watch glass.

7.2.1.3 Place beaker on the hot-plate contained in a fume hood, and boil gently for 30 min. Do not let the sample evaporate to dryness. *Caution:* Nitric acid fumes are toxic.

7.2.1.4 Remove beaker from hot plate and cool to near room temperature.

7.2.1.5 Quantitatively transfer the sample as follows:

7.2.1.5.1 Rinse watch glass and sides of beaker with D.I. water.

7.2.1.5.2 Decant extract and rinsings into a 100-ml volumetric flask.

7.2.1.5.3 Add D.I. water to 40 ml mark on beaker, cover with watch glass, and set aside for a minimum of 30 minutes. This is a critical step and cannot be omitted since it allows the HNO_3 trapped in the filter to diffuse into the rinse water.

7.2.1.5.4 Decant the water from the filter into the volumetric flask.

7.2.1.5.5 Rinse filter and beaker twice with D.I. water and add rinsings to volumetric flask until total volume is 80 to 85 ml.

7.2.1.5.6 Stopper flask and shake vigorously. Set aside for approximately 5 minutes or until foam has dissipated.

7.2.1.5.7 Bring solution to volume with D.I. water. Mix thoroughly.

7.2.1.5.8 Allow solution to settle for one hour before proceeding with analysis.

7.2.1.5.9 If sample is to be stored for subsequent analysis, transfer to a linear polyethylene bottle.

7.2.2 *Ultrasonic extraction procedure.*

7.2.2.1 Cut a ¾" x 8" strip from the exposed filter as described in section 7.2.1.1.

7.2.2.2 Fold the strip in half twice and place in a 30 ml beaker. Add 15 ml of the HNO_3/HCl solution in section 6.2.6. The acid should completely cover the sample. Cover the beaker with parafilm.

The parafilm should be placed over the beaker such that none of the parafilm is in contact with water in the ultrasonic bath. Otherwise, rinsing of the parafilm (section 7.2.2.4.1) may contaminate the sample.

7.2.2.3 Place the beaker in the ultrasonication bath and operate for 30 minutes.

7.2.2.4 Quantitatively transfer the sample as follows:

7.2.2.4.1 Rinse parafilm and sides of beaker with D.I. water.

7.2.2.4.2 Decant extract and rinsings into a 100 ml volumetric flask.

7.2.2.4.3 Add 20 ml D.I. water to cover the filter strip, cover with parafilm, and set aside for a minimum of 30 minutes. This is a critical step and cannot be omitted. The sample is then processed as in sections 7.2.1.5.4 through 7.2.1.5.9.

NOTE: Samples prepared by the hot extraction procedure are now in 0.45 *M* HNO_3. Samples prepared by the ultrasonication procedure are in 0.40 *M* HNO_3 + X *M* HCl.

8. *Analysis.*

8.1 Set the wavelength of the monochromator at 283.3 or 217.0 nm. Set or align other instrumental operating conditions as recommended by the manufacturer.

8.2 The sample can be analyzed directly from the volumetric flask, or an appropriate amount of sample decanted into a sample analysis tube. In either case, care should be taken not to disturb the settled solids.

8.3 Aspirate samples, calibration standards and blanks (section 9.2) into the flame and record the equilibrium absorbance.

8.4 Determine the lead concentration in μg Pb/ml, from the calibration curve, section 9.3.

8.5 Samples that exceed the linear calibration range should be diluted with acid of the same concentration as the calibration standards and reanalyzed.

9. *Calibration.*

9.1 Working standard, 20 μg Pb/ml. Prepared by diluting 2.0 ml of the master standard (section 6.3.1 if the hot acid extraction was used or section 6.3.2 if the ultrasonic extraction procedure was used) to 100 ml with acid of the same concentration as used in preparing the master standard.

9.2 *Calibration standards.* Prepare daily by diluting the working standard, with the same acid matrix, as indicated below. Other lead concentrations may be used.

Volume of 20 μg/ml working standard, ml	Final volume, ml	Concentration μg Pb/ml
0	100	0
1.0	200	0.1
2.0	200	0.2
2.0	100	0.4
4.0	100	0.8
8.0	100	1.6
15.0	100	3.0
30.0	100	6.0
50.0	100	10.0
100.0	100	20.0

9.3 *Preparation of calibration curve.* Since the working range of analysis will vary depending on which lead line is used and the type of instrument, no one set of instructions for preparation of a calibration curve can be given. Select standards (plus the reagent blank), in the same acid concentration as the samples, to cover the linear absorption range indicated by the instrument manufacturer. Measure the absorbance of the blank and standards as in section 8.0. Repeat until good agreement is obtained between replicates. Plot absorbance (y-axis) versus concentration in μg Pb/ml (x-axis). Draw (or compute) a straight line through the linear portion of the curve. Do not force the calibration curve through zero. Other calibration procedures may be used.

To determine stability of the calibration curve, remeasure—alternately—one of the following calibration standards for every 10th sample analyzed: Concentration ≤ 1μg

Pb/ml; concentration ≤ 10 μg Pb/ml. If either standard deviates by more than 5 percent from the value predicted by the calibration curve, recalibrate and repeat the previous 10 analyses.

10. *Calculation.*

10.1 *Measured air volume.* Calculate the measured air volume at Standard Temperature and Pressure as described in Reference 10.

10.2 *Lead concentration.* Calculate lead concentration in the air sample.

$$C = \frac{(\mu g\ Pb/ml \times 100\ ml/strip \times 12\ strips/filter) - F_b}{V_{STP}}$$

where:

C=Concentration, μg Pb/sm³.
μg Pb/ml=Lead concentration determined from section 8.
100 ml/strip=Total sample volume.
12 strips=Total useable filter area, 8" × 9". Exposed area of one strip, ¾" × 7".
Filter=Total area of one strip, ¾" × 8".
F_b=Lead concentration of blank filter, μg, from section 6.1.1.2.3.
V_{STP}=Air volume from section 10.2.

11. *Quality control.*

¾" × 8" glass fiber filter strips containing 80 to 2000 μg Pb/strip (as lead salts) and blank strips with zero Pb content should be used to determine if the method—as being used—has any bias. Quality control charts should be established to monitor differences between measured and true values. The frequency of such checks will depend on the local quality control program.

To minimize the possibility of generating unreliable data, the user should follow practices established for assuring the quality of air pollution data, (*13*) and take part in EPA's semiannual audit program for lead analyses.

12. *Trouble shooting.*

1. During extraction of lead by the hot extraction procedure, it is important to keep the sample covered so that corrosion products—formed on fume hood surfaces which may contain lead—are not deposited in the extract.

2. The sample acid concentration should minimize corrosion of the nebulizer. However, different nebulizers may require lower acid concentrations. Lower concentrations can be used provided samples and standards have the same acid concentration.

3. Ashing of particulate samples has been found, by EPA and contractor laboratories, to be unnecessary in lead analyses by atomic absorption. Therefore, this step was omitted from the method.

4. Filtration of extracted samples, to remove particulate matter, was specifically excluded from sample preparation, because some analysts have observed losses of lead due to filtration.

5. If suspended solids should clog the nebulizer during analysis of samples, centrifuge the sample to remove the solids.

13. *Authority.*

(Secs. 109 and 301(a), Clean Air Act, as amended (42 U.S.C. 7409, 7601(a)))

14. *References.*

1. Scott, D. R. et al. "Atomic Absorption and Optical Emission Analysis of NASN Atmospheric Particulate Samples for Lead." *Envir. Sci. and Tech., 10,* 877–880 (1976).

2. Skogerboe, R. K. et al. "Monitoring for Lead in the Environment." pp. 57–66, Department of Chemistry, Colorado State University, Fort Collins, CO 80523. Submitted to National Science Foundation for publications, 1976.

3. Zdrojewski, A. et al. "The Accurate Measurement of Lead in Airborne Particulates." *Inter. J. Environ. Anal. Chem., 2,* 63–77 (1972).

4. Slavin, W., "Atomic Absorption Spectroscopy." Published by Interscience Company, New York, NY (1968).

5. Kirkbright, G. F., and Sargent, M., "Atomic Absorption and Fluorescence Spectroscopy." Published by Academic Press, New York, NY 1974.

6. Burnham, C. D. et al., "Determination of Lead in Airborne Particulates in Chicago and Cook County, IL, by Atomic Absorption Spectroscopy." Envir. Sci. and Tech., 3, 472–475 (1969).

7. "Proposed Recommended Practices for Atomic Absorption Spectrometry," *ASTM Book of Standards,* part 30, pp. 1596–1608 (July 1973).

8. Koirttyohann, S. R. and Wen, J. W., "Critical Study of the APCD–MIBK Extraction System for Atomic Absorption." *Anal. Chem., 45,* 1986–1989 (1973).

9. *Collaborative Study of Reference Method for the Determination of Suspended Particulates in the Atmosphere (High Volume Method).* Obtainable from National Technical Information Service, Department

of Commerce, Port Royal Road, Springfield, VA 22151, as PB-205-891.

10. [Reserved]

11. Dubois, L., et al., "The Metal Content of Urban Air." JAPCA, *16*, 77-78 (1966).

12. EPA Report No. 600/4-77-034, June 1977, "Los Angeles Catalyst Study Symposium." Page 223.

13. *Quality Assurance Handbook for Air Pollution Measurement System. Volume 1—Principles.* EPA-600/9-76-005, March 1976.

14. Thompson, R. J. et al., "Analysis of Selected Elements in Atmospheric Particulate Matter by Atomic Absorption." *Atomic Absorption Newsletter*, *9*, No. 3, May-June 1970.

15. To be published. EPA, QAB, EMSL, RTP, N.C. 27711

16. *Quality Assurance Handbook for Air Pollution Measurement Systems. Volume II—Ambient Air Specific Methods.* EPA-600/4-77/027a, May 1977.

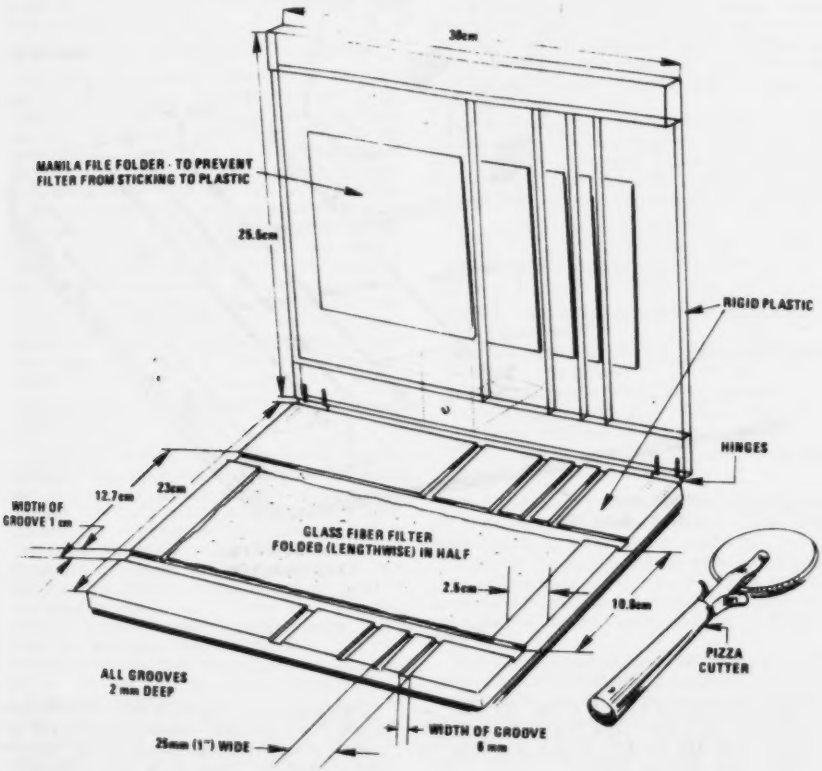

Figure 1

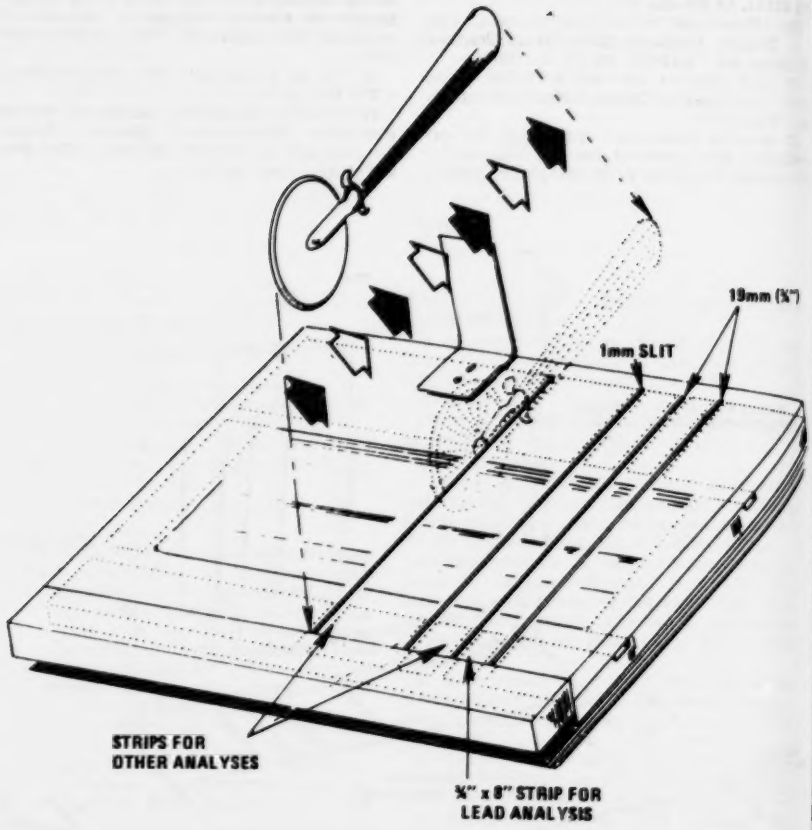

Figure 2

(Secs. 109, 301(a) of the Clean Air Act, as amended (42 U.S.C. 7409, 7601(a)); secs. 110, 301(a) and 319 of the Clean Air Act (42 U.S.C. 7410, 7601(a), 7619))

[43 FR 46258, Oct. 5, 1978; 44 FR 37915, June 29, 1979, as amended at 46 FR 44163, Sept. 3, 1981; 52 FR 24664, July 1, 1987]

Appendix H—Interpretation of the National Ambient Air Quality Standards for Ozone

1. *General*

This appendix explains how to determine when the expected number of days per calendar year with maximum hourly average concentrations above 0.12 ppm (235 μg/m³) is equal to or less than 1. An expanded discussion of these procedures and associated examples are contained in the "Guideline for Interpretation of Ozone Air Quality Standards." For purposes of clarity in the following discussion, it is convenient to use the term "exceedance" to describe a daily maximum hourly average ozone measurement that is greater than the level of the standard. Therefore, the phrase "expected number of days with maximum hourly aver-

age ozone concentrations above the level of the standard" may be simply stated as the "expected number of exceedances."

The basic principle in making this determination is relatively straightforward. Most of the complications that arise in determining the expected number of annual exceedances relate to accounting for incomplete sampling. In general, the average number of exceedances per calendar year must be less than or equal to 1. In its simplest form, the number of exceedances at a monitoring site would be recorded for each calendar year and then averaged over the past 3 calendar years to determine if this average is less than or equal to 1.

2. *Interpretation of Expected Exceedances*

The ozone standard states that the expected number of exceedances per year must be less than or equal to 1. The statistical term "expected number" is basically an arithmetic average. The following example explains what it would mean for an area to be in compliance with this type of standard. Suppose a monitoring station records a valid daily maximum hourly average ozone value for every day of the year during the past 3 years. At the end of each year, the number of days with maximum hourly concentrations above 0.12 ppm is determined and this number is averaged with the results of previous years. As long as this average remains "less than or equal to 1," the area is in compliance.

3. *Estimating the Number of Exceedances for a Year*

In general, a valid daily maximum hourly average value may not be available for each day of the year, and it will be necessary to account for these missing values when estimating the number of exceedances for a particular calendar year. The purpose of these computations is to determine if the expected number of exceedances per year is less than or equal to 1. Thus, if a site has two or more observed exceedances each year, the standard is not met and it is not necessary to use the procedures of this section to account for incomplete sampling.

The term "missing value" is used here in the general sense to describe all days that do not have an associated ozone measurement. In some cases, a measurement might actually have been missed but in other cases no measurement may have been scheduled for that day. A daily maximum ozone value is defined to be the highest hourly ozone value recorded for the day. This daily maximum value is considered to be valid if 75 percent of the hours from 9:01 a.m. to 9:00 p.m. (LST) were measured or if the highest hour is greater than the level of the standard.

In some areas, the seasonal pattern of ozone is so pronounced that entire months need not be sampled because it is extremely unlikely that the standard would be exceeded. Any such waiver of the ozone monitoring requirement would be handled under provisions of 40 CFR, Part 58. Some allowance should also be made for days for which valid daily maximum hourly values were not obtained but which would quite likely have been below the standard. Such an allowance introduces a complication in that it becomes necessary to define under what conditions a missing value may be assumed to have been less than the level of the standard. The following criterion may be used for ozone:

A missing daily maximum ozone value may be assumed to be less than the level of the standard if the valid daily maxima on both the preceding day and the following day do not exceed 75 percent of the level of the standard.

Let z denote the number of missing daily maximum values that may be assumed to be less than the standard. Then the following formula shall be used to estimate the expected number of exceedances for the year:

$$e = v + [(v/n)8(N-n-z)] \qquad (1)$$

(*Indicates multiplication.)

where:

e=the estimated number of exceedances for the year,
N=the number of required monitoring days in the year,
n=the number of valid daily maxima,
v=the number of daily values above the level of the standard, and
z=the number of days assumed to be less than the standard level.

This estimated number of exceedances shall be rounded to one decimal place (fractional parts equal to 0.05 round up).

It should be noted that N will be the total number of days in the year unless the appropriate Regional Administrator has granted a waiver under the provisions of 40 CFR Part 58.

The above equation may be interpreted intuitively in the following manner. The estimated number of exceedances is equal to the observed number of exceedances (v) plus an increment that accounts for incomplete sampling. There were (N-n) missing values for the year but a certain number of these, namely z, were assumed to be less than the standard. Therefore, (N-n-z) missing values are considered to include possible exceedances. The fraction of measured values that are above the level of the standard is v/n. It is assumed that this same fraction applies to the (N-n-z) missing values and that (v/n)*(N-n-z) of these values would also have exceeded the level of the standard.

[44 FR 8220, Feb. 8, 1979]

APPENDIX I—[RESERVED]

APPENDIX J—REFERENCE METHOD FOR THE DETERMINATION OF PARTICULATE MATTER AS PM_{10} IN THE ATMOSPHERE

1.0 *Applicability.*

1.1 This method provides for the measurement of the mass concentration of particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM_{10}) in ambient air over a 24-hour period for purposes of determining attainment and maintenance of the primary and secondary national ambient air quality standards for particulate matter specified in § 50.6 of this chapter. The measurement process is nondestructive, and the PM_{10} sample can be subjected to subsequent physical or chemical analyses. Quality assurance procedures and guidance are provided in part 58, appendices A and B, of this chapter and in References 1 and 2.

2.0 *Principle.*

2.1 An air sampler draws ambient air at a constant flow rate into a specially shaped inlet where the suspended particulate matter is inertially separated into one or more size fractions within the PM_{10} size range. Each size fraction in the PM_{10} size range is then collected on a separate filter over the specified sampling period. The particle size discrimination characteristics (sampling effectiveness and 50 percent cutpoint) of the sampler inlet are prescribed as performance specifications in part 53 of this chapter.

2.2 Each filter is weighed (after moisture equilibration) before and after use to determine the net weight (mass) gain due to collected PM_{10}. The total volume of air sampled, corrected to EPA reference conditions (25° C, 101.3 kPa), is determined from the measured flow rate and the sampling time. The mass concentration of PM_{10} in the ambient air is computed as the total mass of collected particles in the PM_{10} size range divided by the volume of air sampled, and is expressed in micrograms per standard cubic meter ($\mu g/std\ m^3$). For PM_{10} samples collected at temperatures and pressufes significantly different from EPA reference conditions, these corrected concentrations sometimes differ substantially from actual concentrations (in micrograms per actual cubic meter), particularly at high elevations. Although not required, the actual PM_{10} concentration can be calculated from the corrected concentration, using the average ambient temperature and barometric pressure during the sampling period.

2.3 A method based on this principle will be considered a reference method only if (a) the associated sampler meets the requirements specified in this appendix and the requirements in part 53 of this chapter, and (b) the method has been designated as a reference method in accordance with part 53 of this chapter.

3.0 *Range.*

3.1 The lower limit of the mass concentration range is determined by the repeatability of filter tare weights, assuming the nominal air sample volume for the sampler. For samplers having an automatic filter-changing mechanism, there may be no upper limit. For samplers that do not have an automatic filter-changing mechanism, the upper limit is determined by the filter mass loading beyond which the sampler no longer maintains the operating flow rate within specified limits due to increased pressure drop across the loaded filter. This upper limit cannot be specified precisely because it is a complex function of the ambient particle size distribution and type, humidity, filter type, and perhaps other factors. Nevertheless, all samplers should be capable of measuring 24-hour PM_{10} mass concentrations of at least 300 $\mu g/std\ m^3$ while maintaining the operating flow rate within the specified limits.

4.0 *Precision.*

4.1 The precision of PM_{10} samplers must be 5 $\mu g/m^3$ for PM_{10} concentrations below 80 $\mu g/m^3$ and 7 percent for PM_{10} concentrations above 80 $\mu g/m^3$, as required by Part 53 of this chapter, which prescribes a test procedure that determines the variation in the PM_{10} concentration measurements of identical samplers under typical sampling conditions. Continual assessment of precision via collocated samplers is required by Part 58 of this chapter for PM_{10} samplers used in certain monitoring networks.

5.0 *Accuracy.*

5.1 Because the size of the particles making up ambient particulate matter varies over a wide range and the concentration of particles varies with particle size, it is difficult to define the absolute accuracy of PM_{10} samplers. Part 53 of this chapter provides a specification for the sampling effectiveness of PM_{10} samplers. This specification requires that the expected mass concentration calculated for a candidate PM_{10} sampler, when sampling a specified particle size distribution, be within ±10 percent of that calculated for an ideal sampler whose sampling effectiveness is explicitly specified. Also, the particle size for 50 percent sampling effectivensss is required to be 10±0.5 micrometers. Other specifications related to accuracy apply to flow measurement and calibration, filter media, analytical (weighing) procedures, and artifact. The flow rate accuracy of PM_{10} samplers used in certain monitoring networks is required by Part 58

of this chapter to be assessed periodically via flow rate audits.

6.0 *Potential Sources of Error.*

6.1 *Volatile Particles.* Volatile particles collected on filters are often lost during shipment and/or storage of the filters prior to the post-sampling weighing [3]. Although shipment or storage of loaded filters is sometimes unavoidable, filters should be reweighed as soon as practical to minimize these losses.

6.2 *Artifacts.* Positive errors in PM_{10} concentration measurements may result from retention of gaseous species on filters [4, 5]. Such errors include the retention of sulfur dioxide and nitric acid. Retention of sulfur dioxide on filters, followed by oxidation to sulfate, is referred to as artifact sulfate formation, a phenomenon which increases with increasing filter alkalinity [6]. Little or no artifact sulfate formation should occur using filters that meet the alkalinity specification in section 7.2.4. Artifact nitrate formation, resulting primarily from retention of nitric acid, occurs to varying degrees on many filter types, including glass fiber, cellulose ester, and many quartz fiber filters [5, 7, 8, 9, 10]. Loss of true atmospheric particulate nitrate during or following sampling may also occur due to dissociation or chemical reaction. This phenomenon has been observed on Teflon® filters [8] and inferred for quartz fiber filters [11, 12]. The magnitude of nitrate artifact errors in PM_{10} mass concentration measurements will vary with location and ambient temperature; however, for most sampling locations, these errors are expected to be small.

6.3 *Humidity.* The effects of ambient humidity on the sample are unavoidable. The filter equilibration procedure in section 9.0 is designed to minimize the effects of moisture on the filter medium.

6.4 *Filter Handling.* Careful handling of filters between presampling and postsampling weighings is necessary to avoid errors due to damaged filters or loss of collected particles from the filters. Use of a filter cartridge or cassette may reduce the magnitude of these errors. Filters must also meet the integrity specification in section 7.2.3.

6.5 *Flow Rate Variation.* Variations in the sampler's operating flow rate may alter the particle size discrimination characteristics of the sampler inlet. The magnitude of this error will depend on the sensitivity of the inlet to variations in flow rate and on the particle distribution in the atmosphere during the sampling period. The use of a flow control device (section 7.1.3) is required to minimize this error.

6.6 *Air Volume Determination.* Errors in the air volume determination may result from errors in the flow rate and/or sampling time measurements. The flow control device serves to minimize errors in the flow rate determination, and an elapsed time meter (section 7.1.5) is required to minimize the error in the sampling time measurement.

7.0 *Apparatus.*

7.1 *PM_{10} Sampler.*

7.1.1 The sampler shall be designed to:

a. Draw the air sample into the sampler inlet and through the particle collection filter at a uniform face velocity.

b. Hold and seal the filter in a horizontal position so that sample air is drawn downward through the filter.

c. Allow the filter to be installed and removed conveniently.

d. Protect the filter and sampler from precipitation and prevent insects and other debris from being sampled.

e. Minimize air leaks that would cause error in the measurement of the air volume passing through the filter.

f. Discharge exhaust air at a sufficient distance from the sampler inlet to minimize the sampling of exhaust air.

g. Minimize the collection of dust from the supporting surface.

7.1.2 The sampler shall have a sample air inlet system that, when operated within a specified flow rate range, provides particle size discrimination characteristics meeting all of the applicable performance specifications prescribed in part 53 of this chapter. The sampler inlet shall show no significant wind direction dependence. The latter requirement can generally be satisfied by an inlet shape that is circularly symmetrical about a vertical axis.

7.1.3 The sampler shall have a flow control device capable of maintaining the sampler's operating flow rate within the flow rate limits specified for the sampler inlet over normal variations in line voltage and filter pressure drop.

7.1.4 The sampler shall provide a means to measure the total flow rate during the sampling period. A continuous flow recorder is recommended but not required. The flow measurement device shall be accurate to ±2 percent.

7.1.5 A timing/control device capable of starting and stopping the sampler shall be used to obtain a sample collection period of 24 ±1 hr (1,440 ±60 min). An elapsed time meter, accurate to within ±15 minutes, shall be used to measure sampling time. This meter is optional for samplers with continuous flow recorders if the sampling time measurement obtained by means of the recorder meets the ±15 minute accuracy specification.

7.1.6 The sampler shall have an associated operation or instruction manual as required by part 53 of this chapter which includes detailed instructions on the calibration, operation, and maintenance of the sampler.

7.2 *Filters.*

7.2.1 *Filter Medium.* No commercially available filter medium is ideal in all respects for all samplers. The user's goals in sampling determine the relative importance of various filter characteristics (e.g., cost, ease of handling, physical and chemical characteristics, etc.) and, consequently, determine the choice among acceptable filters. Furthermore, certain types of filters may not be suitable for use with some samplers, particularly under heavy loading conditions (high mass concentrations), because of high or rapid increase in the filter flow resistance that would exceed the capability of the sampler's flow control device. However, samplers equipped with automatic filter-changing mechanisms may allow use of these types of filters. The specifications given below are minimum requirements to ensure acceptability of the filter medium for measurement of PM_{10} mass concentrations. Other filter evaluation criteria should be considered to meet individual sampling and analysis objectives.

7.2.2 *Collection Efficiency.* >99 percent, as measured by the DOP test (ASTM-2986) with 0.3 μm particles at the sampler's operating face velocity.

7.2.3 *Integrity.* ±5 μg/m³ (assuming sampler's nominal 24-hour air sample volume). Integrity is measured as the PM_{10} concentration equivalent corresponding to the average difference between the initial and the final weights of a random sample of test filters that are weighed and handled under actual or simulated sampling conditions, but have no air sample passed through them (i.e., filter blanks). As a minimum, the test procedure must include initial equilibration and weighing, installation on an inoperative sampler, removal from the sampler, and final equilibration and weighing.

7.2.4 *Alkalinity.* <25 microequivalents/gram of filter, as measured by the procedure given in Reference 13 following at least two months storage in a clean environment (free from contamination by acidic gases) at room temperature and humidity.

7.3 *Flow Rate Transfer Standard.* The flow rate transfer standard must be suitable for the sampler's operating flow rate and must be calibrated against a primary flow or volume standard that is traceable to the National Bureau of Standards (NBS). The flow rate transfer standard must be capable of measuring the sampler's operating flow rate with an accuracy of ±2 percent.

7.4 *Filter Conditioning Environment.*

7.4.1 Temperature range: 15° to 30° C.

7.4.2 Temperature control: ±3° C.

7.4.3 Humidity range: 20% to 45% RH.

7.4.4 Humidity control: ±5% RH.

7.5 *Analytical Balance.* The analytical balance must be suitable for weighing the type and size of filters required by the sampler. The range and sensitivity required will depend on the filter tare weights and mass loadings. Typically, an analytical balance with a sensitivity of 0.1 mg is required for high volume samplers (flow rates >0.5 m³/min). Lower volume samplers (flow rates <0.5 m³/min) will require a more sensitive balance.

8.0 *Calibration.*

8.1 *General Requirements.*

8.1.1 Calibration of the sampler's flow measurement device is required to establish traceability of subsequent flow measurements to a primary standard. A flow rate transfer standard calibrated against a primary flow or volume standard shall be used to calibrate or verify the accuracy of the sampler's flow measurement device.

8.1.2 Particle size discrimination by inertial separation requires that specific air velocities be maintained in the sampler's air inlet system. Therefore, the flow rate through the sampler's inlet must be maintained throughout the sampling period within the design flow rate range specified by the manufacturer. Design flow rates are specified as actual volumetric flow rates, measured at existing conditions of temperature and pressure (Q_a). In contrast, mass concentrations of PM_{10} are computed using flow rates corrected to EPA reference conditions of temperature and pressure (Q_{std}).

8.2 *Flow Rate Calibration Procedure.*

8.2.1 PM_{10} samplers employ various types of flow control and flow measurement devices. The specific procedure used for flow rate calibration or verification will vary depending on the type of flow controller and flow indicator employed. Calibration in terms of actual volumetric flow rates (Q_a) is generally recommended, but other measures of flow rate (e.g., Q_{std}) may be used provided the requirements of section 8.1 are met. The general procedure given here is based on actual volumetric flow units (Q_a) and serves to illustrate the steps involved in the calibration of a PM_{10} sampler. Consult the sampler manufacturer's instruction manual and Reference 2 for specific guidance on calibration. Reference 14 provides additional information on the use of the commonly used measures of flow rate and their interrelationships.

8.2.2 Calibrate the flow rate transfer standard against a primary flow or volume standard traceable to NBS. Establish a calibration relationship (e.g., an equation or family of curves) such that traceability to the primary standard is accurate to within 2 percent over the expected range of ambient conditions (i.e., temperatures and pressures) under which the transfer standard will be used. Recalibrate the transfer standard periodically.

8.2.3 Following the sampler manufacturer's instruction manual, remove the sampler inlet and connect the flow rate transfer standard to the sampler such that the trans-

fer standard accurately measures the sampler's flow rate. Make sure there are no leaks between the transfer standard and the sampler.

8.2.4 Choose a minimum of three flow rates (actual m^3/min), spaced over the acceptable flow rate range specified for the inlet (see 7.1.2) that can be obtained by suitable adjustment of the sampler flow rate. In accordance with the sampler manufacturer's instruction manual, obtain or verify the calibration relationship between the flow rate (actual m^3/min) as indicated by the transfer standard and the sampler's flow indicator response. Record the ambient temperature and barometric pressure. Temperature and pressure corrections to subsequent flow indicator readings may be required for certain types of flow measurement devices. When such corrections are necessary, correction on an individual or daily basis is preferable. However, seasonal average temperature and average barometric pressure for the sampling site may be incorporated into the sampler calibration to avoid daily corrections. Consult the sampler manufacturer's instruction manual and Reference 2 for additional guidance.

8.2.5 Following calibration, verify that the sampler is operating at its design flow rate (actual m^3/min) with a clean filter in place.

8.2.6 Replace the sampler inlet.

9.0 *Procedure.*

9.1 The sampler shall be operated in accordance with the specific guidance provided in the sampler manufacturer's instruction manual and in Reference 2. The general procedure given here assumes that the sampler's flow rate calibration is based on flow rates at ambient conditions (Q_a) and serves to illustrate the steps involved in the operation of a PM_{10} sampler.

9.2 Inspect each filter for pinholes, particles, and other imperfections. Establish a filter information record and assign an identification number to each filter.

9.3 Equilibrate each filter in the conditioning environment (see 7.4) for at least 24 hours.

9.4 Following equilibration, weigh each filter and record the presampling weight with the filter identification number.

9.5 Install a preweighed filter in the sampler following the instructions provided in the sampler manufacturer's instruction manual.

9.6 Turn on the sampler and allow it to establish run-temperature conditions. Record the flow indicator reading and, if needed, the ambient temperature and barometric pressure. Determine the sampler flow rate (actual m^3/min) in accordance with the instructions provided in the sampler manufacturer's instruction manual. NOTE.—No onsite temperature or pressure measurements are necessary if the sampler's flow indicator does not require temperature or pressure corrections or if seasonal average temperature and average barometric pressure for the sampling site are incorporated into the sampler calibration (see step 8.2.4). If individual or daily temperature and pressure corrections are required, ambient temperature and barometric pressure can be obtained by on-site measurements or from a nearby weather station. Barometric pressure readings obtained from airports must be station pressure, not corrected to sea level, and may need to be corrected for differences in elevation between the sampling site and the airport.

9.7 If the flow rate is outside the acceptable range specified by the manufacturer, check for leaks, and if necessary, adjust the flow rate to the specified setpoint. Stop the sampler.

9.8 Set the timer to start and stop the sampler at appropriate times. Set the elapsed time meter to zero or record the initial meter reading.

9.9 Record the sample information (site location or identification number, sample date, filter identification number, and sampler model and serial number).

9.10 Sample for 24 ± 1 hours.

9.11 Determine and record the average flow rate ($\bar{Q}_a$) in actual m^3/min for the sampling period in accordance with the instructions provided in the sampler manufacturer's instruction manual. Record the elapsed time meter final reading and, if needed, the average ambient temperature and barometric pressure for the sampling period (see note following step 9.6).

9.12 Carefully remove the filter from the sampler, following the sampler manufacturer's instruction manual. Touch only the outer edges of the filter.

9.13 Place the filter in a protective holder or container (e.g., petri dish, glassine envelope, or manila folder).

9.14 Record any factors such as meteorological conditions, construction activity, fires or dust storms, etc., that might be pertinent to the measurement on the filter information record.

9.15 Transport the exposed sample filter to the filter conditioning environment as soon as possible for equilibration and subsequent weighing.

9.16 Equilibrate the exposed filter in the conditioning environment for at least 24 hours under the same temperature and humidity conditions used for presampling filter equilibration (see 9.3).

9.17 Immediately after equilibration, reweigh the filter and record the postsampling weight with the filter identification number.

10.0 *Sampler Maintenance.*

10.1 The PM_{10} sampler shall be maintained in strict accordance with the mainte-

nance procedures specified in the sampler manufacturer's instruction manual.

11.0 *Calculations.*

11.1 Calculate the average flow rate over the sampling period corrected to EPA reference conditions as Q_{std}. When the sampler's flow indicator is calibrated in actual volumetric units (Q_a), Q_{std} is calculated as:

$$Q_{std} = Q_a \times (P_{av}/T_{av})(T_{std}/P_{std})$$

where

Q_{std} = average flow rate at EPA reference conditions, std m^3/min;

Q_a = average flow rate at ambient conditions, m^3/min;

P_{av} = average barometric pressure during the sampling period or average barometric pressure for the sampling site, kPa (or mm Hg);

T_{av} = average ambient temperature during the sampling period or seasonal average ambient temperature for the sampling site, K;

T_{std} = standard temperature, defined as 298 K;

P_{std} = standard pressure, defined as 101.3 kPa (or 760 mm Hg).

11.2 Calculate the total volume of air sampled as:

$$V_{std} = Q_{std} \times t$$

where

V_{std} = total air sampled in standard volume units, std m^3;

t = sampling time, min.

11.3 Calculate the PM_{10} concentration as:

$$PM_{10} = (W_f - W_i) \times 10^6 / V_{std}$$

where

PM_{10} = mass concentration of PM_{10}, μg/std m^3;

W_f, W_i = final and initial weights of filter collecting PM_{10} particles, g;

10^6 = conversion of g to μg.

NOTE: If more than one size fraction in the PM_{10} size range is collected by the sampler, the sum of the net weight gain by each collection filter $[\Sigma(W_f - W_i)]$ is used to calculate the PM_{10} mass concentration.

12.0 *References.*

1. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume I, Principles. EPA-600/9-76-005, March 1976. Available from CERI, ORD Publications, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, OH 45268.

2. Quality Assurance Handbook for Air Pollution Measurement Systems, Volume II, Ambient Air Specific Methods. EPA-600/4-77-027a, May 1977. Available from CERI, ORD Publications, U.S. Environmental Protection Agency, 26 West St. Clair Street, Cincinnati, OH 45268.

3. Clement, R.E., and F.W. Karasek. Sample Composition Changes in Sampling and Analysis of Organic Compounds in Aerosols. Int. J. Environ. Analyt. Chem., 7:109, 1979.

4. Lee, R.E., Jr., and J. Wagman. A Sampling Anomaly in the Determination of Atmospheric Sulfate Concentration. Amer. Ind. Hyg. Assoc. J., 27:266, 1966.

5. Appel, B.R., S.M. Wall, Y. Tokiwa, and M. Haik. Interference Effects in Sampling Particulate Nitrate in Ambient Air. Atmos. Environ., 13:319, 1979.

6. Coutant, R.W. Effect of Environmental Variables on Collection of Atmospheric Sulfate. Environ. Sci. Technol., 11:873, 1977.

7. Spicer, C.W., and P. Schumacher. Interference in Sampling Atmospheric Particulate Nitrate. Atmos. Environ., 11:873, 1977.

8. Appel, B.R., Y. Tokiwa, and M. Haik. Sampling of Nitrates in Ambient Air. Atmos. Environ., 15:283, 1981.

9. Spicer, C.W., and P.M. Schumacher. Particulate Nitrate: Laboratory and Field Studies of Major Sampling Interferences. Atmos. Environ., 13:543, 1979.

10. Appel, B.R. Letter to Larry Purdue, U.S. EPA, Environmental Monitoring and Support Laboratory. March 18, 1982, Docket No. A-82-37, II-I-1.

11. Pierson, W.R., W.W. Brachaczek, T.J. Korniski, T.J. Truex, and J.W. Butler. Artifact Formation of Sulfate, Nitrate, and Hydrogen Ion on Backup Filters: Allegheny Mountain Experiment. J. Air Pollut. Control Assoc., 30:30, 1980.

12. Dunwoody, C.L. Rapid Nitrate Loss From PM_{10} Filters. J. Air Pollut. Control Assoc., 36:817, 1986.

13. Harrell, R.M. Measuring the Alkalinity of Hi-Vol Air Filters. EMSL/RTP-SOP-QAD-534, October 1985. Available from the U.S. Environmental Protection Agency, EMSL/QAD, Research Triangle Park, NC 27711.

14. Smith, F., P.S. Wohlschlegel, R.S.C. Rogers, and D.J. Mulligan. Investigation of Flow Rate Calibration Procedures Associated With the High Volume Method for Determination of Suspended Particulates. EPA-600/4-78-047, U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, 1978.

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APPENDIX K—INTERPRETATION OF THE NATIONAL AMBIENT AIR QUALITY STANDARDS FOR PARTICULATE MATTER

1.0 *General.*

This appendix explains the computations necessary for analyzing particulate matter data to determine attainment of the 24-hour and annual standards specified in 40 CFR 50.6. For the primary and secondary stand-

ards, particulate matter is measured in the ambient air as PM_{10} (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) by a reference method based on Appendix J of this part and designated in accordance with part 53 of this chapter, or by an equivalent method designated in accordance with part 53 of this chapter. The required frequency of measurements is specified in part 58 of this chapter.

Several terms used throughout this appendix must be defined. A "daily value" for PM_{10} refers to the 24-hour average concentration of PM_{10} calculated or measured from midnight to midnight (local time). The term "exceedance" means a daily value that is above the level of the 24-hour standard after rounding to the nearest 10 $\mu g/m^3$ (i.e., values ending in 5 or greater are to be rounded up). The term "average" refers to an arithmetic mean. All particulate matter standards are expressed in terms of expected annual values: expected number of exceedances per year for the 24-hour standards and expected annual arithmetic mean for the annual standards. The "expected annual value" is the number approached when the annual values from an increasing number of years are averaged, in the absence of long-term trends in emissions or meteorological conditions. The term "year" refers to a calendar year.

Although the discussion in this appendix focuses on monitored data, the same principles apply to modeling data, subject to EPA modeling guidelines.

2.0 *Attainment Determinations.*

2.1 *24-Hour Primary and Secondary Standards.*

Under 40 CFR 50.6(a) the 24-hour primary and secondary standards are attained when the expected number of exceedances per year at each monitoring site is less than or equal to one. In the simplest case, the number of expected exceedances at a site is determined by recording the number of exceedances in each calendar year and then averaging them over the past 3 calendar years. Situations in which 3 years of data are not available and possible adjustments for unusual events or trends are discussed in Sections 2.3 and 2.4. Further, when data for a year are incomplete, it is necessary to compute an estimated number of exceedances for that year by adjusting the observed number of exceedances. This procedure, performed by calendar quarter, is described in Section 3. The expected number of exceedances is then estimated by averaging the individual annual estimates for the past 3 years.

The comparison with the allowable expected exceedance rate of one per year is made in terms of a number rounded to the nearest tenth (fractional values equal to or greater than 0.05 are to be rounded up; e.g., an exceedance rate of 1.05 would be rounded to 1.1, which is the lowest rate for nonattainment).

2.2 *Annual Primary and Secondary Standards.*

Under 40 CFR 50.6(b), the annual primary and secondary standards are attained when the expected annual arithmetic mean PM_{10} concentration is less than or equal to the level of the standard. In the simplest case, the expected annual arithmetic mean is determined by averaging the annual arithmetic mean PM_{10} concentrations for the past 3 calendar years. Because of the potential for incomplete data and the possible seasonality in PM_{10} concentrations, the annual mean shall be calculated by averaging the four quarterly means of PM_{10} concentrations within the calendar year. The formulas for calculating the annual arithmetic mean are given in Section 4. Situations in which 3 years of data are not available and possible adjustments for unusual events or trends are discussed in Sections 2.3 and 2.4. The expected annual arithmetic mean is rounded to the nearest 1 $\mu g/m^3$ before comparison with the annual standards (fractional values equal to or greater than 0.5 are to be rounded up).

2.3 *Data Requirements.*

40 CFR 58.13 specifies the required minimum frequency of sampling for PM_{10}. For the purposes of making comparisons with the particulate matter standards, all data produced by National Air Monitoring Stations (NAMS), State and Local Air Monitoring Stations (SLAMS) and other sites submitted to EPA in accordance with the Part 58 requirements must be used, and a minimum of 75 percent of the scheduled PM_{10} samples per quarter are required.

To demonstrate attainment of either the annual or 24-hour standards at a monitoring site, the monitor must provide sufficient data to perform the required calculations of Sections 3 and 4. The amount of data required varies with the sampling frequency, data capture rate and the number of years of record. In all cases, 3 years of representative monitoring data that meet the 75 percent criterion of the previous paragraph should he utilized, if available, and would suffice. More than 3 years may be considered, if all additional representative years of data meeting the 75 percent criterion are utilized. Data not meeting these criteria may also suffice to show attainment; however, such exceptions will have to be approved by the appropriate Regional Administrator in accordance with EPA guidance.

There are less stringent data requirements for showing that a monitor has failed an attainment test and thus has recorded a violation of the particulate matter standards. Although it is generally necessary to meet the minimum 75 percent data capture require-

ment per quarter to use the computational formulas described in Sections 3 and 4, this criterion does not apply when less data is sufficient to unambiguously establish nonattainment. The following examples illustrate how nonattainment can be demonstrated when a site fails to meet the completeness criteria. Nonattainment of the 24-hour primary standards can be established by (a) the observed annual number of exceedances (e.g. four observed exceedances in a single year), or by (b) the estimated number of exceedances derived from the observed number of exceedances and the required number of scheduled samples (e.g. two observed exceedances with every other day sampling). Nonattainment of the annual standards can be demonstrated on the basis of quarterly mean concentrations developed from observed data combined with one-half the minimum detectable concentration substituted for missing values. In both cases, expected annual values must exceed the levels allowed by the standards.

2.4 *Adjustment for Exceptional Events and Trends.*

An exceptional event is an uncontrollable event caused by natural sources of particulate matter or an event that is not expected to recur at a given location. Inclusion of such a value in the computation of exceedances or averages could result in inappropriate estimates of their respective expected annual values. To reduce the effect of unusual events, more than 3 years of representative data may be used. Alternatively, other techniques, such as the use of statistical models or the use of historical data could be considered so that the event may be discounted or weighted according to the likelihood that it will recur. The use of such techniques is subject to the approval of the appropriate Regional Administrator in accordance with EPA guidance.

In cases where long-term trends in emissions and air quality are evident, mathematical techniques should be applied to account for the trends to ensure that the expected annual values are not inappropriately biased by unrepresentative data. In the simplest case, if 3 years of data are available under stable emission conditions, this data should be used. In the event of a trend or shift in emission patterns, either the most recent representative year(s) could be used or statistical techniques or models could be used in conjunction with previous years of data to adjust for trends. The use of less than 3 years of data, and any adjustments are subject to the approval of the appropriate Regional Administrator in accordance with EPA guidance.

3.0 *Computational formulas for the 24-hour standards.*

3.1 *Estimating Exceedances for a year.*

If PM_{10} sampling is scheduled less frequently than every day, or if some scheduled samples are missed, a PM_{10} value w not be available for each day of the year. T account for the possible effect of incomple data, an adjustment must be made to th data collected at each monitoring locati to estimate the number of exceedances in calendar year. In this adjustment, the a sumption is made that the fraction of mis ing values that would have exceeded th standard level is identical to the fraction measured values above this level. This co putation is to be made for all sites that w scheduled to monitor throughout the entir year and meet the minimum data requir ments of Section 2.3. Because of possib seasonal imbalance, this adjustment shall b applied on a quarterly basis. The estimat of the expected number of exceedances fo the quarter is equal to the observed numbe of exceedances plus an increment associate with the missing data. The following formu la must be used for these computations:

$$e_q = v_q + [(v_q/n_q) \times (N_q - n_q)] = v_q \times N_q/n_q \quad [1$$

where

e_q = the estimated number of exceedance for calendar quarter q,

v_q = the observed number of exceedances fo calendar quarter q,

N_q = the number of days in calendar quarte q,

n_q = the number of days in calendar quarte q with PM_{10} data, and

q = the index for calendar quarter, q = 1, 2, or 4.

The estimated number of exceedances fo a calendar quarter must be rounded to th nearest hundredth (fractional values equa to or greater than 0.005 must be rounde up).

The estimated number of exceedances fo the year, e, is the sum of the estimates fo each calendar quarter.

$$e = \sum_{q=1}^{4} e_q \quad [2$$

The estimated number of exceedances fo a single year must be rounded to one dec mal place (fractional values equal to o greater than 0.05 are to be rounded up). Th expected number of exceedances is then e timated by averaging the individual annua estimates for the most recent 3 or more re resentative years of data. The expecte number of exceedances must be rounded t one decimal place (fractional values equal t or greater than 0.05 are to be rounded up

The adjustment for incomplete data will not be necessary for monitoring or modeling data which constitutes a complete record, i.e., 365 days per year.

To reduce the potential for overestimating the number of expected exceedances, the correction for missing data will not be required for a calendar quarter in which the first observed exceedance has occurred if: (a) there was only one exceedance in the calendar quarter, (b) everyday sampling is subsequently initiated and maintained for 4 calendar quarters in accordance with 40 CFR 58.13 and (c) data capture of 75 percent is achieved during the required period of everyday sampling. In addition, if the first exceedance is observed in a calendar quarter in which the monitor is already sampling every day, no adjustment for missing data will be made to the first exceedance if a 75 percent data capture rate was achieved in the quarter in which it was observed.

Example 1

During a particular calendar quarter, 39 out of a possible 92 samples were recorded, with one observed exceedance of the 24-hour standard. Using formula [1], the estimated number of exceedances for the quarter is

$e_q = 1 \times 92/39 = 2.359$ or 2.36

If the estimated exceedances for the other 3 calendar quarters in the year were 2.30, 0.0 and 0.0, then, using formula [2], the estimated number of exceedances for the year is $2.36 + 2.30 + 0.0 + 0.0$ which equals 4.66 or 4.7. If no exceedances were observed for the 2 previous years, then the expected number of exceedances is estimated by:

$$(1/3) \times (4.7 + 0 + 0) = 1.57$$

or 1.6. Since 1.6 exceeds the allowable number of expected exceedances, this monitoring site would fail the attainment test.

Example 2

In this example, everyday sampling was initiated following the first observed exceedance as required by 40 CFR 58.13. Accordingly, the first observed exceedance would not be adjusted for incomplete sampling. During the next three quarters, 1.2 exceedances were estimated. In this case, the estimated exceedances for the year would be $1.0 + 1.2 + 0.0 + 0.0$ which equals 2.2. If, as before, no exceedances were observed for the two previous years, then the estimated exceedances for the 3-year period would then be $(1/3) \times (2.2 + 0.0 + 0.0) = 0.7$, and the monitoring site would *not* fail the attainment test.

3.2 *Adjustments for Non-Scheduled Sampling Days.*

If a systematic sampling schedule is used and sampling is performed on days in addition to the days specified by the systematic sampling schedule, e.g., during episodes of high pollution, then an adjustment must be made in the formula for the estimation of exceedances. Such an adjustment is needed to eliminate the bias in the estimate of the quarterly and annual number of exceedances that would occur if the chance of an exceedance is different for scheduled than for non-scheduled days, as would be the case with episode sampling.

The required adjustment treats the systematic sampling schedule as a stratified sampling plan. If the period from one scheduled sample until the day preceding the next scheduled sample is defined as a sampling stratum, then there is one stratum for each scheduled sampling day. An average number of observed exceedances is computed for each of these sampling strata. With nonscheduled sampling days, the estimated number of exceedances is defined as

$$e_q = (N_q/m_q) \times \sum_{j=1}^{m_q} (v_j/k_j) \qquad [3]$$

where

e_q = the estimated number of exceedances for the quarter.

N_q = the number of days in the quarter,

m_q = the number of strata with samples during the quarter,

v_j = the number of observed exceedances in stratum j, and

k_j = the number of actual samples in stratum j.

Note that if only one sample value is recorded in each stratum, then formula [3] reduces to formula [1].

Example 3

A monitoring site samples according to a systematic sampling schedule of one sample every 6 days, for a total of 15 scheduled samples in a quarter out of a total of 92 possible samples. During one 6-day period, potential episode levels of PM_{10} were suspected, so 5 additional samples were taken. One of the regular scheduled samples was missed, so a total of 19 samples in 14 sampling strata were measured. The one 6-day sampling stratum with 6 samples recorded 2 exceedances. The remainder of the quarter with one sample per stratum recorded zero exceedances. Using formula [3], the estimated number of exceedances for the quarter is

$e_q = (92/14) \times (2/6 + 0 + \ldots + 0) = 2.19$

4.0 Computational Formulas for Annual Standards.

4.1 Calculation of the Annual Arithmetic Mean.

An annual arithmetic mean value for PM_{10} is determined by averaging the quarterly means for the 4 calendar quarters of the year. The following formula is to be used for calculation of the mean for a calendar quarter:

$$\bar{x}_q = (1/n_q) \times \sum_{i=1}^{n_q} x_i \qquad [4]$$

where

$\bar{x}_q$ = the quarterly mean concentration for quarter q, q = 1, 2, 3, or 4,
n_q = the number of samples in the quarter, and
x_i = the ith concentration value recorded in the quarter.

The quarterly mean, expressed in $\mu g/m^3$, must be rounded to the nearest tenth (fractional values of 0.05 should be rounded up).

The annual mean is calculated by using the following formula:

$$\bar{x} = (1/4) \times \sum_{q=1}^{4} \bar{x}_q \qquad [5]$$

where

$\bar{x}$ = the annual mean, and
$\bar{x}_q$ = the mean for calendar quarter q.

The average of quarterly means must be rounded to the nearest tenth (fractional values of 0.05 should be rounded up).

The use of quarterly averages to compute the annual average will not be necessary for monitoring or modeling data which results in a complete record, i.e., 365 days per year.

The expected annual mean is estimated as the average of three or more annual means. This multi-year estimate, expressed in $\mu g/m^3$, shall be rounded to the nearest integer for comparison with the annual standard (fractional values of 0.5 should be rounded up).

Example 4

Using formula [4], the quarterly means are calculated for each calendar quarter. If the quarterly means are 52.4, 75.3, 82.1, and 63.2 $\mu g/m^3$, then the annual mean is

$$\bar{x} = (1/4) \times (52.4 + 75.3 + 82.1 + 63.2) = 68.25 \text{ or } 68.3$$

4.2 Adjustments for Non-scheduled Sampling Days.

An adjustment in the calculation of the annual mean is needed if sampling is performed on days in addition to the days specified by the systematic sampling schedule. For the same reasons given in the discussion of estimated exceedances (Section 3.2), the quarterly averages would be calculated by using the following formula:

$$\bar{x}_q = (1/m_q) \times \sum_{j=1}^{m_q} \sum_{i=1}^{k_j} (x_{ij}/k_j) \qquad [6]$$

where

$\bar{x}_q$ = the quarterly mean concentration for quarter q, q = 1, 2, 3, or 4,
x_{ij} = the ith concentration value recorded in stratum j,
k_j = the number of actual samples in stratum j, and
m_q = the number of strata with data in the quarter.

If one sample value is recorded in each stratum, formula [6] reduces to a simple arithmetic average of the observed values as described by formula [4].

Example 5

During one calendar quarter, 9 observations were recorded. These samples were distributed among 7 sampling strata, with 3 observations in one stratum. The concentrations of the 3 observations in the single stratum were 202, 242, and 180 $\mu g/m^3$. The remaining 6 observed concentrations were 55, 68, 73, 92, 120, and 155 $\mu g/m^3$. Applying the weighting factors specified in formula [6], the quarterly mean is

$$\bar{x}_q = (1/7) \times [(1/3) \times (202 + 242 + 180) + 55 + 68 + 73 + 92 + 120 + 155] = 110.1$$

Although 24-hour measurements are rounded to the nearest 10 $\mu g/m^3$ for determinations of exceedances of the 24-hour standard, note that these values are rounded to the nearest 1 $\mu g/m^3$ for the calculation of means.

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PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

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AQMA Plan

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51.53 AQMA plan: Demonstration of adequacy.
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AUTHORITY: 42 U.S.C. 7401(b)(1), 7410, 7470–7479, 7501–7508, and 7601(a), unless otherwise noted.

SOURCE: 36 FR 22398, Nov. 25, 1971, unless otherwise noted.

EDITORIAL NOTE: Nomenclature changes affecting part 51 appear at 51 FR 40661, Nov. 7, 1986.

Subparts A–C—[Reserved]

Subpart D—Maintenance of National Standards

SOURCE: 41 FR 18388, May 3, 1976, unless otherwise noted.

§ 51.40 Scope.

(a) *Applicability.* The requirements of this subpart apply to air quality maintenance areas (AQMAs) identified under §'51.110(i) and to any areas identified under § 51.110(l).

(b) *AQMA Analysis.* Under this subpart, procedures are given for the analysis of the air quality impact of specified pollutant emissions from existing sources and emissions associated with projected growth and development in areas identified under paragraphs (i) and (l) of § 51.110. This analysis is referred to in this subpart as an AQMA analysis.

(c) *AQMA Plan.* Under this subpart, the Administrator will require a revision to the State implementation plan

for areas identified under § 51.110(i) or § 51.110(l) when necessary to prevent a national ambient air quality standard from being exceeded or when necessary to assure the attainment of the standards as well as to assure their maintenance. This revision is referred to in this subpart as an AQMA plan. The AQMA plan shall include, as necessary, control strategy revisions and/or other measures to ensure that emissions associated with projected growth and development will be compatible with maintenance of the national standards. The AQMA plan submittal is subject to the same requirements of this part as pertain to any implementation plan revision.

[41 FR 18388, May 3, 1976, as amended at 51 FR 40675, Nov. 7, 1986]

AQMA Analysis

§ 51.41 AQMA analysis: Submittal date.

For areas identified pursuant to § 51.110(i) or (l), a State shall submit an AQMA analysis on a schedule established by the Administrator.

[41 FR 18388, May 3, 1976, as amended at 51 FR 40675, Nov. 7, 1986]

§ 51.42 AQMA analysis: Analysis period.

The time period analyzed shall extend at least 20 years or, if modified under § 51.63, not less than 10 years from the date on which the Administrator identified the area.

§ 51.43 AQMA analysis: Guidelines.

The guidelines referenced in this subpart refer to the Guidelines for Air Quality Maintenance Planning and Analysis, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711. When a guideline in this series is referenced in this subpart, only the applicable volume number or the volume number and its particular sub-title are cited. These documents are available for public inspection at EPA's Public Information Reference Unit and at the libraries of each of the ten EPA regional offices. Copies are available as supplies permit from the Air Pollution Technical Information Service, Research Triangle Park, NC 27711. Copies are also available for a nominal fee from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

§ 51.44 AQMA analysis: Projection of emissions.

(a) The State shall project emissions for each identified area and for each pollutant for which the area is identified.

(b) Unless alternative techniques are approved under § 51.63, emissions shall be projected by the techniques specified in the Guidelines, Volume 7, Projecting County Emissions, Second Edition (EPA-450/4-74-008). If this guideline is used, the analysis shall indicate the level of analysis performed.

(c) The requirements of paragraph (b) of this section do not apply if emissions are projected and allocated under § 51.45 for—

(1) Transportation source categories if an order 2 or 3 emission allocation is performed as described in the guideline of § 51.45, or

(2) Industrial source categories including process and fuel combustion sources.

§ 51.45 AQMA analysis: Allocation of emissions.

(a) The State shall allocate projected emissions to sub-county areas for each identified area and for each pollutant for which the area is identified.

(b) Unless alternative techniques are approved under § 51.63, projected emissions shall be allocated to sub-county areas by the techniques specified in the Guidelines, Volume 13, Allocating Projected Emissions to Sub-County Areas, (EPA-450/4-74-014) and its supplement, Accounting for New Source Performance Standards in Projecting and Allocating Emissions—Hypothetical Example, (EPA-450/4-74-014b). If this guideline is used the analysis shall indicate the order of analysis performed.

(c) The requirements of paragraphs (a) and (b) of this section do not apply if air quality concentrations are calculated in § 51.46 by the use of a proportional model.

§ 51.46 AQMA analysis: Projection of air quality concentrations.

(a) The State shall project air quality concentrations for each identified area and for each pollutant for which the area is identified.

(b) Unless alternative techniques are approved under § 51.63, air quality concentrations shall be projected by the techniques specified in the Guidelines, Volume 12, Applying Atmospheric Simulation Models to Air Quality Maintenance Areas, (EPA-450/4-74-013), or equivalent techniques.

(c) Unless modified under § 51.63—

(1) For the projection of air quality concentrations of particulate matter and sulfur dioxide, the Air Quality Display Model (AQDM) or an equivalent model shall be used; and

(2) For the determination of short-term (24- and 3-hour) air quality concentrations for particulate matter and sulfur dioxide, the model used, where possible, shall provide for consideration of the short-term localized air quality impact of individual large point sources.

§ 51.47 AQMA analysis: Description of data sources.

(a) The State shall identify in the analysis the sources of the data used in its projections of growth and development.

(b) The State shall discuss in the analysis its choice of parameters and information used in its projections. Projections may be in terms of such parameters and information as earnings, employment, production, building starts, vehicle miles traveled, and gasoline sales.

§ 51.48 AQMA analysis: Data bases.

(a) All applicable air quality data collected from all existing sites since October 1, 1972, must be considered in the development of the baseline air quality for the analysis.

(b) For interstate areas, the analysis from each constituent State shall, unless modified under § 51.63, be based upon the same regional emission inventory and air quality baseline. If there is disagreement among constituent States as to a data base, the States shall consult with the appropriate EPA Regional Office(s) for the selection of a baseline.

§ 51.49 AQMA analysis: Techniques description.

The State shall include in the analysis a description of the techniques utilized in each allocation or projection required in §§ 51.44, 51.45 and 51.46, with a detailed description of any alternative methods approved under § 51.63 or any equivalent methods used.

§ 51.50 AQMA analysis: Accuracy factors.

In making the determination of whether a national standard will be violated in an area within the applicable period, the State may account for factors that affect the accuracy of the protected air quality concentrations. Where the State considers such factors in its determination of whether a national standard will be violated, the analysis shall contain a full discussion of the factors.

§ 51.51 AQMA analysis: Submittal of calculations.

The State shall include in the analysis summaries of baseline emissions. Also, for at least one other intermediate year and for the tenth year following the date of the Administrator's identification of the area and for the end of the applicable analysis period, the State shall submit summaries of projections and allocations of emissions required under §§ 51.44 and 51.45 and summaries of air quality concentrations required under § 51.46. These summaries shall be submitted in the following format:

(a) *Baseline and projected emissions.* (1) Tables 7.1 and 7.2 contained in the Guidelines, Volume 7 for each county in an area if emissions are projected under § 51.44(b), or

(2) If projected emissions are allocated directly under §§ 51.44(c) and 51.45, tables similar to Tables 7.1 and 7.2 of the Guidelines, Volume 7 for the area as a whole.

(b) *Allocated emissions.* Table 4.2 "Master Grid Emissions" contained in the Guidelines, Volume 13 along with a map portraying the master grid.

(c) *Projected air quality concentrations.* A tabulation or isopleth map showing maximum pollutant concentrations and concentration gradients.

AQMA Plan

§ 51.52 AQMA plan: General.

(a) The Administrator will establish, by notifying the appropriate State,

(1) Which areas require an AQMA plan,

(2) The period over which the AQMA plan must demonstrate that the national standards will be attained and maintained, and

(3) The submission dates for the plans.

(b) The AQMA plan shall provide a detailed description of each revision to the existing State implementation plan that the AQMA plan effects, together with a list of any documents or portions of the State implementation plan that are being revised.

§ 51.53 AQMA plan: Demonstration of adequacy.

(a) An AQMA plan shall demonstrate that the measures, rules and regulations contained in the plan are adequate to provide for the attainment and maintenance of the national standards for the pollutants for which the State implementation plan revision is required for a reasonable period as specified by the Administrator. In providing such a demonstration a State shall use analysis techniques required in §§ 51.44, 51.45 and 51.46 and shall include the following in the AQMA plan:

(1) A summary of the computations, assumptions, and judgments used to determine the reduction of emissions or reduction of the growth in emissions that will result from the application of the AQMA plan.

(2) A presentation of emission levels expected to result from application of each measure of the control strategy, using the tables required in § 51.51 (a) and (b).

(3) A presentation of the air quality levels expected to result from application of the overall control strategy presented either in tabular form or as an isopleth map showing expected maximum pollutant concentrations and expected concentration gradients.

(b) The presentations required in paragraphs (a)(2) and (3) of this section shall be provided for the last year of the period for which the AQMA plan is designed to maintain the national standards and for any other preceding years the Administrator specifies.

(c) Where the quantification of the reduction in either emissions or growth in emissions resulting from a single measure cannot be done with a substantial degree of precision, that measure may be combined with other similar measures and an aggregate effect estimated.

§ 51.54 AQMA plan: Strategies.

The State shall include the following in the AQMA plan:

(a) A description of each control measure that is incorporated into the AQMA plan;

(b) The enforceable laws and regulations to implement the measures adopted in the AQMA plan;

(c) A description of administrative procedures to be used in implementing each selected maintenance measure;

(d) A description of enforcement methods including, but not limited to, procedures for monitoring compliance with each of the selected control measures, procedures for handling violations, and a designation of the agency responsible for enforcement or implementation,

(e) A description of the relationship between the control strategy of the AQMA plan and the State's procedure for review of new and modified sources required under subpart I.

[41 FR 18388, May 3, 1976, as amended at 51 FR 40675, Nov. 7, 1986]

§ 51.55 AQMA plan: Legal authority.

An AQMA plan must demonstrate that the State has the legal authority to enforce all control measures contained in the AQMA plan unless the AQMA plan provides a demonstration that a substate entity has the legal authority and responsibility to enforce such measures.

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§ 51.56 AQMA plan: Future strategies.

(a) The AQMA plan shall include a discussion of possible strategies for maintaining air quality within the AQMA for the period—

(1) Starting from the end of the period specified under § 51.53 over which the AQMA plan specifically provides for maintenance of the national standards, and

(2) Ending with the end of the analysis period determined under § 51.42.

(b) The discussion shall include:

(1) Control strategies that could be applied to solve the maintenance problem for the applicable time period; and

(2) Actions that would be needed to adopt the necessary laws and regulations in a timely manner.

§ 51.57 AQMA plan: Future legal authority.

All laws and regulations that are necessary to maintain the national standards must be adopted in sufficient time before compliance is necessary to ensure the maintenance of the national standards. The State shall consult with the Administrator in determining what constitutes sufficient time.

§ 51.58 AQMA plan: Intergovernmental cooperation.

To insure intergovernmental cooperation the preparation and implementation of an AQMA plan shall, as a minimum, include the procedures required in this section.

(a) *Agency designation.* (1) Within 90 days after the Administrator has notified a State of the need for an AQMA plan the Governor shall designate the agency or organization wholly or partially responsible for the development of an AQMA plan. Before making such designations, he shall consult with appropriate elected officials of affected general purpose local governments and affected regional planning agencies.

(2) Elected officials of affected local governments and regional planning agencies may petition the Governor to obtain responsibilities in the development of AQMA plans.

(Secs. 110, 121, 174(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7410, 7421, 7504, and 7601(a)))

[41 FR 18388, May 3, 1976, as amended at 44 FR 35179, June 18, 1979]

§ 51.59 [Reserved]

§ 51.60 AQMA plan: Resources.

(a) An AQMA plan shall include a description of the resources available, the additional resources needed to implement the AQMA plan and projections of the extent to which resources will be acquired for each agency charged with responsibility for implementation of any part of the plan. This information shall be provided for the first and last years of the period for which the plan is designed to maintain standards and for any other time the Administrator specifies. This information shall be provided in a form similar to Appendix R of this part. The form may be modified pursuant to § 51.63.

(b) An AQMA plan shall include written assurances from the Governor or local government chief executive or both that they will actively seek additional resources needed to implement the AQMA plan, if any.

§ 51.61 AQMA plan: Submittal format.

An AQMA plan shall be submitted in the following format:

(a) *AQMA identification;*

(b) *AQMA plan summary;*

(c) *AQMA analysis.* Information required under §§ 51.44, 51.45, 51.46, 51.47, 51.49, 51.50, and 51.51 of this part.

(d) *AQMA plan.* Applicable information required under §§ 51.52(b), 51.53, 51.54, 51.55, 51.56, 51.58, 51.59, 51.60 and subpart M.

(e) *Public hearing certification.* Certification that public hearings were held pursuant to § 51.102 of this part.

(Secs. 110, 121, 174(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7410, 7421, 7504, and 7601(a)))

[41 FR 18388, May 3, 1976, as amended at 44 FR 35179, June 18, 1979; 51 FR 40675, Nov. 7, 1986]

§ 51.62 AQMA analysis and plan: Data availability.

(a) The State shall retain all detailed data and calculations used in the preparation of AQMA analyses and plans, make them available for public inspection, and submit them to the Administrator at his request.

(b) The detailed data and calculations used in the preparation of the AQMA analyses and plans shall not be considered a part of the AQMA plan.

§ 51.63 AQMA analysis and plan: Alternative procedures.

(a) At the request of a State, or under his own initiative, the Administrator, where he determines it appropriate, may approve alternative AQMA analysis and plan development procedures as allowed under §§ 51.42, 51.44, 51.45, 51.46, 51.48(b), and 51.60(a). He may consider all relevant factors including but not limited to air quality problems, financial and manpower limitations, administrative feasibility, and existing commitments by the State.

(b) The Administrator shall act upon a request for modification within 45 days after receipt of a properly prepared and filed request. Unless a State is notified of a denial, or the Administrator requests additional information, such a request is automatically approved on the forty-sixth day.

(c) The Administrator shall publish in the FEDERAL REGISTER a description of each modification made.

(d) A public hearing on an AQMA plan does not fulfill the public hearing requirements of this part if, subsequent to the hearing, any alternative procedures are approved under this section.

(Secs. 110, 121, 174(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7410, 7421, 7504, and 7601(a)))

[41 FR 18388, May 3, 1976, as amended at 44 FR 35179, June 18, 1979]

Subpart E—[Reserved]

Subpart F—Procedural Requirements

SOURCE: 51 FR 40661, Nov. 7, 1986, unless otherwise noted.

§ 51.100 Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act:

(a) *Act* means the Clean Air Act (42 U.S.C. 7401 *et seq.*, as amended by Pub. L. 91-604, 84 Stat. 1676 Pub. L. 95-95, 91 Stat., 685 and Pub. L. 95-190, 91 Stat., 1399.)

(b) *Administrator* means the Administrator of the Environmental Protection Agency (EPA) or an authorized representative.

(c) *Primary standard* means a national primary ambient air quality standard promulgated pursuant to section 109 of the Act.

(d) *Secondary standard* means a national secondary ambient air quality standard promulgated pursuant to section 109 of the Act.

(e) *National standard* means either a primary or secondary standard.

(f) *Owner or operator* means any person who owns, leases, operates, controls, or supervises a facility, building, structure, or installation which directly or indirectly result or may result in emissions of any air pollutant for which a national standard is in effect.

(g) *Local agency* means any local government agency other than the State agency, which is charged with responsibility for carrying out a portion of the plan.

(h) *Regional Office* means one of the ten (10) EPA Regional Offices.

(i) *State agency* means the air pollution control agency primarily responsible for development and implementation of a plan under the Act.

(j) *Plan* means an implementation plan approved or promulgated under section 110 of 172 of the Act.

(k) *Point source* means the following:

(1) For particulate matter, sulfur oxides, carbon monoxide, volatile organic compounds (VOC) and nitrogen dioxide—

(i) Any stationary source the actual emissions of which are in excess of 90.7 metric tons (100 tons) per year of the pollutant in a region containing an area whose 1980 *urban place* population, as defined by the U.S. Bureau of the Census, was equal to or greater than 1 million.

(ii) Any stationary source the actual emissions of which are in excess of 22.7 metric tons (25 tons) per year of the pollutant in a region containing an area whose 1980 *urban place* population, as defined by the U.S. Bureau of the Census, was less than 1 million; or

(2) For lead or lead compounds measured as elemental lead, any stationary source that actually emits a total of 4.5 metric tons (5 tons) per year or more.

(l) *Area source* means any small residential, governmental, institutional, commercial, or industrial fuel combustion operations; onsite solid waste disposal facility; motor vehicles, aircraft vessels, or other transportation facilities or other miscellaneous sources identified through inventory techniques similar to those described in the "AEROS Manual series, Vol. II AEROS User's Manual," EPA-450/2-76-029 December 1976.

(m) *Region* means an area designated as an air quality control region (AQCR) under section 107(c) of the Act.

(n) *Control strategy* means a combination of measures designated to achieve the aggregate reduction of emissions necessary for attainment and maintenance of national standards including, but not limited to, measures such as:

(1) Emission limitations.

(2) Federal or State emission charges or taxes or other economic incentives or disincentives.

(3) Closing or relocation of residential, commercial, or industrial facilities.

(4) Changes in schedules or methods of operation of commercial or industrial facilities or transportation systems, including, but not limited to, short-term changes made in accordance with standby plans.

(5) Periodic inspection and testing of motor vehicle emission control systems, at such time as the Administrator determines that such programs are feasible and practicable.

(6) Emission control measures applicable to in-use motor vehicles, including, but not limited to, measures such as mandatory maintenance, installation of emission control devices, and conversion to gaseous fuels.

(7) Any transportation control measure including those transportation measures listed in section 108(f) of the Clean Air Act as amended.

(8) Any variation of, or alternative to any measure delineated herein.

(9) Control or prohibition of a fuel or fuel additive used in motor vehicles, if such control or prohibition is necessary to achieve a national primary or seconary air quality standard and is approved by the Administrator under section 211(c)(4)(C) of the Act.

(o) *Reasonably available control technology (RACT)* means devices, systems process modifications, or other apparatus or techniques that are reasonably available taking into account (1) the necessity of imposing such controls in order to attain and maintain a national ambient air quality standard, (2) the social, environmental and economic impact of such controls, and (3) alternative means of providing for attainment and maintenance of such standard. (This provision defines RACT for the purposes of §§ 51.110(c)(2) and 51.341(b) only.)

(p) *Compliance schedule* means the date or dates by which a source or category of sources is required to comply with specific emission limitations contained in an implementation plan and with any increments of progress toward such compliance.

(q) *Increments of progress* means steps toward compliance which will be taken by a specific source, including:

(1) Date of submittal of the source's final control plan to the appropriate air pollution control agency;

(2) Date by which contracts for emission control systems or process modifications will be awarded; or date by which orders will be issued for the purchase of component parts to accomplish emission control or process modification;

(3) Date of initiation of on-site construction or installation of emission control equipment or process change;

(4) Date by which on-site construction or installation of emission control equipment or process modification is to be completed; and

(5) Date by which final compliance is to be achieved.

(r) *Transportation control measure* means any measure that is directed

toward reducing emissions of air pollutants from transportation sources. Such measures include, but are not limited to, those listed in section 108(f) of the Clean Air Act.

(s)–(w) [Reserved]

(x) *Time period* means any period of time designated by hour, month, season, calendar year, averaging time, or other suitable characteristics, for which ambient air quality is estimated.

(y) *Variance* means the temporary deferral of a final compliance date for an individual source subject to an approved regulation, or a temporary change to an approved regulation as it applies to an individual source.

(z) *Emission limitation* and *emission standard* mean a requirement established by a State, local government, or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirements which limit the level of opacity, prescribe equipment, set fuel specifications, or prescribe operation or maintenance procedures for a source to assure continuous emission reduction.

(aa) *Capacity factor* means the ratio of the average load on a machine or equipment for the period of time considered to the capacity rating of the machine or equipment.

(bb) *Excess emissions* means emissions of an air pollutant in excess of an emission standard.

(cc) *Nitric acid plant* means any facility producing nitric acid 30 to 70 percent in strength by either the pressure or atmospheric pressure process.

(dd) *Sulfuric acid plant* means any facility producing sulfuric acid by the contact process by burning elemental sulfur, alkylation acid, hydrogen sulfide, or acid sludge, but does not include facilities where conversion to sulfuric acid is utilized primarily as a means of preventing emissions to the atmosphere of sulfur dioxide or other sulfur compounds.

(ee) *Fossil fuel-fired steam generator* means a furnance or bioler used in the process of burning fossil fuel for the primary purpose of producing steam by heat transfer.

(ff) *Stack* means any point in a source designed to emit solids, liquids, or gases into the air, including a pipe or duct but not including flares.

(gg) *A stack in existence* means that the owner or operator had (1) begun, or caused to begin, a continuous program of physical on-site construction of the stack or (2) entered into binding agreements or contractual obligations, which could not be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the stack to be completed within a reasonable time.

(hh)(1) *Dispersion technique* means any technique which attempts to affect the concentration of a pollutant in the ambient air by:

(i) Using that portion of a stack which exceeds good engineering practice stack height:

(ii) Varying the rate of emission of a pollutant according to atmospheric conditions or ambient concentrations of that pollutant; or

(iii) Increasing final exhaust gas plume rise by manipulating source process parameters, exhaust gas parameters, stack parameters, or combining exhaust gases from several existing stacks into one stack; or other selective handling of exhaust gas streams so as to increase the exhaust gas plume rise.

(2) The preceding sentence does not include:

(i) The reheating of a gas stream, following use of a pollution control system, for the purpose of returning the gas to the temperature at which it was originally discharged from the facility generating the gas stream;

(ii) The merging of exhaust gas streams where:

(A) The source owner or operator demonstrates that the facility was originally designed and constructed with such merged gas streams;

(B) After July 8, 1985 such merging is part of a change in operation at the facility that includes the installation of pollution controls and is accompanied by a net reduction in the allowable emissions of a pollutant. This exclusion from the definition of *dispersion techniques* shall apply only to the emission limitation for the pollutant affected by such change in operation; or

(C) Before July 8, 1985, such merging was part of a change in operation at the facility that included the installation of emissions control equipment or was carried out for sound economic or engineering reasons. Where there was an increase in the emission limitation or, in the event that no emission limitation was in existence prior to the merging, an increase in the quantity of pollutants actually emitted prior to the merging, the reviewing agency shall presume that merging was significantly motivated by an intent to gain emissions credit for greater dispersion. Absent a demonstration by the source owner or operator that merging was not significantly motivated by such intent, the reviewing agency shall deny credit for the effects of such merging in calculating the allowable emissions for the source;

(iii) Smoke management in agricultural or silvicultural prescribed burning programs;

(iv) Episodic restrictions on residential woodburning and open burning; or

(v) Techniques under § 51.100(hh)(1)(iii) which increase final exhaust gas plume rise where the resulting allowable emissions of sulfur dioxide from the facility do not exceed 5,000 tons per year.

(ii) *Good engineering practice* (GEP) stack height means the greater of:

(1) 65 meters, measured from the ground-level elevation at the base of the stack:

(2)(i) For stacks in existence on January 12, 1979, and for which the owner or operator had obtained all applicable permits or approvals required under 40 CFR parts 51 and 52.

$$H_g = 2.5H,$$

provided the owner or operator produces evidence that this equation was actually relied on in establishing an emission limitation:

(ii) For all other stacks,

$$H_g = H + 1.5L$$

where

H_g = good engineering practice stack height, measured from the ground-level elevation at the base of the stack,

H = height of nearby structure(s) measured from the ground-level elevation at the base of the stack.

L = lesser dimension, height or projected width, of nearby structure(s)

provided that the EPA, State or local control agency may require the use of a field study or fluid model to verify GEP stack height for the source; or

(3) The height demonstrated by a fluid model or a field study approved by the EPA State or local control agency, which ensures that the emissions from a stack do not result in excessive concentrations of any air pollutant as a result of atmospheric downwash, wakes, or eddy effects created by the source itself, nearby structures or nearby terrain features.

(jj) *Nearby* as used in § 51.100(ii) of this part is defined for a specific structure or terrain feature and

(1) For purposes of applying the formulae provided in § 51.100(ii)(2) means that distance up to five times the lesser of the height or the width dimension of a structure, but not greater than 0.8 km (½ mile), and

(2) For conducting demonstrations under § 51.100(ii)(3) means not greater than 0.8 km (½ mile), except that the portion of a terrain feature may be considered to be nearby which falls within a distance of up to 10 times the maximum height (H_t) of the feature, not to exceed 2 miles if such feature achieves a height (H_t) 0.8 km from the stack that is at least 40 percent of the GEP stack height determined by the formulae provided in § 51.100(ii)(2)(ii) of this part or 26 meters, whichever is greater, as measured from the ground-level elevation at the base of the stack. The height of the structure or terrain feature is measured from the ground-level elevation at the base of the stack.

(kk) *Excessive concentration* is defined for the purpose of determining good engineering practice stack height under § 51.100(ii)(3) and means.

(1) For sources seeking credit for stack height exceeding that established under § 51.100(ii)(2) a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, and eddy effects produced by nearby structures or nearby terrain features which individually is at least 40 percent in excess of the maximum concentration experienced in the absence of such down-

wash, wakes, or eddy effects and which contributes to a total concentration due to emissions from all sources that is greater than an ambient air quality standard. For sources subject to the prevention of significant deterioration program (40 CFR 51.166 and 52.21), an excessive concentration alternatively means a maximum ground-level concentration due to emissions from a stack due in whole or part to downwash, wakes, or eddy effects produced by nearby structures or nearby terrain features which individually is at least 40 percent in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects and greater than a prevention of significant deterioration increment. The allowable emission rate to be used in making demonstrations under this part shall be prescribed by the new source performance standard that is applicable to the source category unless the owner or operator demonstrates that this emission rate is infeasible. Where such demonstrations are approved by the authority administering the State implementation plan, an alternative emission rate shall be established in consultation with the source owner or operator.

(2) For sources seeking credit after October 11, 1983, for increases in existing stack heights up to the heights established under § 51.100(ii)(2), either (i) a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects as provided in paragraph (kk)(1) of this section, except that the emission rate specified by any applicable State implementation plan (or, in the absence of such a limit, the actual emission rate) shall be used, or (ii) the actual presence of a local nuisance caused by the existing stack, as determined by the authority administering the State implementation plan; and

(3) For sources seeking credit after January 12, 1979 for a stack height determined under § 51.100(ii)(2) where the authority administering the State implementation plan requires the use of a field study or fluid model to verify GEP stack height, for sources seeking stack height credit after November 9, 1984 based on the aerodynamic influence of cooling towers, and for sources seeking stack height credit after December 31, 1970 based on the aerodynamic influence of structures not adequately represented by the equations in § 51.100(ii)(2), a maximum ground-level concentration due in whole or part to downwash, wakes or eddy effects that is at least 40 percent in excess of the maximum concentration experienced in the absence of such downwash, wakes, or eddy effects.

(ll)-(mm) [Reserved]

(nn) Intermittent control system (ICS) means a dispersion technique which varies the rate at which pollutants are emitted to the atmosphere according to meteorological conditions and/or ambient concentrations of the pollutant, in order to prevent ground-level concentrations in excess of applicable ambient air quality standards. Such a dispersion technique is an ICS whether used alone, used with other dispersion techniques, or used as a supplement to continuous emission controls (i.e., used as a supplemental control system).

(oo) *Particulate matter* means any airborne finely divided solid or liquid material with an aerodynamic diameter smaller than 100 micrometers.

(pp) *Particulate matter emissions* means all finely divided solid or liquid material, other than uncombined water, emitted to the ambient air as measured by applicable reference methods, or an equivalent or alternative method, specified in this chapter, or by a test method specified in an approved State implementation plan.

(qq) PM_{10} means particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers as measured by a reference method based on Appendix J of part 50 of this chapter and designated in accordance with part 53 of this chapter or by an equivalent method designated in accordance with part 53 of this chapter.

(rr) PM_{10} emissions means finely divided solid or liquid material, with an aerodynamic diameter less than or equal to a nominal 10 micrometers emitted to the ambient air as measured by an applicable reference method, or an equivalent or alternative method, specified in this chapter

or by a test method specified in an approved State implementation plan.

(ss) *Total suspended particulate* means particulate matter as measured by the method described in Appendix B of part 50 of this chapter.

[51 FR 40661, Nov. 7, 1986, as amended at 52 FR 24712, July 1, 1987]

§ 51.101 Stipulations.

Nothing in this part will be construed in any manner:

(a) To encourage a State to prepare, adopt, or submit a plan which does not provide for the protection and enhancement of air quality so as to promote the public health and welfare and productive capacity.

(b) To encourage a State to adopt any particular control strategy without taking into consideration the cost-effectiveness of such control strategy in relation to that of alternative control strategies.

(c) To preclude a State from employing techniques other than those specified in this part for purposes of estimating air quality or demonstrating the adequacy of a control strategy, provided that such other techniques are shown to be adequate and appropriate for such purposes.

(d) To encourage a State to prepare, adopt, or submit a plan without taking into consideration the social and economic impact of the control strategy set forth in such plan, including, but not limited to, impact on availability of fuels, energy, transportation, and employment.

(e) To preclude a State from preparing, adopting, or submitting a plan which provides for attainment and maintenance of a national standard through the application of a control strategy not specifically identified or described in this part.

(f) To preclude a State or political subdivision thereof from adopting or enforcing any emission limitations or other measures or combinations thereof to attain and maintain air quality better than that required by a national standard.

(g) To encourage a State to adopt a control strategy uniformly applicable throughout a region unless there is no satisfactory alternative way of providing for attainment and maintenance of a national standard throughout such region.

§ 51.102 Public hearings.

(a) Except as otherwise provided in paragraph (c) of this section, States must conduct one or more public hearings on the following prior to adoption and submission to EPA of:

(1) Any plan or revision of it required by § 51.104(a).

(2) Any individual compliance schedule under (§ 51.260).

(3) Any revision under § 51.104(d).

(b) Separate hearings may be held for plans to implement primary and secondary standards.

(c) No hearing will be required for any change to an increment of progress in an approved individual compliance schedule unless such change is likely to cause the source to be unable to comply with the final compliance date in the schedule. The requirements of §§ 51.104 and 51.105 will be applicable to such schedules, however.

(d) Any hearing required by paragraph (a) of this section will be held only after reasonable notice, which will be considered to include, at least 30 days prior to the date of such hearing(s):

(1) Notice given to the public by prominent advertisement in the area affected announcing the date(s), time(s), and place(s) of such hearing(s);

(2) Availability of each proposed plan or revision for public inspection in at least one location in each region to which it will apply, and the availability of each compliance schedule for public inspection in at least one location in the region in which the affected source is located;

(3) Notification to the Administrator (through the appropriate Regional Office);

(4) Notification to each local air pollution control agency which will be significantly impacted by such plan, schedule or revision;

(5) In the case of an interstate region, notification to any other States included, in whole or in part, in the regions which are significantly im-

pacted by such plan or schedule or revision.

(6) In the case of hearings on AQMA plans:

(i) Notification to the chief executives of affected local governments, planning agencies, transportation agencies, environmental control agencies, economic development agencies, and any other affected States, and

(ii) Public notice of alternative analysis and plan development procedures approved under § 51.63.

(e) The State must prepare and retain, for inspection by the Administrator upon request, a record of each hearing. The record must contain, as a minimum, a list of witnesses together with the text of each presentation.

(f) The State must submit with the plan, revision, or schedule a certification that the hearing required by paragraph (a) of this section was held in accordance with the notice required by paragraph (d) of this section.

(g) Upon written application by a State agency (through the appropriate Regional Office), the Administrator may approve State procedures for public hearings. The following criteria apply:

(1) Procedures approved under this section shall be deemed to satisfy the requirement of this part regarding public hearings.

(2) Procedures different from this part may be approved if they—

(i) Ensure public participation in matters for which hearings are required; and

(ii) Provide adequate public notification of the opportunity to participate.

(3) The Administrator may impose any conditions on approval he or she deems necessary.

§ 51.103 Submission of plans, preliminary review of plans.

(a) The State makes an official plan submission to EPA only when the submission conforms to the requirements of Appendix V to this part, and the State delivers five copies of the plan to the appropriate Regional Office, with a letter giving notice of such action. The State must adopt the plan and the Governor or his designee must submit it to EPA as follows:

(1) For any primary standard, or revision thereof, within 9 months after promulgation of such standard.

(2) For any secondary standard, or revision thereof, within 9 months after promulgation of such secondary standard or by such later date prescribed or by such later date prescribed by the Administrator under subpart R of this part.

(b) Upon request of a State, the Administrator will provide preliminary review of a plan or portion thereof submitted in advance of the date such plan is due. Such requests must be made in writing to the appropriate Regional Office and must be accompanied by five copies of the materials to be reviewed. Requests for preliminary review do not relieve a State of the responsibility of adopting and submitting plans in accordance with prescribed due dates.

[51 FR 40661, Nov. 7, 1986, as amended at 55 FR 5830, Feb. 16, 1990]

§ 51.104 Revisions.

(a) The plan shall be revised from time to time, as may be necessary, to take account of:

(1) Revisions of national standards,

(2) The availability of improved or more expeditious methods of attaining such standards, such as improved technology or emission charges or taxes, or

(3) A finding by the Administrator that the plan is substantially inadequate to attain or maintain the national standard which it implements, or to otherwise comply with any applicable additional requirements established under the Clean Air Act Amendments of 1977.

(b) The State must revise the plan within 60 days following notification by the Administrator under paragraph (a)(3) of this section, or by such later date prescribed by the Administrator after consultation with the State.

(c) States may revise the plan from time to time consistent with the requirements applicable to implementation plans under this part.

(d) The States must submit any revision of any regulation or any compliance schedule under paragraph (c) of

this section to the Administrator no later than 60 days after its adoption.

(e) The State must identify and describe revisions other than those covered by paragraphs (a) and (d) of this section.

(f) EPA will approve revisions only after applicable hearing requirements of § 51.102 have been satisfied.

(g) In order for a variance to be considered for approval as a revision to the State implementation plan, the State must submit it in accordance with the requirements of this section.

§ 51.105 Approval of plans.

The Administrator will approve any plan, or portion thereof, or any revision of such plan, or portion thereof, if he or she determines that it meets the requirements of the Act. Revisions of a plan, or any portion thereof, will not be considered part of an applicable plan until such revisions have been approved by the Administrator in accordance with this part.

Subpart G—Control Strategy

SOURCE: 51 FR 40665, Nov. 7, 1986, unless otherwise noted.

§ 51.110 Attainment and maintenance of national standards.

(a) Each plan must set forth a control strategy that provides the degree of emission reductions necessary for attainment and maintenance of the national air quality standards. The emission reductions must be sufficient to offset any increases in air quality concentrations that are expected to result from emission increases due to projected growth of population, industrial activity, motor vehicle traffic, or other factors.

(b) Each plan providing for the attainment of a primary standard or revision of it must do so as expeditiously as practicable. The attainment period must not be longer than three years after the date of the Administrator's approval of the plan, unless the State obtains an extension under subpart R of this part. Each plan must also provide for the maintenance of the standard after it has been attained.

(c)(1) Each plan must provide for the attainment of a secondary standard within a reasonable time after the date of the Administrator's approval of the plan, and must provide for the maintenance of the standard after it has been attained.

(2) *Reasonable time* is defined in two ways as follows:

(i) *Reasonable time* for attainment of a secondary standard must not be more than three years from plan submission unless the State shows that good cause exists for postponing application of the control technology. This definition applies only in a region where the degree of emission reduction necessary for attainment of the secondary standard can be achieved through the application of reasonably available control technology.

(ii) *Reasonable time* will depend on the degree of emission reduction needed for attainment of the secondary standard and on the social, economic, and technological problems involved in carrying out a control strategy adequate for attainment of the secondary standard. This definition applies only in a region where application of reasonably available control technology will not be sufficient for attainment of the secondary standard in three years.

(d) Each plan providing for the attainment of a primary or secondary standard must specify the projected attainment date.

(e) The plan for each Region must have adequate provisions to ensure that stationary sources from within that Region will not:

(1) Prevent attainment and maintenance of any national standard in any portion of an interstate Region or any other Region.

(2) Interfere with measures required to be included in the applicable implementation plan for any such Region to prevent significant deterioration of air quality or to protect visibility.

(f) For purposes of developing a control strategy, data derived from measurements of existing ambient levels of a pollutant may be adjusted to reflect the extent to which occasional natural or accidental phenomena, e.g., dust storms, forest fires, industrial accidents, demonstrably affected such ambient levels during the measurement period.

(g) During developing of the plan, EPA encourages States to identify alternative control strategies, as well as the costs and benefits of each such alternative for attainment or maintenance of the national standard.

(h) The plan shall identify those areas (counties, urbanized areas, standard metropolitan statistical areas, et cetera) which, due to current air quality and/or projected growth rate, may have the potential for exceeding any national standard within the subsequent 10-year period.

(1) For each such area identified, the plan shall generally describe the intended method and timing for producing the analysis and plan required by paragraph (g) of this section.

(2) The area identification and description of method and timing required by this paragraph shall be submitted no later than May 10, 1974.

(3) This paragraph covers only plans to attain and maintain the national standards for particulate matter, sulfur oxides, carbon monoxide, ozone, VOCS, and nitrogen dioxide.

(i) Based on the information submitted by the State pursuant to paragraph (e) of this section, the Administrator will publish by August 31, 1975, a list of the areas which shall be subject to the requirements of paragraph (g) of this section.

(j) For each area identified by the Administrator pursuant to paragraph (f) of this section, the State shall submit an air quality analysis and, if called for by the Administrator, a plan revision following the procedures of subpart D.

(k)(1) For all areas of the State, the State implementation plan shall, by May 3, 1978, provide for a procedure for the continual acquisition of information used in projecting emissions.

(2) The plan shall provide that at intervals of no more than 5 years, all areas of the State shall be assessed to determine if any areas are in need of plan revisions.

(3) The State shall retain the data gathered and the written assessment made under paragraphs (h)(1) and (2) of this section, and make them available for public inspection and submit them to the Administrator at his request.

(4) The State shall notify the Administrator if an area is undergoing an amount of development such that it presents the potential for a violation of national standards within a period of 20 years.

(l) Whenever the Administrator calls for a plan revision he may, without publishing the area in part 52 of this chapter, require the revision be developed in accordance with the procedures of subpart D.

[51 FR 40661 Nov. 7, 1986 as amended at 51 FR 40665, Nov. 7, 1986]

§ 51.111 Description of control measures.

Each plan must set forth a control strategy which includes the following:

(a) A description of each control measure that is incorporated into the plan, and a schedule for its implementation.

(b) Copies of the enforceable laws and regulations to implement the measures adopted in the plan.

(c) A description of the administrative procedures to be used in implementing each control measure.

(d) A description of enforcement methods including, but not limited to:

(1) Procedures for monitoring compliance with each of the selected control measures,

(2) Procedures for handling violations, and

(3) A designation of agency responsibility for enforcement of implementation.

§ 51.112 Demonstration of adequacy.

(a) Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements. The adequacy of a control strategy shall be demonstrated by means of a proporational model or dispersion model or other procedure which is shown to be adequate and appropriate for such purposes.

(b) The demonstration must include the following:

(1) A summary of the computations, assumptions, and judgments used to determine the degree of reduction of emissions (or reductions in the growth of emissions) that will result from the

implementation of the control strategy.

(2) A presentation of emission levels expected to result from implementation of each measure of the control strategy.

(3) A presentation of the air quality levels expected to result from implementation of the overall control strategy presented either in tabular form or as an isopleth map showing expected maximum pollutant concentrations.

(4) A description of the dispersion models used to project air quality and to evaluate control strategies.

(5) For interstate regions, the analysis from each constituent State must, where practicable, be based upon the same regional emission inventory and air quality baseline.

§ 51.113 Time period for demonstration of adequacy.

(a) The demonstration of the adequacy of the control strategy to attain a primary standard required under § 51.112 must cover the following periods:

(1) At least three years from the date by which the Administrator must approve or disapprove the plan, if no extension under subpart R is granted, or

(2) At least five years from the date by which the Administrator must approve or disapprove the plan. If an extension under subpart R is granted.

(b) The demonstration of adequacy to attain a secondary standard required under § 51.112 must cover the period of time determined to be reasonable under § 51.110(c) for attainment of such secondary standard.

§ 51.114 Emissions data and projections.

(a) Except for lead, each plan must contain a detailed inventory of emissions from point and area sources. Lead requirements are specified in § 51.117. The inventory must be based upon measured emissions or, where measured emissions are not available, documented emission factors.

(b) Each plan must contain a summary of emission levels projected to result from application of the new control strategy.

(c) Each plan must identify the sources of the data used in the projection of emissions.

§ 51.115 Air quality data and projections.

(a) Each plan must contain a summary of data showing existing air quality.

(b) Each plan must:

(1) Contain a summary of air quality concentrations expected to result from application of the control strategy, and

(2) Identify and describe the dispersion model, other air quality model, or receptor model used.

(c) Actual measurements of air quality must be used where available if made by methods specified in Appendix C to part 58 of this chapter. Estimated air quality using appropriate modeling techniques may be used to supplement measurements.

(d) For purposes of developing a control strategy, background concentration shall be taken into consideration with respect to particulate matter. As used in this subpart, background concentration is that portion of the measured ambient levels that cannot be reduced by controlling emissions from man-made sources.

(e) In developing an ozone control strategy for a particular area, background ozone concentrations and ozone transported into an area must be considered. States may assume that the ozone standard will be attained in upwind areas.

§ 51.116 Data availability.

(a) The State must retain all detailed data and calculations used in the preparation of each plan or each plan revision, and make them available for public inspection and submit them to the Administrator at his request.

(b) The detailed data and calculations used in the preparation of plan revisions are not considered a part of the plan.

(c) Each plan must provide for public availability of emission data reported by source owners or operators or otherwise obtained by a State or local agency. Such emission data must be correlated with applicable emission

limitations or other measures. As used in this paragraph, *correlated* means presented in such a manner as to show the relationship between measured or estimated amounts of emissions and the amounts of such emissions allowable under the applicable emission limitations or other measures.

§ 51.117 Additional provisions for lead.

In addition to other requirements in §§ 51.100 through 51.116 the following requirements apply to lead. To the extent they conflict, there requirements are controlling over those of the proceeding sections.

(a) *Control strategy demonstration.* Each plan must contain a demonstration showing that the plan will attain and maintain the standard in the following areas:

(1) Areas in the vicinity of the following point sources of lead: Primary lead smelters, Secondary lead smelters, Primary copper smelters, Lead gasoline additive plants, Lead-acid storage battery manufacturing plants that produce 2,000 or more batteries per day. Any other stationary source that actually emits 25 or more tons per year of lead or lead compounds measured as elemental lead.

(2) Any other area that has lead air concentrations in excess of the national ambient air quality standard concentration for lead, measured since January 1, 1974.

(b) *Time period for demonstration of adequacy.* The demonstration of adequacy of the control strategy required under § 51.112 may cover a longer period if allowed by the appropriate EPA Regional Administrator.

(c) *Special modeling provisions.* (1) For urbanized areas with measured lead concentrations in excess of 4.0 $\mu g/m^3$, quarterly mean measured since January 1, 1974, the plan must employ the modified rollback model for the demonstration of attainment as a minimum, but may use an atmospheric dispersion model if desired. If a proportional model is used, the air quality data should be the same year as the emissions inventory required under the paragraph e.

(2) For each point source listed in § 51.117(a), that plan must employ an atmospheric dispersion model for demonstration of attainment.

(3) For each area in the vicinity of an air quality monitor that has recorded lead concentrations in excess of the lead national standard concentration, the plan must employ the modified rollback model as a minimum, but may use an atmospheric dispersion model if desired for the demonstration of attainment.

(d) *Air quality data and projections.* (1) Each State must submit to the appropriate EPA Regional Office with the plan, but not part of the plan, all lead air quality data measured since January 1, 1974. This requirement does not apply if the data has already been submitted.

(2) The data must be submitted in accordance with the procedures and data forms specified in Chapter 3.4.0 of the "AEROS User's Manual" concerning storage and retrieval of aerometric data (SAROAD) except where the Regional Administrator waives this requirement.

(3) If additional lead air quality data are desired to determine lead air concentrations in areas suspected of exceeding the lead national ambient air quality standard, the plan may include data from any previously collected filters from particulate matter high volume samplers. In determining the lead content of the filters for control strategy demonstration purposes, a State may use, in addition to the reference method, X-ray fluorescence or any other method approved by the Regional Administrator.

(e) *Emissions data.* (1) The point source inventory on which the summary of the baseline lead emissions inventory is based must contain all sources that emit five or more tons of lead per year.

(2) Each State must submit lead emissions data to the appropriate EPA Regional Office with the original plan. The submission must be made with the plan, but not as part of the plan, and must include emissions data and information related to point and area source emissions. The emission data and information should include the information identified in the Hazardous and Trace Emissions System (HATREMS) point source coding forms

for all point sources and the area source coding forms for all sources that are not point sources, but need not necessarily be in the format of those forms.

§ 51.118 Stack height provisions.

(a) The plan must provide that the degree of emission limitation required of any source for control of any air pollutant must not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in § 51.118(b). The plan must provide that before a State submits to EPA a new or revised emission limitation that is based on a good engineering practice stack height that exceeds the height allowed by § 51.100(ii) (1) or (2), the State must notify the public of the availabilty of the demonstration study and must provide opportunity for a public hearing on it. This section does not require the plan to restrict, in any manner, the actual stack height of any source.

(b) The provisions of § 51.118(a) shall not apply to (1) stack heights in existence, or dispersion techniques implemented on or before December 31, 1970, except where pollutants are being emitted from such stacks or using such dispersion techniques by sources, as defined in section 111(a)(3) of the Clean Air Act, which were constructed, or reconstructed, or for which major modifications, as defined in §§ 51.165(a)(1)(v)(A), 51.166(b)(2)(i) and 52.21(b)(2)(i), were carried out after December 31, 1970; or (2) coal-fired steam electric generating units subject to the provisions of section 118 of the Clean Air Act, which commenced operation before July 1, 1957, and whose stacks were construced under a construction contract awarded before February 8, 1974.

§ 51.119 Intermittent control systems.

(a) The use of an intermittent control system (ICS) may be taken into account in establishing an emission limitation for a pollutant under a State implementation plan, provided:

(1) The ICS was implemented before December 31, 1970, according to the criteria specified in § 51.119(b).

(2) The extent to which the ICS is taken into account is limited to reflect emission levels and associated ambient pollutant concentrations that would result if the ICS was the same as it was before December 31, 1970, and was operated as specified by the operating system of the ICS before December 31, 1970.

(3) The plan allows the ICS to compensate only for emissions from a source for which the ICS was implemented before December 31, 1970, and, in the event the source has been modified, only to the extent the emissions correspond to the maximum capacity of the source before December 31, 1970. For purposes of this paragraph, a source for which the ICS was implemented is any particular structure or equipment the emissions from which were subject to the ICS operating procedures.

(4) The plan requires the continued operation of any constant pollution control system which was in use before December 31, 1970, or the equivalent of that system.

(5) The plan clearly defines the emission limits affected by the ICS and the manner in which the ICS is taken into account in establishing those limits.

(6) The plan contains requirements for the operation and maintenance of the qualifying ICS which, together with the emission limitations and any other necessary requirements, will assure that the national ambient air quality standards and any applicable prevention of significant deterioration increments will be attained and maintained. These requirements shall include, but not necessarily be limited to, the following:

(i) Requirements that a source owner or operator continuously operate and maintain the components of the ICS specified at § 51.119(b)(3) (ii)-(iv) in a manner which assures that the ICS is at least as effective as it was before December 31, 1970. The air quality monitors and meteorological instrumentation specified in § 51.119(b) may be operated by a local authority or other entity provided the source has ready access to the data from the monitors and instrumentation.

(ii) Requirements which specify the circumstances under which, the extent to which, and the procedures through which, emissions shall be curtailed through the activation of ICS.

(iii) Requirements for recordkeeping which require the owner or operator of the source to keep, for periods of at least 3 years, records of measured ambient air quality data, meteorological information acquired, and production data relating to those processes affected by the ICS.

(iv) Requirements for reporting which require the owner or operator of the source to notify the State and EPA within 30 days of a NAAQS violation pertaining to the pollutant affected by the ICS.

(7) Nothing in this paragraph affects the applicability of any new source review requirements or new source performance standards contained in the Clean Air Act or 40 CFR Subchapter C. Nothing in this paragraph precludes a State from taking an ICS into account in establishing emission limitations to any extent less than permitted by this paragraph.

(b) An intermittent control system (ICS) may be considered implemented for a pollutant before December 31, 1970, if the following criteria are met:

(1) The ICS must have been established and operational with respect to that pollutant prior to December 31, 1970, and reductions in emissions of that pollutant must have occurred when warranted by meteorological and ambient monitoring data.

(2) The ICS must have been designed and operated to meet an air quality objective for that pollutant such as an air quality level or standard.

(3) The ICS must, at a minimum, have included the following components prior to December 31, 1970:

(i) *Air quality monitors.* An array of sampling stations whose location and type were consistent with the air quality objective and operation of the system.

(ii) *Meteorological instrumentation.* A meteorological data acquisition network (may be limited to a single station) which provided meteorological prediction capabilities sufficient to determine the need for, and degree of, emission curtailments necessary to achieve the air quality design objective.

(iii) *Operating system.* A system of established procedures for determining the need for curtailments and for accomplishing such curtailments. Documentation of this system, as required by paragraph (n)(4), may consist of a compendium of memoranda or comparable material which define the criteria and procedures for curtailments and which identify the type and number of personnel authorized to initiate curtailments.

(iv) *Meteorologist.* A person, schooled in meteorology, capable of interpreting data obtained from the meteorological network and qualified to forecast meteorological incidents and their effect on ambient air quality. Sources may have obtained meteorological services through a consultant. Services of such a consultant could include sufficient training of source personnel for certain operational procedures, but not for design, of the ICS.

(4) Documentation sufficient to support the claim that the ICS met the criteria listed in this paragraph must be provided. Such documentation may include affidavits or other documentation.

Subpart H—Prevention of Air Pollution Emergency Episodes

SOURCE: 51 FR 40668, Nov. 7, 1986, unless otherwise noted.

§ 51.150 Classification of regions for episode plans.

(a) This section continues the classification system for episode plans. Each region is classified separately with respect to each of the following pollutants: Sulfur oxides, particulate matter, carbon monoxide, nitrogen dioxide, and ozone.

(b) *Priority I Regions* means any area with greater ambient concentrations than the following:

(1) Sulfur dioxide—100 $\mu g/m^3$ (0.04 ppm) annual arithmetic mean; 455 $\mu g/m^3$ (0.17 ppm) 24-hour maximum.

(2) Particulate matter—95 $\mu g/m^3$ annual geometric mean; 325 $\mu g/m^3$ 24-hour maximum.

(3) Carbon monoxide—55 mg/m³ (48 ppm) 1-hour maximum; 14 mg/m³ (12 ppm) 8-hour maximum.

(4) Nitrogen dioxide—100 μg/m³ (0.06 ppm) annual arithmetic mean.

(5) Ozone—195 μg/m³ (0.10 ppm) 1-hour maximum.

(c) *Priority IA Region* means any area which is Priority I primarily because of emissions from a single point source.

(d) *Priority II Region* means any area which is not a Priority I region and has ambient concentrations between the following:

(1) Sulfur Dioxides—60–100 μg/m³ (0.02–0.04 ppm) annual arithmetic mean; 260–445 μg/m³ (0.10–0.17 ppm) 24-hour maximum; any concentration above 1,300 μg/m³ (0.50 ppm) three-hour average.

(2) Particulate matter—60–95 μg/m³ annual geometric mean; 150–325 μg/m³ 24-hour maximum.

(e) In the absence of adequate monitoring data, appropriate models must be used to classify an area under paragraph (b) of this section. Information on these models may be found through the "Air Programs Reports and Guidelines Index," EPA–150/2–82–016. With respect to carbon monoxide, ozone, and nitrogen dioxide, any area whose urban population as defined in the most recent U.S. Bureau of the Census, exceeds 200,000 will be classified Priority I.

(f) Areas which do not meet the above criteria are classified Priority III.

§ 51.151 Significant harm levels.

Each plan for a Priority I region must include a contingency plan which must, as a mimimum, provide for taking action necessary to prevent ambient pollutant concentrations at any location in such region from reaching the following levels:

Sulfur dioxide—2.620 μg/m³ (1.0 ppm) 24-hour average.

PM_{10}—600 micrograms/cubic meter; 24-hour average.

Carbon monoxide—57.5 mg/m³ (50 ppm) 8-hour average; 86.3 mg/m³ (75 ppm) 4-hour average; 144 mg/m³ (125 ppm) 1-hour average.

Ozone—1,200 ug/m³ (0.6 ppm) 2-hour average.

Nitrogen dioxide—3.750 ug/m³ (2.0 ppm) 1-hour average; 938 ug/m³ (0.5 ppm) 24-hour average.

[51 FR 40668, Nov. 7, 1986, as amended at 52 FR 24713, July 1, 1987]

§ 51.152 Contingency plans.

(a) Each contingency plan must—

(1) Specify two or more stages of episode criteria such as those set forth in Appendix L to this part, or their equivalent;

(2) Provide for public announcement whenever any episode stage has been determined to exist; and

(3) Specify adequate emission control actions to be taken at each episode stage. (Examples of emission control actions are set forth in Appendix L.)

(b) Each contingency plan for a Priority I region must provide for the following:

(1) Prompt acquisition of forecasts of atmospheric stagnation conditions and of updates of such forecasts as frequently as they are issued by the National Weather Service.

(2) Inspection of sources to ascertain compliance with applicable emission control action requirements.

(3) Communications procedures for transmitting status reports and orders as to emission control actions to be taken during an episode stage, including procedures for contact with public officials, major emission sources, public health, safety, and emergency agencies and news media.

(c) Each plan for a Priority IA and II region must include a contingency plan that meets, as a minimum, the requirements of paragraphs (b)(1) and (b)(2) of this section. Areas classified Priority III do not need to develop episode plans.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, the Administrator may, at his discretion—

(1) Exempt from the requirements of this section those portions of Priority I, IA, or II regions which have been designated as attainment or unclassifiable for national primary and secondary standards under section 107 of the Act; or

(2) Limit the requirements pertaining to emission control actions in Priority I regions to—

(i) Urbanized areas as identified in the most recent United States Census, and

(ii) Major emitting facilities, as defined by section 169(1) of the Act, outside the urbanized areas.

§ 51.153 Reevaluation of episode plans.

(a) States should periodically reevaluate priority classifications of all Regions or portion of Regions within their borders. The reevaluation must consider the three most recent years of air quality data. If the evaluation indicates a change to a higher priority classification, appropriate changes in the episode plan must be made as expeditiously as practicable.

Subpart I—Review of New Sources and Modifications

SOURCE: 51 FR 40669, Nov. 7, 1986, unless otherwise noted.

§ 51.160 Legally enforceable procedures.

(a) Each plan must set forth legally enforceable procedures that enable the State or local agency to determine whether the construction or modification of a facility, building, structure or installation, or combination of these will result in—

(1) A violation of applicable portions of the control strategy; or

(2) Interference with attainment or maintenance of a national standard in the State in which the proposed source (or modification) is located or in a neighboring State.

(b) Such procedures must include means by which the State or local agency responsible for final decisionmaking on an application for approval to construct or modify will prevent such construction or modification if—

(1) It will result in a violation of applicable portions of the control strategy; or

(2) It will interfere with the attainment or maintenance of a national standard.

(c) The procedures must provide for the submission, by the owner or operator of the building, facility, structure, or installation to be constructed or modified, of such information on—

(1) The nature and amounts of emissions to be emitted by it or emitted by associated mobile sources;

(2) The location, design, construction, and operation of such facility, building, structure, or installation as may be necessary to permit the State or local agency to make the determination referred to in paragraph (a) of this section.

(d) The procedures must provide that approval of any construction or modification must not affect the responsibility to the owner or operator to comply with applicable portions of the control strategy.

(e) The procedures must identify types and sizes of facilities, buildings, structures, or installations which will be subject to review under this section. The plan must discuss the basis for determining which facilities will be subject to review.

(f) The procedures must discuss the air quality data and the dispersion or other air quality modeling used to meet the requirements of this subpart.

§ 51.161 Public availability of information.

(a) The legally enforceable procedures in § 51.160 must also require the State or local agency to provide opportunity for public comment on information submitted by owners and operators. The public information must include the agency's analysis of the effect of construction or modification on ambient air quality, including the agency's proposed approval or disapproval.

(b) For purposes of paragraph (a) of this section, opportunity for public comment shall include, as a minimum—

(1) Availability for public inspection in at least one location in the area affected of the information submitted by the owner or operator and of the State or local agency's analysis of the effect on air quality;

(2) A 30-day period for submittal of public comment; and

(3) A notice by prominent advertisement in the area affected of the location of the source information and

analysis specified in paragraph (b)(1) of this section.

(c) Where the 30-day comment period required in paragraph (b) of this section would conflict with existing requirements for acting on requests for permission to construct or modify, the State may submit for approval a comment period which is consistent with such existing requirements.

(d) A copy of the notice required by paragraph (b) of this section must also be sent to the Administrator through the appropriate Regional Office, and to all other State and local air pollution control agencies having jurisdiction in the region in which such new or modified installation will be located. The notice also must be sent to any other agency in the region having responsibility for implementing the procedures required under this subpart. For lead, a copy of the notice is required for all point sources. The definition of point for lead is given in § 51.100(k)(2).

§ 51.162 Identification of responsible agency.

Each plan must identify the State or local agency which will be responsible for meeting the requirements of this subpart in each area of the State. Where such responsibility rests with an agency other than an air pollution control agency, such agency will consult with the appropriate State or local air pollution control agency in carrying out the provisions of this subpart.

§ 51.163 Administrative procedures.

The plan must include the administrative procedures, which will be followed in making the determination specified in paragraph (a) of § 51.160.

§ 51.164 Stack height procedures.

Such procedures must provide that the degree of emission limitation required of any source for control of any air pollutant must not be affected by so much of any source's stack height that exceeds good engineering practice or by any other dispersion technique, except as provided in § 51.118(b). Such procedures must provide that before a State issues a permit to a source based on a good engineering practice stack height that exceeds the height allowed by § 51.100(ii) (1) or (2), the State must notify the public of the availability of the demonstration study and must provide opportunity for public hearing on it. This section does not require such procedures to restrict in any manner the actual stack height of any source.

§ 51.165 Permit requirements.

(a) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) *Stationary source* means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(ii) *Building, structure, facility, or installation* means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0065 and 003-005-00176-0, respectively).

(iii) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored,

or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(iv)(A) *Major stationary source* means:

(*1*) Any stationary source of air pollutants which emits, or has the potential to emit 100 tons per year or more of any pollutant subject to regulation under the Act, or

(*2*) Any physical change that would occur at a stationary source not qualifying under paragraph (a)(1)(iv)(A)(*1*) as a major stationary source, if the change would constitute a major stationary source by itself.

(B) A major stationary source that is major for volatile organic compounds shall be considered major for ozone

(C) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this paragraph whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*1*) Coal cleaning plants (with thermal dryers);

(*2*) Kraft pulp mills;

(*3*) Portland cement plants;

(*4*) Primary zinc smelters;

(*5*) Iron and steel mills;

(*6*) Primary aluminum ore reduction plants;

(*7*) Primary copper smelters;

(*8*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*9*) Hydrofluoric, sulfuric, or nitric acid plants;

(*10*) Petroleum refineries;

(*11*) Lime plants;

(*12*) Phosphate rock processing plants;

(*13*) Coke oven batteries;

(*14*) Sulfur recovery plants;

(*15*) Carbon black plants (furnace process);

(*16*) Primary lead smelters;

(*17*) Fuel conversion plants;

(*18*) Sintering plants;

(*19*) Secondary metal production plants;

(*20*) Chemical process plants;

(*21*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*22*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*23*) Taconite ore processing plants;

(*24*) Glass fiber processing plants;

(*25*) Charcoal production plants;

(*26*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat output; and

(*27*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(v)(A) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(B) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(C) A physical change or change in the method of operation shall not include:

(*1*) Routine maintenance, repair and replacement;

(*2*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*3*) Use of an alternative fuel by reason of an order or rule section 125 of the Act;

(*4*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*5*) Use of an alternative fuel or raw material by a stationary source which:

(*i*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 12, 1976 pursuant to 40 CFR 52.21 or under regula-

tions approved pursuant to 40 CFR subpart I or § 51.166, or

(*ii*) The source is approved to use under any permit issued under regulations approved pursuant to this section;

(*6*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR part 51 subpart I or 40 CFR 51.166.

(*7*) Any change in ownership at a stationary source.

(vi)(A) *Net emissions increase* means the amount by which the sum of the following exceeds zero:

(1) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(2) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(B) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs before the date that the increase from the particular change occurs;

(C) An increase or decrease in actual emissions is creditable only if:

(*1*) It occurs within a reasonable period to be specified by the reviewing authority; and

(*2*) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section which permit is in effect when the increase in actual emissions from the particular change occurs.

(D) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(E) A decrease in actual emissions is creditable only to the extent that:

(*1*) The old level of actual emission or the old level of allowable emissions whichever is lower, exceeds the new level of actual emissions;

(*2*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*3*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the state has not relied on it in demonstrating attainment or reasonable further progress;

(*4*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(F) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(vii) *Emissions unit* means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the the Act.

(viii) *Secondary emissons* means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction of operation of the major stationary source of major modification. Secondary emissions do not include any emissions which come directly from a mobile source such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

(ix) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening.

(x) *Significant* means, in reference to a net emissions increase pr the potential of a source to emit any of the

following pollutions, as rate of emissions that would equal or exceed any of the following rates:

Pollutant	*Emission Rate*
Carbon monoxide	100 tons per year (tpy)
Nitrogen oxides	40 tpy
Sulfur dioxide	40 tpy
Ozone	40 tpy of volatile organic compounds
Lead	0.6 tpy

(xi) *Allowable emissions* means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(A) The applicable standards set forth in 40 CFR part 60 or 61;

(B) Any applicable State Implementation Plan emissions limitation including those with a future compliance date; or

(C) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(xii)(A) *Actual emissions* means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with paragraphs (a)(1)(xii) (B) through (D) of this section.

(B) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(C) The reviewing authority may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(D) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(xiii) *Lowest achievable emission rate* means, for any source, the more stringent rate of emissions based on the following:

(A) The most stringent emissions limitation which is contained in the implementation plan of any State for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(B) The most stringent emissions limitation which is achieved in practice by such class or category of stationary sources. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within or stationary source. In no event shall the application of the term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

(xiv) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

(xv) *Begin actual construction* means in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(xvi) *Commence* as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(A) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(B) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(xvii) *Necessary preconstruction approvals or permits* means those Federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(xviii) *Construction* means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(xix) *Volatile organic compounds* excludes: methane; ethane; methylene chloride: 1,1,1 tricholoroethane (methyl chloroform); trichlorotrifluoroethane (CFC-113) (Freon 113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); dichlorotetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); dichlorotrifluoroethane (HCFC-123); tetrafluoroethane (HFC-134a); dichlorofluoroethane (HCFC-141b); and chlorodifluoroethane (HCFC-142b).

(2) Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard under 40 CFR 81.300 *et seq.* Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment, if the stationary source or modification would locate anywhere in the designated nonattainment area.

(3)(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed, except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained where;

(A) The demonstration of reasonable further progress and attainment of ambient air quality standards is based upon the actual emissions of sources located within a designated nonattainment area for which the preconstruction review program was adopted; or

(B) The applicable State Implementation Plan does not contain an emissions limitation for that source or source category.

(ii) The plan shall further provide that:

(A) Where the emissions limit under the applicable State Implementation Plan allows greater emissions than the potential to emit of the source, emissions offset credit will be allowed only for control below this potential;

(B) For an existing fuel combustion source, credit shall be based on the allowable emissions under the applicable State Implementation Plan for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offset credit based on the allowable (or actual) emissions for the fuels involved is not acceptable, unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches.

(C)(*1*) Emissions reductions achieved by shutting down an existing source or curtailing production or operating

hours below baseline levels may be generally credited if such reductions are permanent, quantifiable, and federally enforceable, and if the area has an EPA-approved attainment plan. In addition, the shutdown or curtailment is creditable only if it occurred on or after the date specified for this purpose in the plan, and if such date is on or after the date of the most recent emissions inventory used in the plan's demonstration of attainment. Where the plan does not specify a cutoff date for shutdown credits, the date of the most recent emissions inventory or attainment demonstration, as the case may be, shall apply. However, in no event may credit be given for shutdowns which occurred prior to August 7, 1977. For purposes of this paragraph, a permitting authority may choose to consider a prior shutdown or curtailment to have occurred after the date of its most recent emissions inventory, if the inventory explicitly includes as current *existing* emissions the emissions from such previously shutdown or curtailed sources.

(2) Such reductions may be credited in the absence of an approved attainment demonstration only if the shutdown or curtailment occurred on or after the date the new source permit application is filed, or, if the applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the cutoff date provisions of § 51.165(a)(3)(ii)(C)(*1*) are observed.

(D) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977; (This document is also available from Mr. Ted Creekmore, Office of Air Quality Planning and Standards, (MD-15) Research Triangle Park, NC 27711.))

(E) All emission reductions claimed as offset credit shall be federally enforceable;

(F) Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR part 51 Appendix S section IV.D.

(G) Credit for an emissions reduction can be claimed to the extent that the reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR part 51 subpart I or the State has not relied on it in demonstration attainment or reasonable further progress.

(4) Each plan may provide that the provisions of this paragraph do not apply to a source or modification that would be a major stationary source or major modification only if fugitive emission to the extent quantifiable are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(i) Coal cleaning plants (with thermal dryers);

(ii) Kraft pulp mills;

(iii) Portland cement plants;

(iv) Primary zinc smelters;

(v) Iron and steel mills;

(vi) Primary aluminum ore reduction plants;

(vii) Primary copper smelters;

(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(ix) Hydrofluoric, sulfuric, or citric acid plants;

(x) Petroleum refineries;

(xi) Lime plants;

(xii) Phosphate rock processing plants;

(xiii) Coke oven batteries;

(xiv) Sulfur recovery plants;

(xv) Carbon black plants (furnace process);

(xvi) Primary lead smelters;

(xvii) Fuel conversion plants;

(xviii) Sintering plants;

(xix) Secondary metal production plants;

(xx) Chemical process plants;

(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(xxiii) Taconite ore processing plants;

(xxiv) Glass fiber processing plants;

(xxv) Charcoal production plants;

(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(xxvii) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(5) Each plan shall include enforceable procedures to provide that:

(i) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provision of the plan and any other requirements under local, State or Federal law.

(ii) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforcement limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of regulations approved pursuant to this section shall apply to the source or modification as though construction had not yet commenced on the source or modification;

(b)(1) Each plan shall include a preconstruction review permit program or its equivalent to satisfy the requirements of section 110(a)(2)(D)(i) of the Act for any new major stationary source or major modification as defined in paragraphs (a)(1) (iv) and (v) of this section. Such a program shall apply to any such source or modification that would locate in any area designated as attainment or unclassifiable for any national ambient air quality standard pursuant to section 107 of the Act, when it would cause or contribute to a violation of any national ambient air quality standard.

(2) A major source or major modification will be considered to cause or contribute to a violation of a national ambient air quality standard when such source or modification would, at a minimum, exceed the following significance levels at any locality that does not or would not meet the applicable national standard:

	Annual	Averaging time (hours)			
		24	8	3	1
Pollutant					
SO_2	1.0 μg/m³	5 μg/m³		25 μg/m³	
PM_{10}	1.0 μg/m³	5 μg/m³			
NO_2	1.0 μg/m³				
CO			0.5 mg/m³		2 mg/m³

(3) Such a program may include a provision which allows a proposed major source or major modification subject to paragraph (b) of this section to reduce the impact of its emissions upon air quality by obtaining sufficient emission reductions to, at a minimum, compensate for its adverse ambient impact where the major source or major modification would otherwise cause or contribute to a violation of any national ambient air quality standard. The plan shall require that, in the absence of such emission reductions, the State or local agency shall deny the proposed construction.

(4) The requirements of paragraph (b) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment pursuant to section 107 of the Act.

[51 FR 40669, Nov. 7, 1986, as amended at 52 FR 24713, July 1, 1987; 52 FR 29386, Aug 7, 1987; 54 FR 27285, 27299 June 28, 1989]

§ 51.166 Prevention of significant deterioration of air quality.

(a)(1) *Plan requirements.* In accordance with the policy of section 101(b)(1) of the act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to

prevent significant deterioration of air quality.

(2) *Plan Revisions.* If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph (a)(4) of this section, shall review the expected impact to the applicable increment(s).

(3) *Required plan revision.* If the State or the Administrator determines that a plan is substantially inadequate to prevent significant deterioration or that an applicable increment is being violated, the plan shall be revised to correct the inadequacy or the violation. The plan shall be revised within 60 days of such a finding by a State or within 60 days following notification by the Administrator, or by such later date as prescribed by the Administrator after consultation with the State.

(4) *Plan assessment.* The State shall review the adequacy of a plan on a periodic basis and within 60 days of such time as information becomes available that an applicable increment is being violated.

(5) *Public participation.* Any State action taken under this paragraph shall be subject to the opportunity for public hearing in accordance with procedures equivalent to those established in § 51.102.

(6) *Amendments.* (i) Any State required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph, shall adopt and submit such plan revision to the Administrator for approval within 9 months after the effective date of the new amendments.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) *Major stationary source* means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the po-

tential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) of this section, as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal . production plants;

(t) Chemical process plants;

(u) Fossil-fuel boilers (or combination thercof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more that 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(2)(i) *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair, and replacement;

(b) Use of an alternative fuel or raw material by reason of any order under section 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source which:

(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR subpart I or § 51.166.

(g) Any change in ownership at a stationary source.

(3)(i) *Net emissions increase* means the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides which occurs before the applicable minor source baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(a) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) *Stationary source* means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) *Building, structure, facility, or installation* means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

(7) *Emissions unit* means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) *Construction* means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) *Commence* as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) *Necessary preconstruction approvals or permits* means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) *Begin actual construction* means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

(12) *Best available control technology* means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR parts 60 and 61. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) *Baseline concentration* means that ambient concentration level which exists in the baseline area at the time of the applicable minor source baseline date. A baseline concentration is determined for each pollutant for which a minor source baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable minor source baseline date, except as provided in paragraph (b)(13)(ii) of this section;

(*b*) The allowable emissions of major stationary sources which commenced construction before the major source baseline date, but were not in operation by the applicable minor source baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emissions from any major stationary source on which construction commenced after the major source baseline date; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the minor source baseline date.

(14)(i) *Major source baseline date* means:

(a) In the case of particulate matter and sulfur dioxide, January 6, 1975, and

(b) In the case of nitrogen dioxide, February 8, 1988.

(ii) *Minor source baseline date* means the earliest date after the trigger date on which a major stationary source or a major modification subject to 40 CFR 52.21 or to regulations approved pursuant to 40 CFR 51.166 submits a complete application under the relevant regulations. The trigger date is:

(a) In the case of particulate matter and sulfur dioxide, August 7, 1977, and

(b) In the case of nitrogen dioxide, February 8, 1988.

(iii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(a) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166; and

(b) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(15)(i) *Baseline area* means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act in which the major source or major modification establishing the minor source baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the minor source baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(a) Establishes a minor source baseline date; or

(b) Is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166, and would be constructed in the same state as the state proposing the redesignation.

(16) *Allowable emissions* means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR parts 60 and 61;

(ii) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition.

(17) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR part 51, subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

(18) *Secondary emissions* means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purposes of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas the stationary source modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the

tailpipe of a motor vehicle, from a train, or from a vessel.

(19) *Innovative control technology* means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) *Fugitive emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) *Actual emissions* means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii) through (iv) of this section.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) *Complete* means, in reference to an application for a permit, that the application contains all the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

(23)(i) *Significant* means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions. 15 tpy of PM_{10} emissions.
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) *Significant* means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) of this section, does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i) of this section, *significant* means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

(24) *Federal Land Manager* means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) *High terrain* means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) *Low terrain* means any area other than high terrain.

(27) *Indian Reservation* means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) *Indian Governing Body* means the governing body of any tribe, band, or group of Indians subject to the ju-

risdiction of the United States and recognized by the United States as possessing power of self-government.

(29) *Volatile organic compounds* excludes each of the following compounds, unless the compound is subject to an emissions standard under sections 111 or 112 of the Act: methane; ethane; methylene chloride; 1,1,1 trichloroethane (methyl chloroform); trichlorotrifluoroethane (CFC-113) (Freon 113); trichlorofluoromethane (CFC-11); dichlorodifluouromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); dichlorotetrafluoroethane (CFC-114); chloropentafluoroethane (CFC-115); dichlorotrifluoroethane (HCFC-123); tetrafluoroethane (HCFC-134a); dichlorofluoroethane (HCFC-141b); and chlorodifluoroethane (HCFC-142b).

(c) *Ambient air increments.* The plan shall contain emission limitations and such other measures as may be necessary to assure that in areas designated as Class I, II, or III, increases in pollutant concentration over the baseline concentration shall be limited to the following:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
Particulate matter:	
TSP, annual geometric mean	5
TSP, 24-hr maximum	10
Sulfur dioxide:	
Annual arithmetic mean	2
24-hr maximum	5
3-hr maximum	25
Nitrogen dioxide:	
Annual arithmetic mean	2.5
Class II	
Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	512
Nitrogen dioxide:	
Annual arithmetic mean	25
Class III	
Particulate matter:	
TSP, annual geometric mean	37
TSP, 24-hr maximum	75
Sulfur dioxide:	
Annual arithmetic mean	40
24-hr maximum	182
3-hr maximum	700
Nitrogen dioxide:	
Annual arithmetic mean	50

For any period other than an annual period, the applicable maximum allowable increase may be exceeded during one such period per year at any one location.

(d) *Ambient air ceilings.* The plan shall provide that no concentration of a pollutant shall exceed:

(1) The concentration permitted under the national secondary ambient air quality standard, or

(2) The concentration permitted under the national primary ambient air quality standard, whichever concentration is lowest for the pollutant for a period of exposure.

(e) *Restrictions on area classifications.* The plan shall provide that—

(1) All of the following areas which were in existence on August 7, 1977, shall be Class I areas and may not be redesignated:

(i) International parks,

(ii) National wilderness areas which exceed 5,000 acres in size,

(iii) National memorial parks which exceed 5,000 acres in size, and

(iv) National parks which exceed 6,000 acres in size.

(2) Areas which were redesignated as Class I under regulations promulgated before August 7, 1977, shall remain Class I, but may be redesignated as provided in this section.

(3) Any other area, unless otherwise specified in the legislation creating such an area, is initially designated Class II, but may be redesignated as provided in this section.

(4) The following areas may be redesignated only as Class I or II:

(i) An area which as of August 7, 1977, exceeded 10,000 acres in size and was a national monument, a national primitive area, a national preserve, a national recreational area, a national wild and scenic river, a national wild-

life refuge, a national lakeshore or seashore; and

(ii) A national park or national wilderness area established after August 7, 1977, which exceeds 10,000 acres in size.

(f) *Exclusions from increment consumption.* (1) The plan may provide that the following concentrations shall be excluded in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under section 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4) of this section.

(2) If the plan provides that the concentrations to which paragraph (f)(1)(i) or (ii) of this section, refers shall be excluded, it shall also provide that no exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) of this section, refers or the plan to which paragraph (f)(1)(ii) of this section, refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.166 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v) of this section, the Administrator may approve a plan revision that:

(i) Specifies the time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur. Such time is not to exceed 2 years in duration unless a longer time is approved by the Administrator.

(ii) Specifies that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) of this section, is not renewable;

(iii) Allows no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Requires limitations to be in effect the end of the time period specified in accordance with paragraph (f)(4)(i) of this section, which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

(g) *Redesignation.* (1) The plan shall provide that all areas of the State (except as otherwise provided under paragraph (e) of this section) shall be designated either Class I, Class II, or Class III. Any designation other than Class II shall be subject to the redesignation procedures of this paragraph. Redesignation (except as otherwise precluded by paragraph (e) of this section) may be proposed by the respective States or Indian Governing Bodies, as provided below, subject to approval by the Administrator as a re-

vision to the applicable State implementation plan.

(2) The plan may provide that the State may submit to the Administrator a proposal to redesignate areas of the State Class I or Class II: *Provided,* That:

(i) At least one public hearing has been held in accordance with procedures established in § 51.102.

(ii) Other States, Indian Governing Bodies, and Federal Land Managers whose lands may be affected by the proposed redesignation were notified at least 30 days prior to the public hearing;

(iii) A discussion of the reasons for the proposed redesignation, including a satisfactory description and analysis of the health, environmental, economic, social, and energy effects of the proposed redesignation, was prepared and made available for public inspection at least 30 days prior to the hearing and the notice announcing the hearing contained appropriate notification of the availability of such discussion;

(iv) Prior to the issuance of notice respecting the redesignation of an area that includes any Federal lands, the State has provided written notice to the appropriate Federal Land Manager and afforded adequate opportunity (not in excess of 60 days) to confer with the State respecting the redesignation and to submit written comments and recommendations. In redesignating any area with respect to which any Federal Land Manager had submitted written comments and recommendations, the State shall have published a list of any inconsistency between such redesignation and such comments and recommendations (together with the reasons for making such redesignation against the recommendation of the Federal Land Manager); and

(v) The State has proposed the redesignation after consultation with the elected leadership of local and other substate general purpose governments in the area covered by the proposed redesignation.

(3) The plan may provide that any area other than an area to which paragraph (e) of this section refers may be redesignated as Class III if—

(i) The redesignation would meet the requirements of provisions established in accordance with paragraph (g)(2) of this section;

(ii) The redesignation, except any established by an Indian Governing Body, has been specifically approved by the Governor of the State, after consultation with the appropriate committees of the legislature, if it is in session, or with the leadership of the legislature, if it is not in session (unless State law provides that such redesignation must be specifically approved by State legislation) and if general purpose units of local government representing a majority of the residents of the area to be redesignated enact legislation (including resolutions where appropriate) concurring in the redesignation;

(iii) The redesignation would not cause, or contribute to, a concentration of any air pollutant which would exceed any maximum allowable increase permitted under the classification of any other area or any national ambient air quality standard; and

(iv) Any permit application for any major stationary source or major modification subject to provisions established in accordance with paragraph (l) of this section which could receive a permit only if the area in question were redesignated as Class III, and any material submitted as part of that application, were available, insofar as was practicable, for public inspection prior to any public hearing on redesignation of any area as Class III.

(4) The plan shall provide that lands within the exterior boundaries of Indian Reservations may be redesignated only by the appropriate Indian Governing Body. The appropriate Indian Governing Body may submit to the Administrator a proposal to redesignate areas Class I, Class II, or Class III: *Provided,* That:

(i) The Indian Governing Body has followed procedures equivalent to those required of a State under paragraphs (g) (2), (3)(iii), and (3)(iv) of this section; and

(ii) Such redesignation is proposed after consultation with the State(s) in which the Indian Reservation is locat-

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ed and which border the Indian Reservation.

(5) The Administrator shall disapprove, within 90 days of submission, a proposed redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with paragraph (e) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(6) If the Administrator disapproves any proposed area designation, the State or Indian Governing Body, as appropriate, may resubmit the proposal after correcting the deficiencies noted by the Administrator.

(h) *Stack heights.* The plan shall provide, as a minimum, that the degree of emission limitation required for control of any air pollutant under the plan shall not be affected in any manner by—

(1) So much of a stack height, not in existence before December 31, 1970, as exceeds good engineering practice, or

(2) Any other dispersion technique not implemented before then.

(i) *Review of major stationary sources and major modifications—source applicability and exemptions.*

(1) The plan shall provide that no major stationary source or major modification shall begin actual construction unless, as a minumum, requirements equivalent to those contained in paragraphs (j) through (r) of this section have been met.

(2) The plan shall provide that the requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section would otherwise allow.

(3) The plan shall provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area which is designated as attainment or unclassifiable under section 107(a)(1) (D) or (E) of the Act; and

(4) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a particular major stationary source or major modification if:

(i) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(iii) The source or modification is a portable stationary source which has previously received a permit under requirements equivalent to those contained in paragraphs (j) through (r) of this section, if:

(*a*) The source proposes to relocate and emissions of the source at the new location would be temporary; and

(*b*) The emissions from the source would not exceed its allowable emissions; and

(*c*) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(*d*) Reasonable notice is given to the reviewing authority prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the reviewing authority not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the reviewing authority.

(5) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(6) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section do not apply to a proposed major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from a new source, or the net emissions increase of that pollutant from a modification, would be temporary and impact no Class I area and no area where an applicable increment is known to be violated.

(7) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The plan may provide that the reviewing authority may exempt a proposed major stationary source or major modification from the requirements of paragraph (m) of this section, with respect to monitoring for a particular pollutant, if:

(i) The emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

(*a*) Carbon monoxide—575 ug/m^3, 8-hour average;

(*b*) Nitrogen dioxide—14 ug/m^3, annual average;

(*c*) Particulate matter—10 μg/m^3 TSP, 24-hour average.—10 μg/m^3 PM_{10}, 24-hour average.

(*d*) Sulfur dioxide—13 ug/m^3, 24-hour average;

(*e*) Ozone; [1]

(*f*) Lead—0.1 μg/m^3, 3-month average.

(*g*) Mercury—0.25 ug/m^3, 24-hour average;

(*h*) Beryllium—0.001 μg/m^3, 24-hour average:

(*i*) Fluorides—0.25 ug/m^3, 24-hour average;

(*j*) Vinyl chloride—15 ug/m^3, 24-hour average;

(*k*) Total reduced sulfur—10 ug/m^3, 1-hour average;

(*l*) Hydrogen sulfide—0.2 μg/m^3, 1-hour average:

[1] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform and ambient impact analysis, including the gathering of ambient air quality data.

(m) Reduced sulfur compounds—10 ug/m³, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in (i)(8)(i) of this section; or

(iii) The pollutants is not listed in paragraph (i)(8)(i) of this section.

(9) If EPA approves a plan revision under 40 CFR 51.166 as in effect before August 7, 1980, any subsequent revision which meets the requirements of this section may contain transition provisions which parallel the transition provisions of 40 CFR 52.21(i)(9), (i)(10) and (m)(1)(v) as in effect on that date, which provisions relate to requirements for best available control technology and air quality analyses. Any such subsequent revision may not contain any transition provision which in the context of the revision would operate any less stringently than would its counterpart in 40 CFR 52.21.

(10) If EPA approves a plan revision under § 51.166 as in effect [before July 31, 1987], any subsequent revision which meets the requirements of this section may contain transition provisions which parallel the transition provisions of § 52.21 (i)(11), and (m)(1)(vii) and (viii) of this chapter as in effect on that date, these provisions being related to monitoring requirements for particulate matter. Any such subsequent revision may not contain any transition provision which in the context of the revision would operate any less stringently than would its counterpart in § 52.21 of this chapter.

(11) The plan may provide that the permitting requirements equivalent to those contained in paragraph (k)(2) of this section do not apply to a stationary source or modification with respect to any maximum allowable increase for nitrogen oxides if the owner or operator of the source or modification submitted an application for a permit under the applicable permit program approved or promulgated under the Act before the provisions embodying the maximum allowable increase took effect as part of the plan and the permitting authority subsequently determined that the application as submitted before that date was complete.

(j) *Control technology review.* The plan shall provide that:

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emission standard and standard of performance under 40 CFR parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the least reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source impact analysis.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air quality models.* The plan shall provide for procedures which specify that—

(1) All estimates of ambient concentrations required under this paragraph shall be based on the applicable air quality models, data bases, and other requirements specified in the "Guideline on Air Quality Models (Revised)" (1986) and Supplement A (1987) which are incorporated by reference. The guideline (EPA Publication No. 450/2-78-027R) and Supplement A (1987) are for sale from the U.S. Department of Commerce, National Technical Information Service, 5825 Port Royal Road, Springfield, Virginia 22161. They are also available for inspection at the Office of the Federal Register Information Center, Room 8301, 1100 L Street NW., Washington, DC 20408. These materials are incorporated as they exist on the date of approval and a notice of any change will be published in the FEDERAL REGISTER.

(2) Where an air quality impact model specified in the "Guideline on Air Quality Models (Revised)" (1936) and Supplement A (1987) are inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific state program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures developed in accordance with paragraph (q) of this section.

(m) *Air quality analysis*—(1) *Preapplication analysis.* (i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) The plan shall provide that, with respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the reviewing authority determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maxiumum allowable increase.

(iv) The plan shall provide that, in general, the continuous air monitoring data that is required shall have been gathered over a period of one year and shall represent the year preceding receipt of the application, except that, if the reviewing authority determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) The plan may provide that the owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of 40 CFR part 51 Appendix S, section IV may provide postapproval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph (m)(1) of this section.

(2) *Post-construction monitoring.* The plan shall provide that the owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) *Operation of monitoring stations.* The plan shall provide that the owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B

to part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) *Source information.* (1) The plan shall provide that the owner or operator of a proposed source or modification shall submit all information necessary to perform any analysis or make any determination required under procedures established in accordance with this section.

(2) The plan may provide that such information shall include:

(i) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(ii) A detailed schedule for construction of the source or modification;

(iii) A detailed description as to what system of continuous emission reduction is planned by the source or modification, emission estimates, and any other information as necessary to determine that best available control technology as applicable would be applied;

(3) The plan shall provide that upon request of the State, the owner or operator shall also provide information on:

(i) The air quality impact of the source or modification, including meteorological and topographical data necessary to estimate such impact; and

(ii) The air quality impacts and the nature and extent of any or all general commercial, residential, industrial, and other growth which has occurred since August 7, 1977, in the area the source or modification would affect.

(o) *Additional impact analyses.* The plan shall provide that—

(1) The owner or operator shall provide an analysis of the impairment to visibility, soils, and vegetation that would occur as a result of the source or modification and general commercial, residential, industrial, and other growth associated with the source or modification. The owner or operator need not provide an analysis of the impact on vegetation having no significant commercial or recreational value.

(2) The owner or operator shall provide an analysis of the air quality impact projected for the area as a result of general commercial, residential, industrial, and other growth associated with the source or modification.

(p) *Sources impacting Federal Class I areas—additional requirements.*—(1) *Notice to EPA.* The plan shall provide that the reviewing authority shall transmit to the Administrator a copy of each permit application relating to a major stationary source or major modification and provide notice to the Administrator of every action related to the consideration of such permit.

(2) *Federal Land Manager.* The Federal Land Manager and the Federal official charged with direct responsibility for management of Class I lands have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands and to consider, in consultation with the Administrator, whether a proposed source or modification would have an adverse impact on such values.

(3) *Denial—impact on air quality related values.* The plan shall provide a mechanism whereby a Federal Land Manager of any such lands may present to the State, after the reviewing authority's preliminary determination required under procedures developed in accordance with paragraph (r) of this section, a demonstration that the emissions from the proposed source or modification would have an adverse impact on the air quality-related values (including visibility) of any Federal mandatory Class I lands, notwithstanding that the change in air quality resulting from emissions from such source or modification would not cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the State concurs with such demonstration, the reviewing authority shall not issue the permit.

(4) *Class I Variances.* The plan may provide that the owner or operator of a proposed source or modification may demonstrate to the Federal Land Manager that the emissions from such source would have no adverse impact on the air quality related values of such lands (including visibility), notwithstanding that the change in air quality resulting from emissions from

such source or modification would cause or contribute to concentrations which would exceed the maximum allowable increases for a Class I area. If the Federal land manager concurs with such demonstration and so certifies to the State, the reviewing authority may: *Provided,* That applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over minor source baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Particulate matter:	
TSP, annual geometric mean	19
TSP, 24-hr maximum	37
Sulfur dioxide:	
Annual arithmetic mean	20
24-hr maximum	91
3-hr maximum	325
Nitrogen dioxide: Annual arithmetic mean	25

(5) *Sulfur dioxide variance by Governor with Federal Land Manager's concurrence.* The plan may provide that—

(i) The owner or operator of a proposed source or modification which cannot be approved under procedures developed pursuant to paragraph (q)(4) of this section may demonstrate to the Governor that the source or modification cannot be constructed by reason of any maximum allowable increase for sulfur dioxide for periods of twenty-four hours or less applicable to any Class I area and, in the case of Federal mandatory Class I areas, that a variance under this clause would not adversely affect the air quality related values of the area (including visibility);

(ii) The Governor, after consideration of the Federal Land Manager's recommendation (if any) and subject to his concurrence, may grant, after notice and an opportunity for a public hearing, a variance from such maximum allowable increase; and

(iii) If such variance is granted, the reviewing authority may issue a permit to such source or modification in accordance with provisions developed pursuant to paragraph (q)(7) of this section: *Provided,* That the applicable requirements of the plan are otherwise met.

(6) *Variance by the Governor with the President's concurrence.* The plan may provide that—

(i) The recommendations of the Governor and the Federal Land Manager shall be transferred to the President in any case where the Governor recommends a variance in which the Federal Land Manager does not concur;

(ii) The President may approve the Governor's recommendation if he finds that such variance is in the national interest; and

(iii) If such a variance is approved, the reviewing authority may issue a permit in accordance with provisions developed pursuant to the requirements of paragraph (q)(7) of this section: *Provided,* That the applicable requirements of the plan are otherwise met.

(7) *Emission limitations for Presidential or gubernatorial variance.* The plan shall provide that in the case of a permit issued under procedures developed pursuant to paragraph (q) (5) or (6) of this section, the source or modification shall comply with emission limitations as may be necessary to assure that emissions of sulfur dioxide from the source or modification would not (during any day on which the otherwise applicable maximum allowable increases are exceeded) cause or contribute to concentrations which would exceed the following maximum allowable increases over the baseline concentration and to assure that such emissions would not cause or contribute to concentrations which exceed the otherwise applicable maximum allowable increases for periods of exposure of 24 hours or less for more than 18 days, not necessarily consecutive, during any annual period:

MAXIMUM ALLOWABLE INCREASE

[Micrograms per cubic meter]

Period of exposure	Terrain areas	
	Low	High
24-hr maximum	36	62
3-hr maximum	130	221

(q) *Public participation.* The plan shall provide that—

(1) The reviewing authority shall notify all applicants within a specified time period as to the completeness of the application or any deficiency in the application or information submitted. In the event of such a deficiency, the date of receipt of the application shall be the date on which the reviewing authority received all required information.

(2) Within one year after receipt of a complete application, the reviewing authority shall:

(i) Make a preliminary determination whether construction should be approved, approved with conditions, or disapproved.

(ii) Make available in at least one location in each region in which the proposed source would be constructed a copy of all materials the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination.

(iii) Notify the public, by advertisement in a newspaper of general circulation in each region in which the proposed source would be constructed, of the application, the preliminary determination, the degree of increment consumption that is expected from the source or modification, and of the opportunity for comment at a public hearing as well as written public comment.

(iv) Send a copy of the notice of public comment to the applicant, the Administrator and to officials and agencies having cognizance over the location where the proposed construction would occur as follows: any other State or local air pollution control agencies, the chief executives of the city and county where the source would be located; any comprehensive regional land use planning agency, and any State, Federal Land Manager, or Indian Governing body whose lands may be affected by emissions from the source or modification.

(v) Provide opportunity for a public hearing for interested persons to appear and submit written or oral comments on the air quality impact of the source, alternatives to it, the control technology required, and other appropriate considerations.

(vi) Consider all written comments submitted within a time specified in the notice of public comment and all comments received at any public hearing(s) in making a final decision on the approvability of the application. The reviewing authority shall make all comments available for public inspection in the same locations where the reviewing authority made available preconstruction information relating to the proposed source or modification.

(vii) Make a final determination whether construction should be approved, approved with conditions, or disapproved.

(viii) Notify the applicant in writing of the final determination and make such notification available for public inspection at the same location where the reviewing authority made available preconstruction information and public comments relating to the source.

(r) *Source obligation.* (1) The plan shall include enforceable procedures to provide that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law.

(2) The plan shall provide that at such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(s) *Innovative control technology.*

(1) The plan may provide that an owner or operator of a proposed major stationary source or major modification may request the reviewing authority to approve a system of innovative control technology.

(2) The plan may provide that the reviewing authority may, with the consent of the governor(s) of other affected state(s), determine that the source or modification may employ a system of innovative control technology, if:

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) of this section, by a date specified by the reviewing authority. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements equivalent to those in paragraphs (j) and (k) of this section, based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the reviewing authority;

(iv) The source or modification would not before the date specified by the reviewing authority:

(*a*) Cause or contribute to any violation of an applicable national ambient air quality standard; or

(*b*) Impact any area where an applicable increment is known to be violated;

(v) All other applicable requirements including those for public participation have been met.

(vi) The provisions of paragraph (p) of this section (relating to Class I areas) have been satisfied with respect to all periods during the life of the source or modification.

(3) The plan shall provide that the reviewing authority shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The reviewing authority decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) The plan may provide that if a source or modification fails to meet the required level of continuous emissions reduction within the specified time period, or if the approval is withdrawn in accordance with paragraph (s)(3) of this section, the reviewing authority may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

(Approved by Office of Management and Budget under the control number 2060-0003)

(Secs. 101(b)(1), 110, 160-169, 171-178, and 301(a), Clean Air Act, as amended (42 U.S.C. 7401(b)(1), 7410, 7470-7479, 7501-7508, and 7601(a)); sec. 129(a), Clean Air Act Amendments of 1977 (Pub. L. 95-95, 91 Stat. 685 (Aug. 7, 1977)))

[43 FR 26382, June 19, 1978; 43 FR 40010, Sept. 8, 1978. Redesignated at 51 FR 40669, Nov. 7, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 51.166, see the List of CFR Sections Affected in the Finding Aids section of this volume.

Subpart J—Ambient Air Quality Surveillance

AUTHORITY: Secs. 110, 301(a), 313, 319, Clean Air Act (42 U.S.C. 7410, 7601(a), 7613, 7619).

§ 51.190 Ambient air quality monitoring requirements.

The requirements for monitoring ambient air quality for purposes of the plan are located in subpart C of part 58 of this chapter.

[44 FR 27569, May 10, 1979]

Subpart K—Source Surveillance

SOURCE: 51 FR 40673, Nov. 7, 1986, unless otherwise noted.

§ 51.210 General.

Each plan must provide for monitoring the status of compliance with any rules and regulations that set forth any portion of the control strategy. Specifically, the plan must meet the requirements of this subpart.

§ 51.211 Emission reports and recordkeeping.

The plan must provide for legally enforceable procedures for requiring owners or operators of stationary sources to maintain records of and periodically report to the State—

(a) Information on the nature and amount of emissions from the stationary sources; and

(b) Other information as may be necessary to enable the State to determine whether the sources are in compliance with applicable portions of the control strategy.

§ 51.212 Testing, inspection, enforcement, and complaints.

The plan must provide for—

(a) Periodic testing and inspection of stationary sources; and

(b) Establishment of a system for detecting violations of any rules and regulations through the enforcement of appropriate visible emission limitations and for investigating complaints.

(c) Enforceable test methods for each emission limit specified in the plan. As an enforceable method, States may use:

(1) Any of the appropriate methods in appendix M to this part, Recommended Test Methods for State Implementation Plans; or

(2) An alternative method following review and approval of that method by the Administrator; or

(3) Any appropriate method in appendix A to 40 CFR part 60.

[51 FR 40673, Nov. 7, 1986, as amended at 55 FR 14249, Apr. 17, 1990]

§ 51.213 Transportation control measures.

(a) The plan must contain procedures for obtaining and maintaining data on actual emissions reductions acheived as a result of implementin transportation control measures.

(b) In the case of measures involvin inspection, maintenance, or retrofi these data must include the results o an emission surveillance program de signed to determine actual average pe vehicle emissions reductions attributa ble to inspection, maintenance, and/o retrofit.

(c) In the case of measures based o traffic flow changes or reductions i vehicle use, the data must include ob served changes in vehicle miles trav eled and average speeds.

(d) The data must be maintained i such a way as to facilitate comparison of the planned and actual efficacy o the transportation control measures.

§ 51.214 Continuous emission monitoring.

(a) The plan must contain legally en forceable procedures to—

(1) Require stationary sources sub ject to emission standards as part o an applicable plan to install, calibrate maintain, and operate equipment for continuously monitoring and record ing emissions; and

(2) Provide other information as specified in Appendix P of this part.

(b) The procedures must—

(1) Identify the types of sources, by source category and capacity, that must install the equipment; and

(2) Identify for each source category the pollutants which must be moni tored.

(c) The procedures must, as a mini mum, require the types of sources set forth in Appendix P of this part to meet the applicable requirements set forth therein.

(d)(1) The procedures must contain provisions that require the owner or operator of each source subject to con tinuous emission monitoring and re cording requirements to maintain a file of all pertinent information for at least two years following the date of collection of that information.

(2) The information must include emission measurements, continuous monitoring system performance test ing measurements, performance eval uations, calibration checks, and ad justments and maintenance performed on such monitoring systems and other

reports and records required by Appendix P of this part.

(e) The procedures must require the source owner or operator to submit information relating to emissions and operation of the emission monitors to the State to the extent described in Appendix P at least as frequently as described therein.

(f) (1) The procedures must provide that sources subject to the requirements of paragraph (c) of this section must have installed all necessary equipment and shall have begun monitoring and recording within 18 months after either—

(i) The approval of a State plan requiring monitoring for that source; or

(ii) Promulgation by the Agency of monitoring requirements for that source.

(2) The State may grant reasonable extensions of this period to sources that—

(i) Have made good faith efforts to purchases, install, and begin the monitoring and recording of emission data; and

(ii) Have been unable to complete the installation within the period.

Subpart L—Legal Authority

SOURCE: 51 FR 40673, Nov. 7, 1986, unless otherwise noted.

§ 51.230 Requirements for all plans.

Each plan must show that the State has legal authority to carry out the plan, including authority to:

(a) Adopt emission standards and limitations and any other measures necessary for attainment and maintenance of national standards.

(b) Enforce applicable laws, regulations, and standards, and seek injunctive relief.

(c) Abate pollutant emissions on an emergency basis to prevent substantial endangerment to the health of persons, i.e., authority comparable to that available to the Administrator under section 305 of the Act.

(d) Prevent construction, modification, or operation of a facility, building, structure, or installation, or combination thereof, which directly or indirectly results or may result in emissions of any air pollutant at any location which will prevent the attainment or maintenance of a national standard.

(e) Obtain information necessary to determine whether air pollution sources are in compliance with applicable laws, regulations, and standards, including authority to require recordkeeping and to make inspections and conduct tests of air pollution sources.

(f) Require owners or operators of stationary sources to install, maintain, and use emission monitoring devices and to make periodic reports to the State on the nature and amounts of emissions from such stationary sources; also authority for the State to make such data available to the public as reported and as correlated with any applicable emission standards or limitations.

§ 51.231 Identification of legal authority.

(a) The provisions of law or regulation which the State determines provide the authorities required under this section must be specifically identified, and copies of such laws or regulations be submitted with the plan.

(b) The plan must show that the legal authorities specified in this subpart are available to the State at the time of submission of the plan.

(c) Legal authority adequate to fulfill the requirements of § 51.230 (e) and (f) of this subpart may be delegated to the State under section 114 of the Act.

§ 51.232 Assignment of legal authority to local agencies.

(a) A State government agency other than the State air pollution control agency may be assigned responsibility for carrying out a portion of a plan if the plan demonstrates to the Administrator's satisfaction that the State governm ntai agency has the legal authority necessary to carry out the portion of plan.

(b) The State may authorize a local agency to carry out a plan, or portion thereof, within such local agency's jurisdiction if—

(1) The plan demonstrates to the Administrator's satisfaction that the local agency has the legal authority necessary to implement the plan or portion of it; and

(2) This authorization does not relieve the State of responsibility under the Act for carrying out such plan, or portion thereof.

Subpart M—Intergovernmental Consultation

AUTHORITY: Secs. 110, 121, 174(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7410, 7421, 7504, and 7601(a)).

SOURCE: 44 FR 35179, June 18, 1979, unless otherwise noted.

AGENCY DESIGNATION

§ 51.240 General plan requirements.

Each State implementation plan must identify organizations, by official title, that will participate in developing, implementing, and enforcing the plan and the responsibilities of such organizations. The plan shall include any related agreements or memoranda of understanding among the organizations.

§ 51.241 Nonattainment areas for carbon monoxide and ozone.

(a) For each AQCR or portion of an AQCR in which the national primary standard for carbon monoxide or ozone will not be attained by July 1, 1979, the Governor (or Governors for interstate areas) shall certify, after consultation with local officials, the organization responsible for developing the revised implementation plan or portions thereof for such AQCR. The procedures described in the "Section 174 Guidelines" issued jointly in December 1977 by EPA and the Department of Transportation should be consulted in this process. These guidelines are published as Appendix U to part 51.

(b) The Governor shall certify an organization of elected officials of local governments designated by agreement of affected general purpose local governments unless no agreement was reached by affected local governments by February 7, 1978, or the locally designated organization does not meet the criteria for a lead planning organization contained in the "Section 174 Guidelines." In making the certification, the Governor shall take into consideration any ongoing process of local designation in existence on February 7, 1978. The certification shall be in accordance with the joint determination of responsibilities for plan development, implementation, and enforcement required by section 174(a) of the Clean Air Act, as amended.

(c) The Governor shall certify, where feasible, the metropolitan planning organization responsible for the continuing, cooperative, and comprehensive transportation planning process required under 23 U.S.C. 134 and the Urban Mass Transportation Act; the organization responsible for air quality maintenance planning; or the organization responsible for both. In determining the feasibility of certifying such an organization, the Governor shall also consider whether the organization gives adequate representation to local elected officials of general purpose governments and has areawide planning responsibilities in other Federal environmental or planning programs which could contribute to integration and consolidation of planning functions. Where possible, preference should be given to organizations with several program responsibilities, such as comprehensive planning or water quality management.

(d) The Governor shall submit the following information to the Administrator of the EPA through the appropriate EPA regional office. The information shall be made available for public review at the regional office.

(1) A list of all air quality planning organizations certified pursuant to section 174 within the State.

(2) A description of the geographic jurisdictions of these organizations by AQCR, or portion thereof.

(3) A general description of the responsibilities of the certified organizations.

(4) A brief discussion of the alternatives investigated for consolidation of environmental and other planning functions, and the basis for the selection of the certified organization.

(5) A brief description of the consultative process leading to the selection of a certified organization, including the disposition of significant concerns raised by participants.

(e) Within 60 days following a redesignation, pursuant to section 107(d) of

the Clean Air Act, as amended, to nonattainment of any AQCR or portion of an AQCR designated as attainment or unclassifiable for the national primary standard for carbon monoxide or ozone the State and elected officials of affected general purpose local governments shall jointly determine their respective responsibilities in developing, implementing, or enforcing portions of a revised implementation plan. The Governor shall certify, within the 60-day period and after consultation with local officials, the organization responsible for developing the revised plan or portions thereof for such area. The procedures in the "Section 174 Guidelines" should be consulted in the joint determination of responsibilities and in the certification of the organization. The organization certified by the Governor shall be a locally designated organization unless agreement among local officials cannot be achieved in time to make the certification within the 60-day period. If no agreement is reached, the Governor may then, after consultation with local officials, certify an organization of local officials or a State agency. The implementation plan submitted within nine months after an area is designated nonattainment shall include the information listed in § 51.241(d)(1) through (5).

(f) An organization certified under the provisions of this section shall remain certified until the Governor, after consultation with elected officials of local government in a nonattainment area, certifies another organization. Elected officials of local government may make written request to the Governor to change the certified organization for an area. The request shall contain the reasons for the proposed change and the replacement organization proposed for certification. The Governor shall consider such requests and, if he or she finds that the reasons are compelling, shall send a notice of the proposed change to the Regional Administrator, the chief official of the organization to be replaced, and elected officials of major general purpose local governments in the nonattainment area. The notice of proposed change shall include the reasons for the change, the effective date of the change, the effects of the change on development of necessary implementation plan revisions, and a revision of the joint determination of responsibilities developed pursuant to section 174(a) of the Clean Air Act, as amended. The notice of proposed change shall be made available for public review in the affected area for at least 30 days before becoming effective.

[44 FR 35179, June 18, 1979, as amended at 48 FR 29302, June 24, 1983]

§ 51.242 [Reserved]

CONTINUING CONSULTATION PROCESS

§ 51.243 Consultation process objectives.

Any governmental organization that has the lead responsibility for development of one of the State implementation plan elements listed in § 51.244 shall provide for a continuing intergovernmental consultation process in carrying out those responsibilities. All affected governmental organizations should, to the extent feasible, be involved in the development of the process. Already established consultation processes, such as those established under § 51.241, may be used, and supplemented if necessary, to meet the requirements of this subpart. A satisfactory consultation process must include provisions to meet the following objectives:

(a) Provide for information dissemination to and education of relevant organizations and individuals on, at least, all elements of the State implementation plan identified in § 51.244.

(b) Provide an opportunity for regular and frequent involvement of affected governmental organizations and elected officials in development of all elements of the revised State implementation plan which affect their area.

(c) Provide an opportunity for joint resolution by affected governmental organizations and individuals of key issues in the development of the revised implementation plan. Key issues include determination of the proportion of emission reductions to come from stationary and mobile sources; selection of mobile and stationary source control strategies; and determination of responsibilities among State

and local governments for implementation and enforcement, particularly where commitment of local resources will be necessary.

§ 51.244 Plan elements affected.

The consultation process must ensure consultation during preparation of the following measures:

(a) Procedures for preconstruction review of major stationary sources of air pollution. Preparation of such procedures includes the development of allocation programs for allowable emission increments for attainment areas and growth increments or banked emission reductions for nonattainment areas.

(b) Transportation-related planning procedures and control measures.

(c) Procedures and control measures, other than those related to transportation, applicable to nonattainment areas.

(d) Measures for prevention of significant deterioration of air quality, and protection of visibility in Federal Class I areas.

(e) Air quality maintenance measures.

(f) Delayed compliance orders described in section 113(d) of the Clean Air Act, as amended, August 1977.

(g) Any other measures required under Part C or D of the Act.

§ 51.245 Organizations and officials to be consulted.

A continuing intergovernmental consultation process established in accordance with § 51.243 shall ensure the involvement of the following organizations or individuals whenever the interests for which they are responsible are directly or indirectly affected:

(a) State, areawide, and local agencies responsible for air pollution control, health planning, transportation planning, energy planning, manpower planning, economic and community development, housing planning, coastal zone management, solid waste management, and water quality management.

(b) Elected officials of local government.

(c) Federal land managers having authority over lands affected by State implementation plans.

(d) Any other affected governmental organizations that may be responsible for implementing or enforcing the plan element being developed.

§ 51.246 Timing.

The continuing intergovernmental consultation process shall apply to any measure related to the plan elements in § 51.244 adopted after December 18, 1979. The State implementation plan shall be revised to provide an opportunity for Federal, State and local involvement in such a consultation process no later than December 18, 1979.

§ 51.247 Hearings on consultation process violations.

(a) Where a majority of elected officials of any local government affected by a plan element listed in § 51.244 contend that they have been improperly excluded from consultation on that element, they may petition the EPA Regional Administrator to hold a hearing on the matter. Upon receipt of the petition, the Regional Administrator shall request from the responsible State agency a formal response to that petition. After evaluation of the State's response to the petition, the Regional Administrator shall make a determination whether to hold a hearing. If a hearing is held, the transcript and the State's response shall be forwarded to the Administrator for consideration when approving or disapproving the plan elements. If no hearing is held, the Regional Administrator's determination, together with the State's response, shall similarly be forwarded to the Administrator.

(b) The other organizations or individuals involved in preparing the plan element or otherwise affected by it shall be given notice of the hearing and afforded an opportunity to participate in it.

Relationship of Plan to Other Planning and Management Programs

§ 51.248 Coordination with other programs.

(a) A governmental organization that has a major responsibility for developing any of the State implementation plan elements listed in § 51.244

shall coordinate with other planning and management programs substantially affecting or affected by such elements through the development of procedures, or the use of existing procedures, to ensure the following:

(1) Use of common data.

(2) Coordination, and where possible, integration of work programs.

(3) Use, where possible, of common public participation and information programs.

(4) Incorporation of appropriate air quality criteria as a factor in other planning and management programs.

(5) Consideration of other community objectives in development of air pollution control strategies.

(b) The coordination procedures shall include a process for determining conformity between the State implementation plan and other plans and programs, such as those pertaining to transportation, land use, solid waste, water quality, or community development, substantially affecting or affected by the implementation plan. Existing procedures should be used, where feasible. The State implementation plan shall include a list of any memoranda of understanding developed, as part of that process, among the agencies responsible for development, implementation, or enforcement of air quality plans.

[44 FR 35179, June 18, 1979, as amended at 48 FR 29302, June 24, 1983]

§ 51.249 [Reserved]

§ 51.250 Transmittal of information.

Each plan shall provide assurances that the governmental organization having primary responsibility for implementing national ambient air quality standards in any AQCR, or portion thereof, will promptly transmit to other organizations having similar or related responsibility in the same or other States, information on factors (e.g., construction of new industrial plants) which may significantly affect air quality in any portion of such AQCR or in any adjoining AQCR.

§ 51.251 Conformity with Executive Order 12372.

The organization responsible for developing the state implementation plan revision shall submit a draft of any major implementation plan revision including any of the six elements listed in § 51.244 to the state process, if one has been designated by the state under Executive Order 12372, "Intergovernmental Review of Federal Programs" (47 FR 30959, July 16, 1982) as amended April 8, 1983 (48 FR 15587, April 11, 1983) for review and comment for a period of 60 days. The draft plan or portions thereof, shall be submitted to the state process either prior to or concurrent with announcement of public hearings on the plan. Comments received from the state process within that 60-day period shall be considered. The organization initiating the plan revision shall retain copies of these comments for inspection by the Administrator and the public.

[48 FR 29302, June 24, 1983]

§ 51.252 Summary of plan development participation.

An organization with responsibility for the development of all or a portion of the implementation plan elements listed in § 51.244 shall include in the plan:

(a) A summary of the procedures used to involve the general public, public and special interest groups having a major interest in the program, local and areawide governmental organizations, elected officials of local governments, State agencies and the State legislature, and Federal land managers in the development of the plan revision.

(b) A discussion of any significant comments raised during the consultation process, including those received from the state process designated under Executive Order 12372 or in any public hearing held on the plan. The discussion shall include a description of the final disposition of such points.

[44 FR 35179, June 18, 1979, as amended at 48 FR 29302, June 24, 1983]

Subpart N—Compliance Schedules

SOURCE: 51 FR 40673, Nov. 7, 1986, unless otherwise noted.

§ 51.260 Legally enforceable compliance schedules.

(a) Each plan shall contain legally enforceable compliance schedules setting forth the dates by which all stationary and mobile sources or categories of such sources must be in compliance with any applicable requirement of the plan.

(b) The compliance schedules must contain increments of progress required by § 51.262 of this subpart.

§ 51.261 Final compliance schedules.

(a) Unless EPA grants an extension under subpart R, compliance schedules designed to provide for attainment of a primary standard must—

(1) Provide for compliance with the applicable plan requirements as soon as practicable; or

(2) Provide for compliance no later than the date specified for attainment of the primary standard under;

(b) Unless EPA grants an extension under subpart R, compliance schedules designed to provide for attainment of a secondary standard must—

(1) Provide for compliance with the applicable plan requirements in a reasonable time; or

(2) Provide for compliance no later than the date specified for the attainment of the secondary standard under § 51.110(c).

§ 51.262 Extension beyond one-year.

(a) Any compliance schedule or revision of it extending over a period of more than one year from the date of its adoption by the State agency must provide for legally enforceable increments of progress toward compliance by each affected source or category of sources. The increments of progress must include—

(1) Each increment of progress specified in § 51.100(q); and

(2) Additional increments of progress as may be necessary to permit close and effective supervision of progress toward timely compliance.

(b) [Reserved]

Subpart O—Miscellaneous Plan Content Requirements

AUTHORITY: Secs. 110, 301(a), 313, 319 Clean Air Act (42 U.S.C. 7410, 7601(a), 7613, 7619).

§ 51.280 Resources.

Each plan must include a description of the resources available to the State and local agencies at the date of submission of the plan and of any additional resources needed to carry out the plan during the 5-year period following its submission. The description must include projections of the extent to which resources will be acquired at 1-, 3-, and 5-year intervals.

[51 FR 40674, Nov. 7, 1986]

§ 51.281 Copies of rules and regulations.

Emission limitations and other measures necessary for attainment and maintenance of any national standard, including any measures necessary to implement the requirements of subpart L must be adopted as rules and regulations enforceable by the State agency. Copies of all such rules and regulations must be submitted with the plan. Submittal of a plan setting forth proposed rules and regulations will not satisfy the requirements of this section nor will it be considered a timely submittal.

[51 FR 40674, Nov. 7, 1986]

§ 51.285 Public notification.

By March 1, 1980, the State shall submit a plan revision that contains provisions for:

(a) Notifying the public on a regular basis of instances or areas in which any primary standard was exceeded during any portion of the preceeding calendar year,

(b) Advising the public of the health hazards associated with such an exceedance of a primary standard, and

(c) Increasing public awareness of:

(1) Measures which can be taken to prevent a primary standard from being exceeded, and

(2) Ways in which the public can participate in regulatory and other efforts to improve air quality.

[44 FR 27569, May 10, 1979]

Subpart P—Protection of Visibility

AUTHORITY: Secs. 110, 114, 121, 160–169, 169A, and 301 of the Clean Air Act, (42 U.S.C. 7410, 7414, 7421, 7470–7479, and 7601).

SOURCE: 45 FR 80089, Dec. 2, 1980, unless otherwise noted.

§ 51.300 Purpose and applicability.

(a) *Purpose.* The primary purposes of this subpart are (1) to require States to develop programs to assure reasonable progress toward meeting the national goal of preventing any future, and remedying and existing, impairment of visibility in mandatory Class I Federal areas which impairment results from man-made air pollution, and (2) to establish necessary additional procedures for new source permit applicants, States, and Federal Land Managers to use in conducting the visibility impact analysis required for new sources under § 51.24.

(b) *Applicability.* (1) The provisions of this subpart are applicable to:

(i) Each State which has a mandatory Class I Federal area identified in part 81, subpart D, of this title, and (ii) each State in which there is any source the emissions from which may reasonably be anticipated to cause or contribute to any impairment of visibility in any such area.

(2) The provisions of this subpart are applicable to the following States:

(i) Alabama
(ii) Alaska
(iii) Arizona
(iv) Arkansas
(v) California
(vi) Colorado
(vii) Florida
(viii) Georgia
(ix) Hawaii
(x) Idaho
(xi) Kentucky
(xii) Louisiana
(xiii) Maine
(xiv) Michigan
(xv) Minnesota
(xvi) Missouri
(xvii) Montana
(xviii) Nevada
(xix) New Hampshire
(xx) New Jersey
(xxi) New Mexico
(xxii) North Carolina
(xxiii) North Dakota
(xxiv) Oklahoma
(xxv) Oregon
(xxvi) South Carolina
(xxvii) South Dakota
(xxviii) Tennessee
(xxix) Texas
(xxx) Utah
(xxxi) Vermont
(xxxii) Virginia
(xxxiii) Virgin Islands
(xxxiv) Washington
(xxxv) West Virginia
(xxxvi) Wyoming

§ 51.301 Definitions.

For purposes of this subpart:

(a) *Adverse impact on visibility* means, for purposes of section 307, visibility impairment which interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the Federal Class I area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of visibility impairments, and how these factors correlate with (1) times of visitor use of the Federal Class I area, and (2) the frequency and timing of natural conditions that reduce visibility. This term does not include effects on integral vistas.

(b) *Agency* means the U.S. Environmental Protection Agency.

(c) *Best Available Retrofit Technology (BART)* means an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility. The emission limitation must be established, on a case-by-case basis, taking into consideration the technology available, the costs of compliance, the energy and nonair quality environmental impacts of compliance, any pollution control equipment in use or in existence at the source, the remaining useful life of the source, and the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology.

(d) *Building, structure, or facility* means all of the pollutant-emitting activities which belong to the same in-

dustrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities must be considered as part of the same industrial grouping if they belong to the same *Major Group* (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972* as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0 respectively).

(e) *Existing Stationary Facility* means any of the following stationary sources of air pollutants, including any reconstructed source, which was not in operation prior to August 7, 1962, and was in existence on August 7, 1977, and has the potential to emit 250 tons per year or more of any air pollutant. In determining potential to emit, fugitive emissions, to the extent quantifiable, must be counted.

(1) Fossil-fuel fired steam electric plants of more than 250 million British thermal units per hour heat input,

(2) Coal cleaning plants (thermal dryers),

(3) Kraft pulp mills,

(4) Portland cement plants,

(5) Primary zinc smelters,

(6) Iron and steel mill plants,

(7) Primary aluminum ore reduction plants,

(8) Primary copper smelters,

(9) Municipal incinerators capable of charging more than 250 tons of refuse per day,

(10) Hydrofluoric, sulfuric, and nitric acid plants,

(11) Petroleum refineries,

(12) Lime plants,

(13) Phosphate rock processing plants,

(14) Coke oven batteries,

(15) Sulfur recovery plants,

(16) Carbon black plants (furnace process),

(17) Primary lead smelters,

(18) Fuel conversion plants,

(19) Sintering plants,

(20) Secondary metal production facilities,

(21) Chemical process plants,

(22) Fossil-fuel boilers of more than 250 million British thermal units per hour heat input,

(23) Petroleum storage and transfer facilities with a capacity exceeding 300,000 barrels,

(24) Taconite ore processing facilities,

(25) Glass fiber processing plants, and

(26) Charcoal production facilities.

(f) *Federal Class I area* means any Federal land that is classified or reclassified *Class I*.

(g) *Federal Land Manager* means the Secretary of the department with authority over the Federal Class I area or, with respect to Roosevelt-Campobello International Park, the Chairman of the Roosevelt-Campobello International Park Commission.

(h) *Federally enforceable* means all limitations and conditions which are enforceable by the Administrator under the Clean Air Act including those requirements developed pursuant to parts 60 and 61 of this title, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to § 52.21 of this chapter or under regulations approved pursuant to part 51, 52, or 60 of this title.

(i) *Fixed capital cost* means the capital needed to provide all of the depreciable components.

(j) *Fugitive Emissions* means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(k) *In existence* means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (1) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (2) entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed in a reasonable time.

(l) *Installation* means an identifiable piece of process equipment.

(m) *In operation* means engaged in activity related to the primary design function of the source.

(n) *Integral vista* means a view perceived from within the mandatory Class I Federal area of a specific landmark or panorama located outside the boundary of the mandatory Class I Federal area.

(o) *Mandatory Class I Federal Area* means any area identified in part 81, subpart D of this title.

(p) *Major Stationary Source* and *major modification* mean *major stationary source* and *major modification*, respectively, as defined in § 51.24.

(q) *Natural Conditions* includes naturally occurring phenomena that reduce visibility as measured in terms of visual range, contrast, or coloration.

(r) *Potential to emit* means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(s) *Reasonably attributable* means attributable by visual observation or any other technique the State deems appropriate.

(t) *Reconstruction* will be presumed to have taken place where the fixed capital cost of the new component exceeds 50 percent of the fixed capital cost of a comparable entirely new source. Any final decision as to whether reconstruction has occurred must be made in accordance with the provisions of § 60.15 (f) (1) through (3) of this title.

(u) *Secondary emissions* means emissions which occur as a result of the construction or operation of an existing stationary facility but do not come from the existing stationary facility. Secondary emissions may include, but are not limited to, emissions from ships or trains coming to or from the existing stationary facility.

(v) *Significant impairment* means, for purposes of section 303, visibility impairment which, in the judgment of the Administrator, interferes with the management, protection, preservation, or enjoyment of the visitor's visual experience of the mandatory Class I Federal area. This determination must be made on a case-by-case basis taking into account the geographic extent, intensity, duration, frequency and time of the visibility impairment, and how these factors correlate with (1) times of visitor use of the mandatory Class I Federal area, and (2) the frequency and timing of natural conditions that reduce visibility.

(w) *Stationary Source* means any building, structure, facility, or installation which emits or may emit any air pollutant.

(x) *Visibility impairment* means any humanly perceptible change in visibility (visual range, contrast, coloration) from that which would have existed under natural conditions.

(y) *Visibility in any mandatory Class I Federal area* includes any integral vista associated with that area.

§ 51.302 Implementation control strategies.

(a) *Plan Revision Procedures.* (1) Each State identified in section 300(b)(2) must submit, no later than nine months from the date of promulgation of this regulation, an implementation plan revision meeting the requirements of this subpart.

(2) (i) The State, prior to adoption of any implementation plan required by this subpart, must conduct one or more public hearings on such plan in accordance with § 51.4.

(ii) In addition to the requirements in § 51.4, the State must provide written notification of such hearings to each affected Federal Land Manager, and other affected States, and must state where the public can inspect a summary prepared by the Federal Land Managers of their conclusions and recommendations, if any, on the proposed plan.

(3) Submission of plans as required by this subpart must be conducted in accordance with the procedures in § 51.5.

(b) *State and Federal Land Manager Coordination.* (1) The State must identify to the Federal Land Managers, in writing and within 30 days of the date of promulgation of these regulations, the title of the official to which the Federal Land Manager of any mandatory Class I Federal area can submit a recommendation on the implementation of this subpart including, but not limited to:

(i) A list of integral vistas that are to be listed by the State for the purpose of implementing section 304,

(ii) Identification of impairment of visibility in any mandatory Class I Federal area(s), and

(iii) Identification of elements for inclusion in the visibility monitoring strategy required by section 305.

(2) The State must provide opportunity for consultation, in person and at least 60 days prior to holding any public hearing on the plan, with the Federal Land Manager on the proposed SIP revision required by this subpart. This consultation must include the opportunity for the affected Federal Land Managers to discuss their:

(i) Assessment of impairment of visibility in any mandatory Class I Federal area, and

(ii) Recommendations on the development of the long-term strategy.

(3) The plan must provide procedures for continuing consultation between the State and Federal Land Manager on the implementation of the visibility protection program required by this subpart.

(c) *General Plan Requirements.* (1) The affected Federal Land Manager may certify to the State, at any time, that there exists impairment of visibility in any mandatory Class I Federal area.

(2) The plan must contain: (i) A long-term (10–15 years) strategy, as specified in section 305 and section 306, including such emission limitations, schedules of compliance, and such other measures including schedules for the implementation of the elements of the long-term strategy as may be necessary to make reasonable progress toward the national goal specified in section 300(a).

(ii) An assessment of visibility impairment and a discussion of how each element of the plan relates to the preventing of future or remedying of existing impairment of visibility in any mandatory Class I Federal area within the State.

(iii) Emission limitations representing BART and schedules for compliance with BART for each existing stationary facility identified according to paragraph (c)(4) of this section.

(3) The plan must require each source to maintain control equipment required by this subpart and establish procedures to ensure such control equipment is properly operated and maintained.

(4) For any existing visibility impairment the Federal Land Manager certifies to the State under paragraph (c)(1) of this section, at least 6 months prior to plan submission:

(i) The State must identify and analyze for BART each existing stationary facility which may reasonably be anticipated to cause or contribute to impairment of visibility in any mandatory Class I Federal area where the impairment in the mandatory Class I Federal area is reasonably attributable to that existing stationary facility. The State need not consider any integral vista the Federal Land Manager did not identify pursuant to section 304(b) at least 6 months before plan submission.

(ii) If the State determines that technologicial or economic limitations on the applicability of measurement methodology to a particular existing stationary facility would make the imposition of an emission standard infeasible it may instead prescribe a design, equipment, work practice, or other operational standard, or combination thereof, to require the application of BART. Such standard, to the degree possible, is to set forth the emission reduction to be achieved by implementation of such design, equipment, work practice or operation, and must provide for compliance by means which achieve equivalent results.

(iii) BART must be determined for fossil-fuel fired generating plants having a total generating capacity in excess of 750 megawatts pursuant to "Guidelines for Determining Best

Available Retrofit Technology for Coal-fired Power Plants and Other Existing Stationary Facilities" (1980), which is incorporated by reference, exclusive of Appendix E, which was published in the FEDERAL REGISTER on February 6, 1980 (45 FR 8210). It is EPA publication No. 450/3-80-009b and is for sale from the U.S. Department of Commerce, National Technical Information Service, 5285 Port Royal Road, Springfield, Virginia 22161. It is also available for inspection at the Office of the Federal Register Information Center, Room 8301, 1100 L Street, NW, Washington, DC 20408.

(iv) The plan must require that each existing stationary facility required to install and operate BART do so as expeditiously as practicable but in no case later than five years after plan approval.

(v) The plan must provide for a BART analysis of any existing stationary facility that might cause or contribute to impairment of visibility in any mandatory Class I Federal area identified under this paragraph (e)(4) at such times; as determined by the Administrator, as new technology for control of the pollutant becomes reasonably available if:

(A) The pollutant is emitted by that existing stationary facility,

(B) Controls representing BART for the pollutant have not previously been required under this subpart, and

(C) The impairment of visibility in any mandatory Class I Federal area is reasonably attributable to the emissions of that pollutant.

§ 51.303 Exemptions from control.

(a) (1) Any existing stationary facility subject to the requirement under section 302 to install, operate, and maintain BART may apply to the Administrator for an exemption from that requirement.

(2) An application under this section must include all available documentation relevant to the impact of the source's emissions on visibility in any mandatory Class I Federal area and a demonstration by the existing stationary facility that it does not or will not, by itself or in combination with other sources, emit any air pollutant which may be reasonably anticipated to cause or contribute to a significant impairment of visibility in any mandatory Class I Federal area.

(b) Any fossil-fuel fired power plant with a total generating capacity of 750 megawatts or more may receive an exemption from BART only if the owner or operator of such power plant demonstrates to the satisfaction of the Administrator that such power plant is located at such a distance from all mandatory Class I Federal areas that such power plant does not or will not, by itself or in combination with other sources, emit any air pollutant which may reasonably be anticipated to cause or contribute to significant impairment of visibility in any such mandatory Class I Federal area.

(c) Application under this section 303 must be accompanied by a written concurrence from the State with regulatory authority over the source.

(d) The existing stationary facility must give prior written notice to all affected Federal Land Managers of any application for exemption under this section 303.

(e) The Federal Land Manager may provide an initial recommendation or comment on the disposition of such application. Such recommendation, where provided, must be part of the exemption application. This recommendation is not to be construed as the concurrence required under paragraph (h) of this section.

(f) The Administrator, within 90 days of receipt of an application for exemption from control, will provide notice of receipt of an exemption application and notice of opportunity for public hearing on the application.

(g) After notice and opportunity for public hearing, the Administrator may grant or deny the exemption. For purposes of judicial review, final EPA action on an application for an exemption under this section 303 will not occur until EPA approves or disapproves the State Implementation Plan revision.

(h) An exemption granted by the Administrator under this section 303 will be effective only upon concurrence by all affected Federal Land Managers with the Administrator's determination.

§ 51.304 Identification of integral vistas.

(a) On or before December 31, 1985 the Federal Land Manager may identify any integral vista. The integral vista must be identified according to criteria the Federal Land Manager develops. These criteria must include, but are not limited to, whether the integral vista is important to the visitor's visual experience of the mandatory Class I Federal area. Adoption of criteria must be preceded by reasonable notice and opportunity for public comment on the proposed criteria.

(b) The Federal Land Manager must notify the State of any integral vistas identified under paragraph (a) of this section, and the reasons therefor.

(c) The State must list in its implementation plan any integral vista the Federal Land Manager identifies at least six months prior to plan submission, and must list in its implementation plan at its earliest opportunity, and in no case later than at the time of the periodic review of the SIP required by section 306(c), any integral vista the Federal Land Manager identifies after that time.

(d) The State need not in its implementation plan list any integral vista the indentification of which was not made in accordance with the criteria in paragraph (a) of this section. In making this finding, the State must carefully consider the expertise of the Federal Land Manager in making the judgments called for by the criteria for identification. Where the State and the Federal Land Manager disagree on the identification of any integral vista, the State must give the Federal Land Manager an opportunity to consult with the Governor of the State.

§ 51.305 Monitoring.

(a) The State must include in the plan a strategy for evaluating visibility in any mandatory Class I Federal area by visual observation or other appropriate monitoring techniques. Such strategy must take into account current and anticipated visibility monitoring research, the availability of appropriate monitoring techniques, and such guidance as is provided by the Agency.

(b) The plan must provide for the consideration of available visibility data and must provide a mechanism for its use in decisions required by this subpart.

§ 51.306 Long-term strategy.

(a) (1) Each plan must include a long-term (10–15 years) strategy for making reasonable progress toward the national goal specified in section 300(a). This strategy must cover any existing impairment the Federal Land Manager certifies to the State at least 6 months prior to plan submission, and any integral vista of which the Federal Land Manager notifies the State at least 6 months prior to plan submission.

(2) A long-term strategy must be developed for each mandatory Class I Federal area located within the State and each mandatory Class I Federal area located outside the State which may be affected by sources within the State. This does not preclude the development of a single comprehensive plan for all such areas.

(3) The plan must set forth with reasonable specificity why the long-term strategy is adequate for making reasonable progress toward the national visibility goal, including remedying existing and preventing future impairment.

(b) The State must coordinate its long-term strategy for an area with existing plans and goals, including those provided by the affected Federal Land Managers, that may affect impairment of visibility in any mandatory Class I Federal area.

(c) The plan must provide for periodic review and revision, as appropriate, of the long-term strategy not less frequent than every three years. This review process must include consultation with the appropriate Federal Land Managers, and the State must provide a report to the public and the Administrator on progress toward the national goal. This report must include an assessment of:

(1) The progress achieved in remedying existing impairment of visibility in any mandatory Class I Federal area;

(2) The ability of the long-term strategy to prevent future impairment

of visibility in any mandatory Class I Federal area;

(3) Any change in visibility since the last such report, or, in the case of the first report, since plan approval;

(4) Additional measures, including the need for SIP revisions, that may be necessary to assure reasonable progress toward the national visibility goal;

(5) The progress achieved in implementing BART and meeting other schedules set forth in the long-term strategy;

(6) The impact of any exemption granted under section 303;

(7) The need for BART to remedy existing visibility impairment of any integral vista listed in the plan since the last such report, or, in the case of the first report, since plan approval.

(d) The long-term strategy must provide for review of the impacts from any new major stationary source or major modifications on visibility in any mandatory Class I Federal area. This review of major stationary sources or major modifications must be in accordance with section 307, § 51.24, § 51.16 and any other binding guidance provided by the Agency insofar as these provisions pertain to protection of visibility in any mandatory Class I Federal areas.

(e) The State must consider, at a minimum, the following factors during the development of its long-term strategy:

(1) Emission reductions due to ongoing air pollution control programs,

(2) Additional emission limitations and schedules for compliance,

(3) Measures to mitigate the impacts of construction activities,

(4) Source retirement and replacement schedules,

(5) Smoke management techniques for agricultural and forestry management purposes including such plans as currently exist within the State for these purposes, and

(6) Enforceability of emission limitations and control measures.

(f) The plan must discuss the reasons why the above and other reasonable measures considered in the development of the long-term strategy were or were not adopted as part of the long-term strategy.

(g) The State, in developing the long-term strategy, must take into account the effect of new sources, and the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the remaining useful life of any affected existing source and equipment therein.

§ 51.307 New source review.

(a) For purposes of new source review of any new major stationary source or major modification that would be constructed in an area that is designated attainment or unclassified under section 107(d)(1)(D) or (E) of the Clean Air Act, the State plan must, in any review under § 51.24 with respect to visibility protection and analyses, provide for:

(1) Written notification of all affected Federal Land Managers of any proposed new major stationary source or major modification that may affect visibility in any Federal Class I area. Such notification must be made in writing and include a copy of all information relevant to the permit application within 30 days of receipt of and at least 60 days prior to public hearing by the State on the application for permit to construct. Such notification must include an analysis of the anticipated impacts on visibility in any Federal Class I area,

(2) Where the State requires or receives advance notification (e.g. early consultation with the source prior to submission of the application or notification of intent to monitor under § 51.24) of a permit application of a source that may affect visibility the State must notify all affected Federal Land Managers within 30 days of such advance notification, and

(3) Consideration of any analysis performed by the Federal Land Manager, provided within 30 days of the notification and analysis required by paragraph (a)(1) of this section, that such proposed new major stationary source or major modification may have an adverse impact on visibility in any Federal Class I area. Where the State finds that such an analysis does not demonstrate to the satisfaction of the State that an adverse impact will

result in the Federal Class I area, the State must, in the notice of public hearing, either explain its decision or give notice as to where the explanation can be obtained.

(b) The plan shall also provide for the review of any new major stationary source or major modification:

(1) That may have an impact on any integral vista of a mandatory Class I Federal area, if it is identified in accordance with section 304 by the Federal Land Manager at least 12 months before submission of a complete permit application, except where the Federal Land Manager has provided notice and opportunity for public comment on the integral vista in which case the review must include impacts on any integral vista identified at least 6 months prior to submission of a complete permit application, unless the State determines under section 304(d) that the identification was not in accordance with the identification criteria, or

(2) That proposes to locate in an area classified as nonattainment under section 107(d)(1)(A), (B), or (C) of the Clean Air Act that may have an impact on visibility in any mandatory Class I Federal area.

(c) Review of any major stationary source or major modification under paragraph (b) of this section, shall be conducted in accordance with paragraph (a) of this section, and § 51.24(o), (p) (1) through (2), and (q). In conducting such reviews the State must ensure that the source's emissions will be consistent with making reasonable progress toward the national visibility goal referred to in section 300(a). The State may take into account the costs of compliance, the time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source.

(d) The State may require monitoring of visibility in any Federal Class I area near the proposed new stationary source or major modification for such purposes and by such means as the State deems necessary and appropriate.

Subpart Q—Reports

AUTHORITY: Secs. 110, 301(a), 313, 319, Clean Air Act (42 U.S.C. 7410, 7601(a), 7613, 7619).

SOURCE: 44 FR 27569, May 10, 1979, unless otherwise noted.

AIR QUALITY DATA REPORTING

§ 51.320 Annual air quality data report.

The requirements for reporting air quality data collected for purposes of the plan are located in subpart C of part 58 of this chapter.

SOURCE EMISSIONS AND STATE ACTION REPORTING

§ 51.321 Annual source emissions and State action report.

On an annual (calendar year) basis beginning with calendar year 1979, the State agency shall report to the Administrator (through the appropriate Regional Office) information as specified in §§ 51.323 through 51.326. Reports must be submitted by July 1 of each year for data collected and actions which took place during the period January 1 to December 31 of the previous year.

§ 51.322 Sources subject to emissions reporting.

(a) Point sources subject to the annual emissions reporting requirements of § 51.321 are defined as follows:

(1) For particulate matter, PM_{10}, sulfur oxides, VOC and nitrogen oxides, any facility that actually emits a total of 90.7 metric tons (100 tons) per year or more of any one pollutant. For particulate matter emissions, the reporting requirement ends with the reporting of calendar vear 1987 emissions. For PM_{10} emissions, the reporting requirement begins with the reporting of calendar year 1988 emissions.

(2) For carbon monoxide, any facility that actually emits a total of 907 metric tons (1000 tons) per year or more.

(3) For lead or lead compounds measured as elemental lead, any facility that actually emits a total of 4.5 metric tons (5 tons) per year or more.

(b) Annual emissions reporting requirements apply only to emissions of each pollutant from any individual emission point within the facility that emits:

(1) For particulate matter, PM_{10}, sulfur oxides, VOC and nitrogen oxides. 22.7 metric tons (25 tons) per year or more. For particulate matter, the reporting requirement ends with the reporting of calendar year 1987 emissions. For PM_{10}, the reporting requirement begins with the reporting of calendar year 1988 emissions.

(2) For carbon monoxide, 227 metric tons (250 tons) per year or more.

(3) For lead or lead compounds measured as elemental lead, 4.5 metric tons (5 tons) per year or more.

[44 FR 27569, May 10, 1979, as amended at 44 FR 65070, Nov. 9, 1979; 52 FR 24714, July 1, 1987]

§ 51.323 Reportable emissions data and information.

(a) The State shall submit in the annual report the following emissions data and information:

(1) Emissions of particulate matter, sulfur oxides, carbon monoxide, nitrogen oxides, and VOC as specified by AEROS Users Manual, Vol. II (EPA 450/2-76-029, OAQPS No. 1.2-039) to be coded into the National Emissions Data System point source coding form,

(2) Emissions of lead or lead compounds measured as elemental lead as specified by AEROS Users Manual, Vol. II (EPA 45/2-76-029, OAQPS No. 1.2-039) to be coded into the Hazardous and Trace Emissions System points source coding forms, and

(3) Emissions of PM_{10} as will be specified in a future guideline.

(b) Such emissions data and information specified in paragraph (a) of this section must be submitted on either paper forms, punched cards, or magnetic tape in the format of the NEDS point source coding forms or the HATREMS point source coding forms as appropriate.

(c) The emissions data and information specified by paragraph (a) of this section must be submitted in the annual report for any point source for which one or more of the following conditions occurs:

(1) A source achieves compliance at any time within the reporting period with any regulation of an applicable plan,

(2) A new or modified source receives approval to construct during the reporting period or begins operating during the reporting period,

(3) A source ceases operations during the reporting period, or

(4) A source's emissions have changed more than 5% from the most recently submitted emissions data.

(d) If, as determined by the State and the Regional Administrator, the emissions from any point source have not changed more than 5% from the most recently submitted emissions data, the State shall update the year of record of the previously reported data and information specified by paragraph (a) of this section.

[44 FR 27569, May 10, 1979, as amended at 52 FR 24714, July 1, 1987]

§ 51.324 Progress in plan enforcement.

(a) For each point source, the State shall report any achievement made during the reporting period of any increment of progress of compliance schedules required by:

(1) The applicable plan, or

(2) Any enforcement order or other State action required to be submitted pursuant to § 51.327.

(b) For each point source, the State shall report any enforcement action taken during the reporting period and not submitted under § 51.327 which results in civil or criminal penalties.

§ 51.325 Contingency plan actions.

The State shall report any measures taken during the reporting period, and an evaluation of their effectiveness, such as those actions specified in the contingency plan required by § 51.16, to stop emissions of air pollutants causing or contributing to any incident of air pollution which corresponds to a stage of episode criteria as established in the contingency plan. The State shall also report an account of any episode stage, as established in the contingency plan, during which no action was taken by the State or local air pollution control agency and an explana-

tion for the failure to take such action.

§ 51.326 Reportable revisions.

The State shall identify and describe all substantive plan revisions during the reporting period of the applicable plan other than revisions to rules and regulations or compliance schedules submitted in accordance with § 51.6(d). Substantive revisions shall include but are not limited to changes in stack-test procedures for determining compliance with applicable regulations, modifications in the projected total manpower needs to carry out the approved plan, and all changes in responsibilities given to local agencies to carry out various portions of the plan.

§ 51.327 Enforcement orders and other State actions.

(a) Any State enforcement order, including any State court order, must be submitted to the Administrator within 60 days of its issuance or adoption by the State.

(b) A State enforcement order or other State action must be submitted as a revision to the applicable implementation plan pursuant to § 51.104 and approved by the Administrator in order to be considered a revision to such plan.

[36 FR 22398, Nov. 25, 1971, as amended at 51 FR 40675, Nov. 7, 1986]

§ 51.328 [Reserved]

Subpart R—Extensions

SOURCE: 51 FR 40675, Nov. 7, 1986, unless otherwise noted.

§ 51.340 Request for 2-year extension.

(a) The Governor of a State may, at the time of submission of a plan to implement a primary standard, request the Administrator to extend, for a period not exceeding 2 years, the 3-year period prescribed by the Act for attainment of the primary standard in such region.

(b) Any such request regarding an interstate region must be submitted jointly with the requests of Governors of all States in the region, or shall show that the Governor of each State in the region has been notified of such a request.

(c) Any such request regarding attainment of a primary standard must be submitted together with a plan which shall:

(1) Set forth a control strategy adequate for attainment of such primary standard.

(2) Show that the necessary technology or alternatives will not be available soon enough to permit full implementation of such control strategy within such 3-year period, i.e., one or more emission sources or classes of sources will be unable to comply with applicable portions of the control strategy.

(3) Provide for attainment of such primary standard as expeditiously as practicable, but in no case later than 5 years after the date of the Administrator's approval of such plan.

(d) Any showing pursuant to paragraph (c) of this section must include the following:

(1) A clear identification of stationary emission sources or classes of moving sources which will be unable to comply with the applicable portions of such control strategy within a 3-year period because the necessary technology or alternatives will not be available soon enough to permit such compliance.

(2) A clear identification and justification of any assumptions made with the respect to the time at which the necessary technology or alternatives will be available.

(3) A clear identification of any alternative means of attainment of such primary standard which were considered and rejected.

(4) A showing that stationary emission sources or classes of moving sources other than those identified pursuant to paragraph (d)(1) of this section will be required to comply, within such 3-year period, with any applicable portions of such control strategy.

(5) A showing that reasonable interim control measures are provided for in such plan with respect to emissions from the source(s) identified pursuant to paragraph (d)(1) of this section.

§ 51.341 Request for 18-month extension.

(a) Upon request of the State made in accordance with this section, the Administrator may, whenever he determines necessary, extend, for a period not to exceed 18 months, the deadline for submitting that portion of a plan that implements a secondary standard.

(b) Any such request must show that attainment of the secondary standards will require emission reductions exceeding those which can be achieved through the application of reasonably available control technology.

(c) Any such request for extension of the deadline with respect to any State's portion of an interstate region must be submitted jointly with requests for such extensions from all other States within the region or must show that all such States have been notified of such request.

(d) Any such request must be submitted sufficiently early to permit development of a plan prior to the deadline in the event that such request is denied.

APPENDICES A-K—[Reserved]

APPENDIX L—EXAMPLE REGULATIONS FOR PREVENTION OF AIR POLLUTION EMERGENCY EPISODES

The example regulations presented herein reflect generally recognized ways of preventing air pollution from reaching levels that would cause imminent and substantial endangerment to the health of persons. States are required under subpart H to have emergency episodes plans but they are not required to adopt the regulations presented herein.

1.0 *Air pollution emergency.* This regulation is designed to prevent the excessive buildup of air pollutants during air pollution episodes, thereby preventing the occurrence of an emergency due to the effects of these pollutants on the health of persons.

1.1 *Episode criteria.* Conditions justifying the proclamation of an air pollution alert, air pollution warning, or air pollution emergency shall be deemed to exist whenever the Director determines that the accumulation of air pollutants in any place is attaining or has attained levels which could, if such levels are sustained or exceeded, lead to a substantial threat to the health of persons. In making this determination, the Director will be guided by the following criteria:

(a) *Air Pollution Forecast:* An internal watch by the Department of Air Pollution Control shall be actuated by a National Weather Service advisory that Atmospheric Stagnation Advisory is in effect or the equivalent local forecast of stagnant atmospheric condition.

(b) *Alert:* The Alert level is that concentration of pollutants at which first stage control actions is to begin. An Alert will be declared when any one of the following levels is reached at any monitoring site:

SO_2—800 $\mu g/m^3$ (0.3 p.p.m.), 24-hour average.

PM_{10}—350 $\mu g/m^3$, 24-hour average.

CO—17 mg/m^3 (15 p.p.m.), 8-hour average.

Ozone (O_3)=400 $\mu g/m^3$ (0.2 ppm)-hour average.

NO_2-1130 $\mu g/m^3$ (0.6 p.p.m.), 1-hour average, 282 $\mu g/m^3$(0.15 p.p.m.), 24-hour average.

In addition to the levels listed for the above pollutants, meterological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve (12) or more hours or increase, or in the case of ozone, the situation is likely to reoccur within the next 24-hours unless control actions are taken.

(c) *Warning:* The warning level indicates that air quality is continuing to degrade and that additional control actions are necessary. A warning will be declared when any one of the following levels is reached at any monitoring site:

SO_2—1,600 $\mu g/m^3$ (0.6 p.p.m.), 24-hour average.

PM_{10}—420 $\mu g/m^3$, 24-hour average.

CO—34 mg/m^3 (30 p.p.m.), 8-hour average.

Ozone (O_3)—800 $\mu g/m^3$ (0.4 p.p.m.), 1-hour average.

NO_2—2,260 $\mu g/m^3$ (1.2 ppm)—1-hour average; 565$\mu g/m^3$ (0.3 ppm), 24-hour average.

In addition to the levels listed for the above pollutants, meterological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve (12) or more hours or increase, or in the case of ozone, the situation is likely to reoccur within the next 24-hours unless control actions are taken.

(d) *Emergency:* The emergency level indicates that air quality is continuing to degrade toward a level of significant harm to the health of persons and that the most stringent control actions are necessary. An emergency will be declared when any one of the following levels is reached at any monitoring site:

SO_2—2,100 $\mu g/m^3$ (0.8 p.p.m.), 24-hour average.

PM_{10}—500 $\mu g/m^3$, 24-hour average.
CO—46 mg/m^3 (40 p.p.m.), 8-hour average.
Ozone (O_3)—1,000 $\mu g/m^3$ (0.5 p.p.m.), 1-hour average.
NO_2–3,000 $\mu g/m^3$ (1.6 ppm), 1-hour average; 750 $\mu g/m^3$ (0.4 ppm), 24-hour average.

In addition to the levels listed for the above pollutants, meterological conditions are such that pollutant concentrations can be expected to remain at the above levels for twelve (12) or more hours or increase, or in the case of ozone, the situation is likely to reoccur within the next 24-hours unless control actions are taken.

(e) *Termination*: Once declared, any status reached by application of these criteria will remain in effect until the criteria for that level are no longer met. At such time, the next lower status will be assumed.

1.2 *Emission reduction plans.* (a) Air Pollution Alert—When the Director declares an Air Pollution Alert, any person responsible for the operation of a source of air pollutants as set forth in Table I shall take all Air Pollution Alert actions as required for such source of air pollutants and shall put into effect the preplanned abatement strategy for an Air Pollution Alert.

(b) Air Pollution Warning—When the Director declares an Air Pollution Warning, any person responsible for the operation of a source of air pollutants as set forth in Table II shall take all Air Pollution Warning actions as required for such source of air pollutants and shall put into effect the preplanned abatement strategy for an Air Pollution Warning.

(c) Air Pollution Emergency—When the Director declares an Air Pollution Emergency, any person responsible for the operation of a source of air pollutants as described in Table III shall take all Air Pollution Emergency actions as required for such source of air pollutants and shall put into effect the preplanned abatement strategy for an Air Pollution Emergency.

(d) When the Director determines that a specified criteria level has been reached at one or more monitoring sites solely because of emissions from a limited number of sources, he shall notify such source(s) that the preplanned abatement strategies of Tables I, II, and III or the standby plans are required, insofar as it applies to such source(s), and shall be put into effect until the criteria of the specified level are no longer met.

1.3 *Preplanned abatement strategies.* (a) Any person responsible for the operation of a source of air pollutants as set forth in Tables I–III shall prepare standby plans for reducing the emission of air pollutants during periods of an Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency. Standby plans shall be designed to reduce or eliminate emissions of air pollutants in accordance with the objectives set forth in Tables I–III which are made a part of this section.

(b) Any person responsible for the operation of a source of air pollutants not set forth under section 1.3(a) shall, when requested by the Director in writing, prepare standby plans for reducing the emission of air pollutants during periods of an Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency. Standby plans shall be designed to reduce or eliminate emissions of air pollutants in accordance with the objectives set forth in Tables I–III.

(c) Standby plans as required under section 1.3(a) and (b) shall be in writing and identify the sources of air pollutants, the approximate amount of reduction of pollutants and a brief description of the manner in which the reduction will be achieved during an Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency.

(d) During a condition of Air Pollution Alert, Air Pollution Warning, and Air Pollution Emergency, standby plans as required by this section shall be made available on the premises to any person authorized to enforce the provisions of applicable rules and regulations.

(e) Standby plans as required by this section shall be submitted to the Director upon request within thirty (30) days of the receipt of such request; such standby plans shall be subject to review and approval by the Director. If, in the opinion of the Director, a standby plan does not effectively carry out the objectives as set forth in Table I–III, the Director may disapprove it, state his reason for disapproval and order the preparation of an amended standby plan within the time period specified in the order.

TABLE I—ABATEMENT STRATEGIES EMISSION REDUCTION PLANS

ALERT LEVEL

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.

2. The use of incinerators for the disposal of any form of solid waste shall be limited to the hours between 12 noon and 4 p.m.

3. Persons operating fuel-burning equipment which required boiler lancing or soot blowing shall perform such operations only between the hours of 12 noon and 4 p.m.
4. Persons operating motor vehicles should eliminate all unnecessary operations.

Part B. Source curtailment

Any person responsible for the operation of a source of air pollutants listed below shall take all required control actions for this Alert Level.

Source of air pollution	Control action
1. Coal or oil-fired electric power generating facilities	a. Substantial reduction by utilization of fuels having low ash and sulfur content. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Substantial reduction by diverting electric power generation to facilities outside of Alert Area.
2. Coal and oil-fired process steam generating facilities	a. Substantial reduction by utilization of fuels having low ash and sulfur content. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Substantial reduction of steam load demands consistent with continuing plant operations.
3. Manufacturing industries of the following classifications: Primary Metals Industry. Petroleum Refining Operations. Chemical Industries. Mineral Processing Industries. Paper and Allied Products. Grain Industry.	a. Substantial reduction of air pollutants from manufacturing operations by curtailing, postponing, or deferring production and all operations. b. Maximum reduction by deferring trade waste disposal operations which emit solid particles, gas vapors or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing.

TABLE II—EMISSION REDUCTION PLANS

WARNING LEVEL

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.
2. The use of incinerators for the disposal of any form of solid waste or liquid waste shall be prohibited.
3. Persons operating fuel-burning equipment which requires boiler lancing or soot blowing shall perform such operations only between the hours of 12 noon and 4 p.m.
4. Persons operating motor vehicles must reduce operations by the use of car pools and increased use of public transportation and elimination of unnecessary operation.

Part B. Source curtailment

Any person responsible for the operation of a source of air pollutants listed below shall take all required control actions for this Warning Level.

Source of air pollution	Control action
1. Coal or oil-fired process steam generating facilities	a. Maximum reduction by utilization of fuels having lowest ash and sulfur content. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Maximum reduction by diverting electric power generation to facilities outside of Warning Area.
2. Oil and oil-fired process steam generating facilities	a. Maximum reduction by utilization of fuels having the lowest available ash and sulfur content. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Making ready for use a plan of action to be taken if an emergency develops.

Source of air pollution	Control action
3. Manufacturing industries which require considerable lead time for shut-down including the following classifications: Petroleum Refining. Chemical Industries. Primary Metals Industries. Glass Industries. Paper and Allied Products.	a. Maximum reduction of air contaminants from manufacturing operations by, if necessary, assuming reasonable economic hardships by postponing production and allied operations. b. Maximum reduction by deferring trade waste disposal operations which emit solid particles, gases, vapors or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing or soot blowing.
4. Manufacturing industries require relatively short lead times for shut-down including the following classifications: Primary Metals Industries. Chemical Industries. Mineral Processing Industries. Grain Industry.	a. Elimination of air pollutants from manufacturing operations by ceasing, curtailing, postponing or deferring production and allied operations to the extent possible without causing injury to persons or damage to equipment. b. Elimination of air pollutants from trade waste disposal processes which emit solid particles, gases, vapors or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing or soot blowing.

TABLE III—EMISSION REDUCTION PLANS

EMERGENCY LEVEL

Part A. General

1. There shall be no open burning by any persons of tree waste, vegetation, refuse, or debris in any form.

2. The use of incinerators for the disposal of any form of solid or liquid waste shall be prohibited.

3. All places of employment described below shall immediately cease operations.

a. Mining and quarrying of nonmetallic minerals.

b. All construction work except that which must proceed to avoid emergent physical harm.

c. All manufacturing establishments except those required to have in force an air pollution emergency plan.

d. All wholesale trade establishments; i.e., places of business primarily engaged in selling merchandise to retailers, or industrial, commercial, institutional or professional users, or to other wholesalers, or acting as agents in buying merchandise for or selling merchandise to such persons or companies, except those engaged in the distribution of drugs, surgical supplies and food.

e. All offices of local, county, and State government including authorities, joint meetings, and other public bodies excepting such agencies which are determined by the chief administrative officer of local, county, or State government, authorities, joint meetings and other public bodies to be vital for public safety and welfare and the enforcement of the provisions of this order.

f. All retail trade establishments except pharmacies, surgical supply distributors, and stores primarily engaged in the sale of food.

g. Banks, credit agencies other than banks, securities and commodities brokers, dealers, exchanges and services; offices of insurance carriers, agents and brokers, real estate offices.

h. Wholesale and retail laundries, laundry services and cleaning and dyeing establishments; photographic studios; beauty shops, barber shops, shoe repair shops.

i. Advertising offices; consumer credit reporting, adjustment and collection agencies; duplicating, addressing, blueprinting; photocopying, mailing, mailing list and stenographic services; equipment rental services, commercial testing laboratories.

j. Automobile repair, automobile services, garages.

k. Establishments rendering amusement and recreational services including motion picture theaters.

l. Elementary and secondary schools, colleges, universities, professional schools, junior colleges, vocational schools, and public and private libraries.

4. All commercial and manufacturing establishments not included in this order will institute such actions as will result in maximum reduction of air pollutants from their operation by ceasing, curtailing, or postponing operations which emit air pollutants to the extent possible without causing injury to persons or damage to equipment.

5. The use of motor vehicles is prohibited except in emergencies with the approval of local or State police.

Part B. Source curtailment

Any person responsible for the operation of a source of air pollutants listed below shall take all required control actions for this Emergency Level.

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Source of air pollution	Control action
1. Coal or oil-fired electric power generating facilities	a. Maximum reduction by utilization of fuels having lowest ash and sulfur content. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing or soot blowing. c. Maximum reduction by diverting electric power generation to facilities outside of Emergency Area.
2. Coal and oil-fired process steam generating facilities	a. Maximum reduction by reducing heat and steam demands to absolute necessities consistent with preventing equipment damage. b. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing and soot blowing. c. Taking the action called for in the emergency plan.
3. Manufacturing industries of the following classifications: Primary Metals Industries. Petroleum Refining. Chemical Industries. Mineral Processing Industries. Grain Industry. Paper and Allied Products.	a. Elimination of air pollutants from manufacturing operations by ceasing, curtailing, postponing or deferring production and allied operations to the extent possible without causing injury to persons or damage to equipment. b. Elimination of air pollutants from trade waste disposal processes which emit solid particles, gases, vapors or malodorous substances. c. Maximum reduction of heat load demands for processing. d. Maximum utilization of mid-day (12 noon to 4 p.m.) atmospheric turbulence for boiler lancing or soot blowing.

(Secs. 110, 301(a), 313, 319, Clean Air Act (42 U.S.C. 7410, 7601(a), 7613, 7619))

[36 FR 22398, Nov. 25, 1971; 36 FR 24002, Dec. 17, 1971, as amended at 37 FR 26312, Dec. 9, 1972; 40 FR 36333, Aug. 20, 1975; 41 FR 35676, Aug. 24, 1976; 44 FR 27570, May 10, 1979; 51 FR 40675, Nov. 7, 1986; 52 FR 24714, July 1, 1987]

Appendix M—Recommended Test Methods for State Implementation Plans

Method 201—Determination of PM_{10} Emissions (Exhaust Gas Recycle Procedure).

Method 201A—Determination of PM_{10} Emissions (Constant Sampling Rate Procedure).

Presented herein are recommended test methods for measuring air pollutants emanating from an emission source. They are provided for States to use in their plans to meet the requirements of subpart K—Source Surveillance.

The State may also choose to adopt other methods to meet the requirements of subpart K of this part, subject to the normal plan review process.

The State may also meet the requirements of subpart K of this part by adopting, again subject to the normal plan review process, any of the relevant methods in appendix A to 40 CFR part 60.

Method 201—Determination of PM_{10} Emissions

(Exhaust Gas Recycle Procedure)

1. Applicability and Principle

1.1 Applicability. This method applies to the in-stack measurement of particulate matter (PM) emissions equal to or less than an aerodynamic diameter of nominally 10 μm (PM_{10}) from stationary sources. The EPA recognizes that condensible emissions not collected by an in-stack method are also PM_{10}, and that emissions that contribute to ambient PM_{10} levels are the sum of condensible emissions and emissions measured by an in-stack PM_{10} method, such as this method or Method 201A. Therefore, for establishing source contributions to ambient levels of PM_{10}, such as for emission inventory purposes, EPA suggests that source PM_{10} measurement include both in-stack PM_{10} and condensible emissions. Condensible missions may be measured by an impinger analysis in combination with this method.

1.2 Principle. A gas sample is isokinetically extracted from the source. An in-stack cyclone is used to separate PM greater than PM_{10}, and an in-stack glass fiber filter is used to collect the PM_{10}. To maintain isokinetic flow rate conditions at the tip of the probe and a constant flow rate through the cyclone, a clean, dried portion of the sample gas at stack temperature is recycled into the nozzle. The particulate mass is determined gravimetrically after removal of uncombined water.

2. Apparatus

Note: Method 5 as cited in this method refers to the method in 40 CFR part 60, appendix A.

2.1 Sampling Train. A schematic of the exhaust of the exhaust gas recycle (EGR) train is shown in Figure 1 of this method.

2.1.1 Nozzle with Recycle Attachment. Stainless steel (316 or equivalent) with a sharp tapered leading edge, and recycle attachment welded directly on the side of the nozzle (see schematic in Figure 2 of this method). The angle of the taper shall be on the outside. Use only straight sampling nozzles. "Gooseneck" or other nozzle extensions designed to turn the sample gas flow 90°, as in Method 5 are not acceptable. Locate a thermocouple in the recycle attachment to measure the temperature of the recycle gas as shown in Figure 3 of this method. The recycle attachment shall be made of stainless steel and shall be connected to the probe and nozzle with stainless steel fittings. Two nozzle sizes, e.g., 0.125 and 0.160 in., should be available to allow isokinetic sampling to be conducted over a range of flow rates. Calibrate each nozzle as described in Method 5, Section 5.1.

2.1.2 PM_{10} Sizer. Cyclone, meeting the specifications in Section 5.7 of this method.

2.1.3 Filter Holder. 63mm, stainless steel. An Andersen filter, part number SE274, has been found to be acceptable for the in-stack filter.

NOTE: Mention of trade names or specific products does not constitute endorsement by the Environmental Protection Agency.

2.1.4 Pitot Tube. Same as in Method 5, Section 2.1.3. Attach the pitot to the pitot lines with stainless steel fittings and to the cyclone in a configuration similar to that shown in Figure 3 of this method. The pitot lines shall be made of heat resistant material and attached to the probe with stainless steel fittings.

2.1.5 EGR Probe. Stainless steel, 15.9 mm (⅝-in.) ID tubing with a probe liner, stainless steel 9.53-mm (⅜-in.) ID stainless steel recycle tubing, two 6.35-mm (¼-in.) ID stainless steel tubing for the pitot tube extensions, three thermocouple leads, and one power lead, all contained by stainless steel tubing with a diameter of approximately 51 mm (2.0 in.). Design considerations should include minimum weight construction materials sufficient for probe structural strength. Wrap the sample and recycle tubes with a heating tape to heat the sample and recycle gases to stack temperature.

2.1.6 Condenser. Same as in Method 5, Section 2.1.7.

2.1.7 Umbilical Connector. Flexible tubing with thermocouple and power leads of sufficient length to connect probe to meter and flow control console.

2.1.8 Vacuum Pump. Leak-tight, oil-less, noncontaminating, with an absolute filter, "HEPA" type, at the pump exit. A Gast Model 0522-V103 G18DX pump has been found to be satisfactory.

2.1.9 Meter and Flow Control Console. System consisting of a dry gas meter and calibrated orifice for measuring sample flow rate and capable of measuring volume to ±2 percent, calibrated laminar flow elements (LFE's) or equivalent for measuring total and sample flow rates, probe heater control, and manometers and magnehelic gauges (as shown in Figures 4 and 5 of this method), or equivalent. Temperatures needed for calculations include stack, recycle, probe, dry gas meter, filter, and total flow. Flow measurements include velocity head (Δp), orifice differential pressure (ΔH), total flow, recycle flow, and total back-pressure through the system.

2.1.10 Barometer. Same as in Method 5, Section 2.1.9.

2.1.11 Rubber Tubing. 6.35-mm (¼-in.) ID flexible rubber tubing.

2.2 Sample Recovery.

2.2.1 Nozzle, Cyclone, and Filter Holder Brushes. Nylon bristle brushes property sized and shaped for cleaning the nozzle, cyclone, filter holder, and probe or probe liner, with stainless steel wire shafts and handles.

2.2.2 Wash Bottles, Glass Sample Storage Containers, Petri Dishes, Graduated Cylinder and Balance, Plastic Storage Containers, and Funnels. Same as Method 5, Sections 2.2.2 through 2.2.6 and 2.2.8, respectively.

2.3 Analysis. Same as in Method 5, Section 2.3.

3. *Reagents*

The reagents used in sampling, sample recovery, and analysis are the same as that specified in Method 5, Sections 3.1, 3.2, and 3.3, respectively.

4. *Procedure*

4.1 Sampling. The complexity of this method is such that, in order to obtain reliable results, testers should be trained and experienced with the test procedures.

4.1.1 Pretest Preparation. Same as in Method 5, Section 4.1.1.

4.1.2 Preliminary Determinations. Same as Method 5, Section 4.1.2, except use the directions on nozzle size selection in this section. Use of the EGR method may require a minimum sampling port diameter of 0.2 m (6 in.). Also, the required maximum number of sample traverse points at any location shall be 12.

4.1.2.1 The cyclone and filter holder must be in-stack or at stack temperature during sampling. The blockage effects of the EGR sampling assembly will be minimal if the cross-sectional area of the sampling assembly is 3 percent or less of the cross-sec-

tional area of the duct and a pitot coefficient of 0.84 may be assigned to the pitot. If the cross-sectional area of the assembly is greater than 3 percent of the cross-sectional area of the duct, then either determine the pitot coefficient at sampling conditions or use a standard pitot with a known coefficient in a configuration with the EGR sampling assembly such that flow disturbances are minimized.

4.1.2.2 Construct a setup of pressure drops for various Δp's and temperatures. A computer is useful for these calculations. An example of the output of the EGR setup program is shown in Figure 6 of this method, and directions on its use are in section 4.1.5.2 of this method. Computer programs, written in IBM BASIC computer language, to do these types of setup and reduction calculations for the EGR procedure, are available through the National Technical Information Services (NTIS), Accession number PB90-500000, 5285 Port Royal Road, Springfield, VA 22161.

4.1.2.3 The EGR setup program allows the tester to select the nozzle size based on anticipated average stack conditions and prints a setup sheet for field use. The amount of recycle through the nozzle should be between 10 and 80 percent. Inputs for the EGR setup program are stack temperature (minimum, maximum, and average), stack velocity (minimum, maximum, and average), atmospheric pressure, stack static pressure, meter box temperature, stack moisture, percent O_2, and percent CO_2 in the stack gas, pitot coefficient (C_p), orifice Δ $H_@$, flow rate measurement calibration values [slope (m) and y-intercept (b) of the calibration curve], and the number of nozzles available and their diameters.

4.1.2.4 A less rigorous calculation for the setup sheet can be done manually using the equations on the example worksheets in Figures 7, 8, and 9 of this method, or by a Hewlett-Packard HP41 calculator using the program provided in appendix D of the EGR operators manual, entitled *Applications Guide for Source PM_{10} Exhaust Gas Recycle Sampling System.* This calculation uses an approximation of the total flow rate and agrees within 1 percent of the exact solution for pressure drops at stack temperatures from 38 to 260 °C (100 to 500 °F) and stack moisture up to 50 percent. Also, the example worksheets use a constant stack temperature in the calculation, ingoring the complicated temperature dependence from all three pressure drop equations. Errors for this at stack temperatures ±28 °C (±50 °F) of the temperature used in the setup calculations are within 5 percent for flow rate and within 5 percent for cyclone cut size.

4.1.2.5 The pressure upstream of the LFE's is assumed to be constant at 0.6 in. Hg in the EGR setup calculations.

4.1.2.6 The setup sheet constructed using this procedure shall be similar to Figure 6 of this method. Inputs needed for the calculation are the same as for the setup computer except that stack velocities are not needed.

4.1.3 Preparation of Collection Train. Same as in Method 5, Section 4.1.3, except use the following directions to set up the train.

4.1.3.1 Assemble the EGR sampling device, and attach it to probe as shown in Figure 3 of this method. If stack temperatures exceed 260 °C (500 °F), then assemble the EGR cyclone without the O-ring and reduce the vacuum requirement to 130 mm Hg (5.0 in. Hg) in the leak-check procedure in Section 4.1.4.3.2 of this method.

4.1.3.2 Connect the proble directly to the filter holder and condenser as in Method 5. Connect the condenser and probe to the meter and flow control console with the umbilical connector. Plug in the pump and attach pump lines to the meter and flow control console.

4.1.4 Leak-Check Procedure. The leak-check for the EGR Method consists of two parts: the sample-side and the recycle-side. The sample-side leak-check is required at the beginning of the run with the cyclone attached, and after the run with the cyclone removed. The cyclone is removed before the post-test leak-check to prevent any disturbance of the collected sample prior to analysis. The recycle-side leak-check tests the leak tight integrity of the recycle components and is required prior to the first test run and after each shipment.

4.1.4.1 Pretest Leak-Check. A pretest leak-check of the entire sample-side, including the cyclone and nozzle, is required. Use the leak-check procedure in Section 4.1.4.3 of this method to conduct a pretest leak-check.

4.1.4.2 Leak-Checks During Sample Run. Same as in Method 5, Section 4.1.4.1.

4.1.4.3 Post-Test Leak-Check. A leak-check is required at the conclusion of each sampling run. Remove the cyclone before the leak-check to prevent the vacuum created by the cooling of the probe from disturbing the collected sample and use the following procedure to conduct a post-test leak-check.

4.1.4.3.1 The sample-side leak-check is performed as follows: After removing the cyclone, seal the probe with a leak-tight stopper. Before starting pump, close the coarse total valve and both recycle valves, and open completely the sample back pressure valve and the fine total valve. After turning the pump on, partially open the coarse total valve slowly to prevent a surge in the manometer. Adjust the vacuum to at least 381 mm Hg (15.0 in. Hg) with the fine total valve. If the desired vacuum is exceed-

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ed, either leak-check at this higher vacuum or end the leak-check as shown below and start over.

CAUTION: Do not decrease the vacuum with any of the valves. This may cause a rupture of the filter.

NOTE: A lower vacuum may be used, provided that it is not exceeded during the test.

4.1.4.3.2 Leak rates in excess of 0.00057 m^3/min (0.020 ft^3/min) are unacceptable. If the leak rate is too high, void the sampling run.

4.1.4.3.3 To complete the leak-check, slowly remove the stopper from the nozzle until the vacuum is near zero, then immediately turn off the pump. This procedure sequence prevents a pressure surge in the manometer fluid and rupture of the filter.

4.1.4.3.4 The recycle-side leak-check is performed as follows: Close the coarse and fine total valves and sample back pressure valve. Plug the sample inlet at the meter box. Turn on the power and the pump, close the recycle valves, and open the total flow valves. Adjust the total flow fine adjust valve until a vacuum of 25 inches of mercury is achieved. If the desired vacuum is exceeded, either leak-check at this higher vacuum, or end the leak-check and start over. Minimum acceptable leak rates are the same as for the sample-side. If the leak rate is too high, void the sampling run.

4.1.5 EGR Train Operation. Same as in Method 5, Section 4.1.5, except omit references to nomographs and recommendations about changing the filter assembly during a run.

4.1.5.1 Record the data required on a data sheet such as the one shown in Figure 10 of this method. Make periodic checks of the manometer level and zero to ensure correct ΔH and Δp values. An acceptable procedure for checking the zero is to equalize the pressure at both ends of the manometer by pulling off the tubing, allowing the fluid to equilibrate and, if necessary, to re-zero. Maintain the probe temperature to within 11 °C (20 °F) of stack temperature.

4.1.5.2 The procedure for using the example EGR setup sheet is as follows: Obtain a stack velocity reading from the pitot manometer (Δp), and find this value on the ordinate axis of the setup sheet. Find the stack temperature on the abscissa. Where these two values intersect are the differential pressures necessary to achieve isokineticity and 10 μm cut size (interpolation may be necessary).

4.1.5.3 The top three numbers are differential pressures (in. H_2O), and the bottom number is the percent recycle at these flow settings. Adjust the total flow rate valves, coarse and fine, to the sample value (ΔH) on the setup sheet, and the recycle flow rate valves, coarse and fine, to the recycle flow on the setup sheet.

4.1.5.4 For startup of the EGR sampl train, the following procedure is recom mended. Preheat the cyclone in the stac for 30 minutes. Close both the sample an recycle coarse valves. Open the fine total fine recycle, and sample back pressur valves halfway. Ensure that the nozzle properly aligned with the sample stream After noting the Δp and stack temperature select the appropriate ΔH and recycle flow the EGR setup sheet. Start the pump and timing device simultaneously. Immediately open both the coarse total and the coarse recycle valves slowly to obtain the approxi mate desired values. Adjust both the fin total and the fine recycle valves to achieve more precisely the desired values. In the EGR flow system, adjustment of either valve will result in a change in both total and recycle flow rates, and a slight iteration between the total and recycle valves may be necessary. Because the sample back pres sure valve controls the total flow rate through the system, it may be necessary to adjust this valve in order to obtain the cor rect flow rate.

NOTE: Isokinetic sampling and proper op eration of the cyclone are not achieved unless the correct ΔH and recycle flow rates are maintained.

4.1.5.5 During the test run, monitor the probe and filter temperatures periodically and make adjustments as necessary to main tain the desired temperatures. If the sample loading is high, the filter may begin to blind or the cyclone may clog. The filter or the cyclone may be replaced during the sample run. Before changing the filter or cyclone, conduct a leak-check (Section 4.1.4.2 of this method). The total particulate mass shall be the sum of all cyclone and the filter catch during the run. Monitor stack temperature and Δp periodically, and make the necessary adjustments in sampling and recycle flow rates to maintain isokinetic sampling and the proper flow rate through the cyclone. At the end of the run, turn off the pump, close the coarse total valve, and record the final dry gas meter reading. Remove the probe from the stack, and conduct a post test leak-check as outlined in Section 4.1.4.3 of this method.

4.1.6 Calculation of Percent Isokinetic Rate and Aerodynamic Cut Size. Calculate percent isokinetic rate and the aerodynamic cut size (D_{50}) (see Calculations, Section 6 of this method) to determine whether the test was valid or another test run should be made. If there was difficult in maintaining isokinetic rates or a D_{50} of 10 μm because of source conditions, the Administrator may be consulted for possible variance.

4.2 Sample Recovery. Allow the probe to cool. When the probe can be safely handled, wipe off all external PM adhering to the outside of the nozzle, cyclone, and nozzle at

tachment, and place a cap over the nozzle to prevent losing or gaining PM. Do not cap the nozzle tip tightly while the sampling train is cooling, as this action would create a vacuum in the filter holder. Disconnect the probe from the umbilical connector, and take the probe to the cleanup site. Sample recovery should be conducted in a dry indoor area or, if outside, in an area protected from wind and free of dust. Cap the ends of the impingers and carry them to the cleanup site. Inspect the components of the train prior to and during disassembly to note any abnormal conditions. Disconnect the pitot from the cyclone. Remove the cyclone from the probe. Recover the sample as follows:

4.2.1 *Container Number 1* (Filter). The recovery shall be the same as that for Container Number 1 in Method 5, Section 4.2.

4.2.2 *Container Number 2* (Cyclone or Large PM Catch). The cyclone must be disassembled and the nozzle removed in order to recover the large PM catch. Quantitatively recover the PM from the interior surfaces of the nozzle and the cyclone, excluding the "turn around" cup and the interior surfaces of the exit tube. The recovery shall be the same as that for Container Number 2 in Method 5, Section 4.2.

4.2.3 *Container Number 3* (PM_{10}). Quantitatively recover the PM from all of the surfaces from cyclone exit to the front half of the in-stack filter holder, including the "turn around" cup and the interior of the exit tube. The recovery shall be the same as that for Container Number 2 in Method 5, Section 4.2.

4.2.4 *Container Number 4* (Silica Gel). Same as that for Container Number 3 in Method 5, Section 4.2.

4.2.5 *Impinger Water.* Same as in Method 5, Section 4.2, under "Impinger Water."

4.3 Analysis. Same as in Method 5, Section 4.3, except handle EGR Container Numbers 1 and 2 like Container Number 1 in Method 5, EGR Container Numbers 3, 4, and 5 like Container Number 3 in Method 5, and EGR Container Number 6 like Container Number 3 in Method 5. Use Figure 11 of this method to record the weights of PM collected.

4.4 Quality Control Procedures. Same as in Method 5, Section 4.4.

5. Calibration

Maintain an accurate laboratory log of all calibrations.

5.1 Probe Nozzle. Same as in Method 5, Section 5.1.

5.2 Pitot Tube. Same as in Method 5, Section 5.2.

5.3 Meter and Flow Control Console.

5.3.1 Dry Gas Meter. Same as in Method 5, Section 5.3.

5.3.2 LFE Gauges. Calibrate the recycle, total, and inlet total LFE gauges with a manometer. Read and record flow rates at 10, 50, and 90 percent of full scale on the total and recycle pressure gauges. Read and record flow rates at 10, 20, and 30 percent of full scale on the inlet total LFE pressure gauge. Record the total and recycle readings to the nearest 0.3 mm (0.01 in.). Record the inlet total LFE readings to the nearest 3 mm (0.1 in.). Make three separate measurements at each setting and calculate the average. The maximum difference between the average pressure reading and the average manometer reading shall not exceed 1 mm (0.05 in.). If the differences exceed the limit specified, adjust or replace the pressure gauge. After each field use, check the calibration of the pressure gauges.

5.3.3 Total LFE. Same as the metering system in Method 5, Section 5.3.

5.3.4 Recycle LFE. Same as the metering system in Method 5, Section 5.3, except completely close both the coarse and fine recycle valves.

5.4 Probe Heater. Connect the probe to the meter and flow control console with the umbilical connector. Insert a thermocouple into the probe sample line approximately half the length of the probe sample line. Calibrate the probe heater at 66 °C (150 °F), 121 °C (250 °F), and 177 °C (350 °F). Turn on the power, and set the probe heater to the specified temperature. Allow the heater to equilibrate, and record the thermocouple temperature and the meter and flow control console temperature to the nearest 0.5 °C (1 °F). The two temperatures should agree within 5.5 °C (10 °F). If this agreement is not met, adjust or replace the probe heater controller.

5.5 Temperature Gauges. Connect all thermocouples, and let the meter and flow contol console equilibrate to ambient temperature. All thermocouples shall agree to within 1.1 °C (2.0 °F) with a standard mercury-in-glass thermometer. Replace defective thermocouples.

5.6 Barometer. Calibrate against a standard mercury-in-glass barometer.

5.7 Probe Cyclone and Nozzle Combinations. The probe cyclone and nozzle combinations need not be calibrated if the cyclone meets the design specifications in Figure 12 of this method and the nozzle meets the design specifications in appendix B of the *Application Guide for the Source PM_{10} Exhaust Gas Recycle Sampling System,* EPA/600/3–88–058. This document may be obtained from Roy Huntley at (919) 541–1060. If the nozzles do not meet the design specifications, then test the cyclone and nozzle combination for conformity with the performance specifications (PS's) in Table 1 of this method. The purpose of the PS tests is to determine if the cyclone's sharpness of cut meets minimum performance criteria. If the cyclone does not meet design specifica-

tions, then, in addition to the cyclone and nozzle combination conforming to the PS's, calibrate the cyclone and determine the relationship between flow rate, gas viscosity, and gas density. Use the procedures in Section 5.7.5 of this method to conduct PS tests and the procedures in Section 5.8 of this method to calibrate the cyclone. Conduct the PS tests in a wind tunnel described in Section 5.7.1 of this method and using a particle generation system described in Section 5.7.2 of this method. Use five particle sizes and three wind velocities as listed in Table 2 of this method. Perform a minimum of three replicate measurements of collection efficiency for each of the 15 conditions listed, for a minimum of 45 measurements.

5.7.1 Wind Tunnel. Perform calibration and PS tests in a wind tunnel (or equivalent test apparatus) capable of establishing and maintaining the required gas stream velocities within 10 percent.

5.7.2 Particle Generation System. The particle generation system shall be capable of producing solid monodispersed dye particles with the mass median aerodynamic diameters specified in Table 2 of this method. The particle size distribution verification should be performed on an integrated sample obtained during the sampling period of each test. An acceptable alternative is to verify the size distribution of samples obtained before and after each test, with both samples required to meet the diameter and monodispersity requirements for an acceptable test run.

5.7.2.1 Establish the size of the solid dye particles delivered to the test section of the wind tunnel using the operating parameters of the particle generation system, and verify the size during the tests by microscopic examination of samples of the particles collected on a membrane filter. The particle size, as established by the operating parameters of the generation system, shall be within the tolerance specified in Table 2 of this method. The precision of the particle size verification technique shall be at least ± 0.5 μm, and the particle size determined by the verification technique shall not differ by more than 10 percent from that established by the operating parameters of the particle generation system.

5.7.2.2 Certify the monodispersity of the particles for each test either by microscopic inspection of collected particles on filters or by other suitable monitoring techniques such as an optical particle counter followed by a multichannel pulse height analyzer. If the proportion of multiplets and satellites in an aerosol exceeds 10 percent by mass, the particle generation system is unacceptable for purposes of this test. Multiplets are particles that are agglomerated, and satellites are particles that are smaller than the specified size range.

5.7.3 Schematic Drawings. Schematic drawings of the wind tunnel and blower system and other information showing complete procedural details of the test atmosphere generation, verification, and delivery techniques shall be furnished with calibration data to the reviewing agency.

5.7.4 Flow Rate Measurement. Determine the cyclone flow rates with a dry gas meter and a stopwatch, or a calibrated orifice system capable of measuring flow rates to within 2 percent.

5.7.5 Performance Specification Procedure. Establish the test particle generator operation and verify the particle size microscopically. If mondispersity is to be verified by measurements at the beginning and the end of the run rather than by an integrated sample, these measurements may be made at this time.

5.7.5.1 The cyclone cut size (D_{50}) is defined as the aerodynamic diameter of a particle having a 50 percent probability of penetration. Determine the required cyclone flow rate at which D_{50} is 10 μm. A suggested procedure is to vary the cyclone flow rate while keeping a constant particle size of 10 μm. Measure the PM collected in the cyclone (m_c), exit tube (m_t), and filter (m_f). Compute the cyclone efficiency (E_c) as follows:

$$E_c = \frac{m_c}{(m_c + m_t + m_f)} \times 100$$

5.7.5.2 Perform three replicates and calculate the average cyclone efficiency as follows:

$$E_{avg} = \frac{(E_1 + E_2 + E_3)}{3}$$

where E_1, E_2, and E_3 are replicate measurements of E_c.

5.7.5.3 Calculate the standard deviation (σ) for the replicate measurements of E_c as follows:

$$\sigma = \left[\frac{(E_1^2+E_2^2+E_3^2) - \frac{(E_1+E_2+E_3)^2}{3}}{2} \right]^{1/2}$$

if σ exceeds 0.10, repeat the replicate runs.

5.7.5.4 Using the cyclone flow rate that produces D_{50} for 10 μm, measure the overall efficiency of the cyclone and nozzle, E_o, at the particle sizes and nominal gas velocities in Table 2 of this method using this following procedure.

5.7.5.5 Set the air velocity in the wind tunnel to one of the nominal gas velocities from Table 2 of this method. Establish isokinetic sampling conditions and the correct flow rate through the sampler (cyclone and nozzle) using recycle capacity so that the D_{50} is 10 μm. Sample long enough to obtain ±5 percent precision on the total collected mass as determined by the precision and the sensitivity of the measuring technique. Determine separately the nozzle catch (m_n), cyclone catch (m_c), cyclone exit tube catch (m_t), and collection filter catch (m_f).

5.7.5.6 Calculate the overall efficiency (E_o) as follows:

$$E_o = \frac{(m_n+m_c)}{(m_n+m_c+m_t+m_f)} \times 100$$

5.7.5.7 Do three replicates for each combination of gas velocities and particle sizes in Table 2 of this method. Calculate E_o for each particle size following the procedures described in this section for determining efficiency. Calculate the standard deviation (σ) for the replicate measurements. If σ exceeds 0.10, repeat the replicate runs.

5.7.6 Criteria for Acceptance. For each of the three gas stream velocities, plot the average E_o as a function of particle size on Figure 13 of this method. Draw a smooth curve for each velocity through all particle sizes. The curve shall be within the banded region for all sizes, and the average E_c for a D_{50} for 10 μm shall be 50 ± 0.5 percent.

5.8 Cyclone Calibration Procedure. The purpose of this section is to develop the relationship between flow rate, gas viscosity, gas density, and D_{50}. This procedure only needs to be done on those cyclones that do not meet the design specifications in Figure 12 of this method.

5.8.1 Calculate cyclone flow rate. Determine the flow rates and D_{50}'s for three different particle sizes between 5 μm and 15 μm, one of which shall be 10 μm. All sizes must be within 0.5 μm. For each size, use a different temperature within 60°C (108°F) of the temperature at which the cyclone is to be used and conduct triplicate runs. A suggested procedure is to keep the particle size constant and vary the flow rate. Some of the values obtained in the PS tests in Section 5.7.5 may be used.

5.8.1.1 On log-log graph paper, plot the Reynolds number (Re) on the abscissa, and the square root of the Stokes 50 number [$(STK_{50})^{1/2}$] on the ordinate for each temperature. Use the following equations:

$$Re = \frac{4\rho Q_{cyc}}{d_{cyc}\pi\mu_{cyc}}$$

$$(Stk_{50})^{1/2} = \left[\frac{4\,Q_{cyc}\,(D_{50})^2}{9\,\pi\,\mu_{cyc}\,(d_{cyc})^3} \right]^{1/2}$$

where:

Q_{cyc} = Cyclone flow rate cm^3/sec.
ρ = Gas density, g/cm^3.
d_{cyc} = Diameter of cyclone inlet, cm.
μ_{cyc} = Viscosity of gas through the cyclone, poise.
D_{50} = Cyclone cut size, cm.

5.8.1.2 Use a linear regression analysis to determine the slope (m), and the y-intercept (b). Use the following formula to determine Q, the cyclone flow rate required for a cut size of 10 μm.

$$Q = \frac{\pi\,\mu_{cyc}}{4} \left[(3000)(K_1)^b \right]^{-(0.5-m)} \left[\frac{T_s}{M_s\,P_s} \right]^{m/(m-0.5)} d^{(m-1.5)/(m-0.5)}$$

where:

Q = Cyclone flow rate for a cut size of 10 μm, cm^3/sec.

T_s = Stack gas temperature, °K,

d = Diameter of nozzle, cm.

$K_1 = 4.077 \times 10^{-3}$.

5.8.2. Directions for Using Q. Refer to Section 5 of the EGR operators manual for directions in using this expression for Q in the setup calculations.

6. Calculations

6.1 The EGR data reduction calculations are performed by the EGR reduction computer program, which is written in IBM BASIC computer language and is available through NTIS, Accession number PB90-500000, 5285 Port Royal Road, Springfield, Virginia 22161. Examples of program inputs and outputs are shown in Figure 14 of this method.

6.1.1 Calculations can also be done manually, as specified in Method 5, Sections 6.3 through 6.7, and 6.9 through 6.12, with the addition of the following:

6.1.2 Nomenclature.

B_c = Moisture fraction of mixed cyclone gas, by volume, dimensionless.

C_1 = Viscosity constant, 51.12 micropoise for °K (51.05 micropoise for °R).

C_2 = Viscosity constant, 0.372 micropoise/°K (0.207 micropoise/°R).

C_3 = Viscosity constant, 1.05×10^{-4} micropoise/°K^2 (3.24×10^{-5} micropoise/°R^2).

C_4 = Viscosity constant, 53.147 micropoise/fraction O_2.

C_5 = Viscosity constant, 74.143 micropoise/fraction H_2O.

D_{50} = Diameter of particles having a 50 percent probability of penetration, μm.

f_{o2} = Stack gas fraction O_2, by volume, dry basis.

K_1 = 0.3858 °K/mm Hg (17.64 °R/in. Hg).

M_c = Wet molecular weight of mixed gas through the PM_{10} cyclone, g/g-mole (lb/lb-mole).

M_d = Dry molecular weight of stack gas, g/g-mole (lb/lb-mole).

P_{bar} = Barometer pressure at sampling site, mm Hg (in. Hg).

P_{in1} = Gauge pressure at inlet to total LFE, mm H_2O (in. H_2O).

P_s = Absolute stack pressure, mm Hg (in. Hg).

Q_2 = Total cyclone flow rate at wet cyclone conditions, m^3/min (ft^3/min).

$Q_{s(std)}$ = Total cyclone flow rate at standard conditons, dscm/min (dscf/min).

T_m = Average temperature of dry gas meter, °K (°R).

T_s = Average stack gas temperature, °K (°R).

$V_{w(std)}$ = Volume of water vapor in gas sample (standard conditions), scm (scf).

X_T = Total LFE linear calibration constant, $m^3/[(min)(mm\ H_2O])$ $\{ft^3/[(min)(in.\ H_2O)]\}$.

Y_T = Total LFE linear calibration constant, dscm/min (dscf/min).

ΔP_T = Pressure differential across total LFE, mm H_2O, (in. H_2O).

θ = Total sampling time, min.

μ_{cyc} = Viscosity of mixed cyclone gas, micropoise.

μ_{LFE} = Viscosity of gas laminar flow elements, micropoise.

μ_{std} = Viscosity of standard air, 180.1 micropoise.

6.2 PM_{10} Particulate Weight. Determine the weight of PM_{10} by summing the weights obtained from Container Numbers 1 and 3, less the acetone blank.

6.3 Total Particulate Weight. Determine the particulate catch for PM greater than PM_{10} from the weight obtained from Container Number 2 less the acetone blank, and add it to the PM_{10} particulate weight.

6.4 PM_{10} Fraction. Determine the PM_{10} fraction of the total particulate weight by dividing the PM_{10} particulate weight by the total particulate weight.

6.5 Total Cyclone Flow Rate. The average flow rate at standard conditions is determined from the average pressure drop across the total LFE and is calculated as follows:

$$Q_{s(std)} = K_1 \left[X_T \Delta P \frac{\mu_{std}}{\mu_{LFE}} + Y_T \right] \frac{P_{bar} + P_{in1}/13.6}{T_m}$$

The flow rate, at actual cyclone conditions, is calculated as follows:

$$Q_s = \frac{T_s}{K_1 P_s} \left[Q_{s(std)} + \frac{V_{w(std)}}{\theta} \right]$$

The flow rate, at actual cyclone conditions, is calculated as follows:

$$Q_s = \frac{T_s}{K_1 P_s}\left[Q_{s(std)} + \frac{V_{m(std)}}{\Theta} \right]$$

6.6 Aerodynamic Cut Size. Use the following procedure to determine the aerodynamic cut size (D_{50}).

6.6.1 Determine the water fraction of the mixed gas through the cyclone by using the equation below.

$$B_c = \frac{V_{w(std)}}{Q_{s(std)}\,\Theta + V_{w(std)}}$$

6.6.2 Calculate the cyclone gas viscosity as follows:

$\mu_{cyc} = C_1 + C_2\,T_s + C_3\,T_s^2 + C_4\,f_{02} - C_5\,B_c$

6.6.3 Calculate the molecular weight on a wet basis of the cyclone gas as follows:

$M_c = M_d(1 - B_c) + 18.0(B_c)$

6.6.4 If the cyclone meets the design specification in Figure 12 of this method, calculate the actual D_{50} of the cyclone for the run as follows:

$$D_{50} = \beta_1 \left[\frac{T_s}{M_c\,P_s} \right]^{\frac{0.2091}{}} \left[\frac{\mu_{cyc}}{Q_s} \right]^{\frac{0.7091}{}}$$

where $\beta_1 = 0.1562$.

6.6.5 If the cyclone does not meet the design specifications in Figure 12 of this method, then use the following equation to calculate D_{50}.

$$D_{50} = (3)(10)^b\,(7.376\times10^{-4})^m \left[\frac{M_c\,P_s}{T_s} \right] \left[\frac{4\,Q_s}{\pi\,\mu_{cyc}} \right] d^{(1.5-m)}$$

where:

m = Slope of the calibration curve obtained in Section 5.8.2.

b = y-intercept of the calibration curve obtained in Section 5.8.2.

6.7 Acceptable Results. Acceptability of anisokinetic variation is the same as Method 5, Section 6.12.

6.7.1 If 9.0 μm < D_{50} <11 μm and 90 < I < 110, the results are acceptable. If D_{50} is greater than 11 μm, the Administrator may accept the results. If D_{50} is less than 9.0 μm, reject the results and repeat the test.

7. Bibliography

1. Same as Bibliography in Method 5.

2. McCain, J.D., J.W. Ragland, and A.D. Williamson. Recommended Methodology for the Determination of Particles Size Distributions in Ducted Sources, Final Report. Prepared for the California Air Resources Board by Southern Research Institute. May 1986.

3. Farthing, W.E., S.S. Dawes, A.D. Williamson, J.D. McCain, R.S. Martin, and J.W. Ragland. Development of Sampling Methods for Source PM-10 Emissions. Southern Research Institute for the Environmental Protection Agency. April 1989.

4. *Application Guide for the Source PM_{10} Exhaust Gas Recycle Sampling System*, EPA/600/3-88-058.

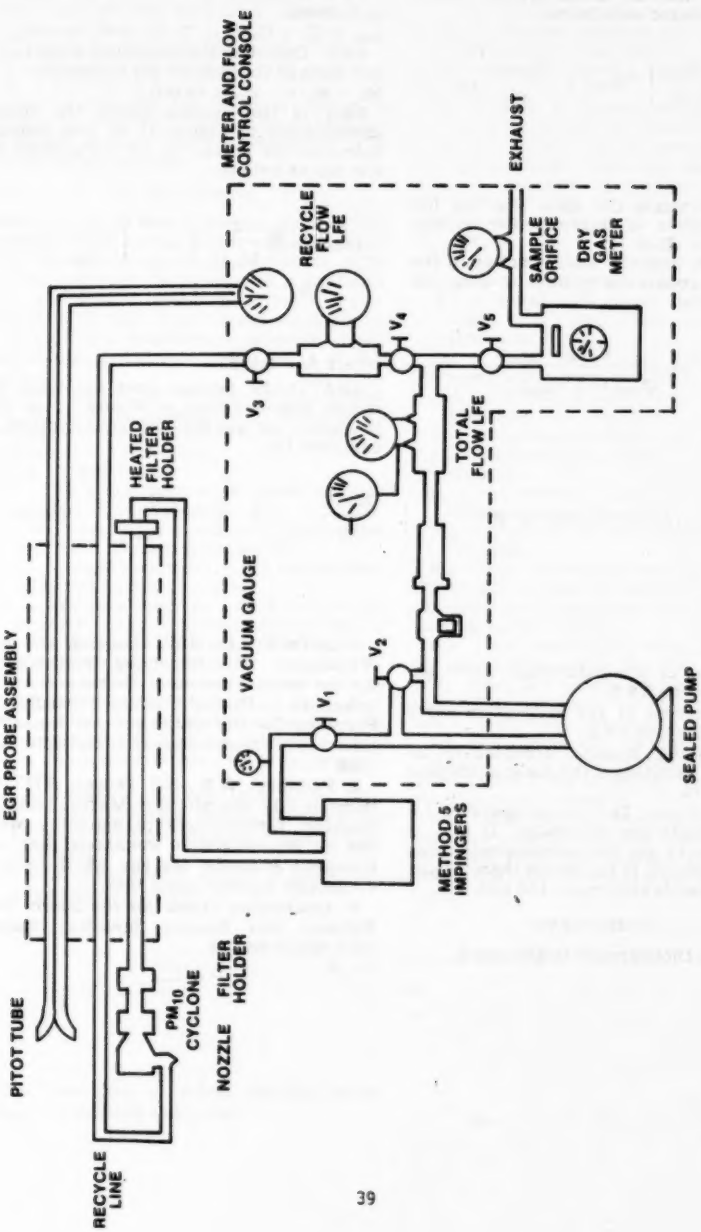


Figure 1. Schematic of the exhaust gas recycle train.

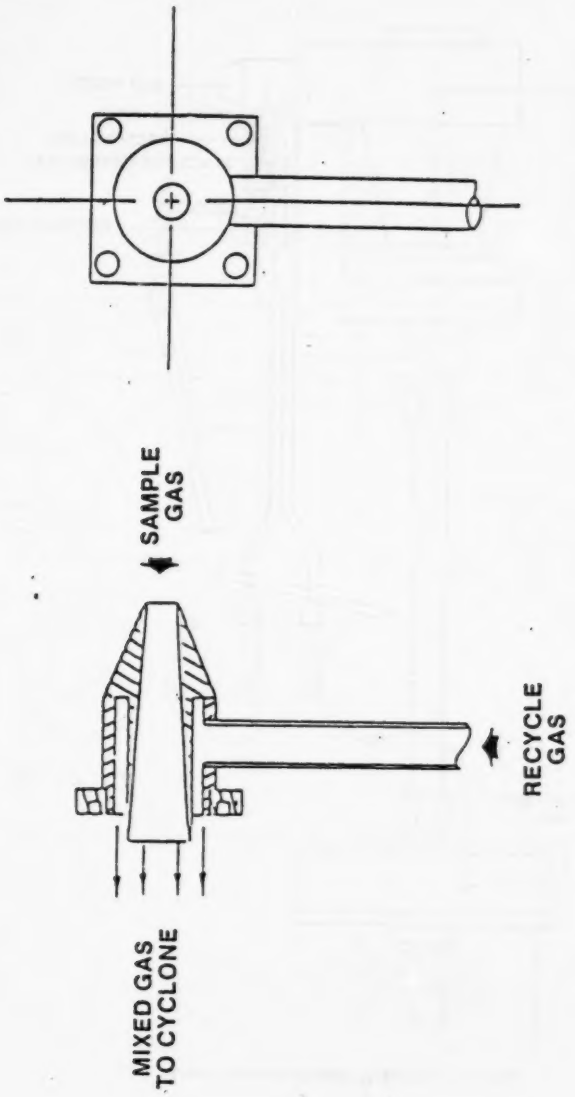


Figure 2. Schematic of EGR nozzle assembly.

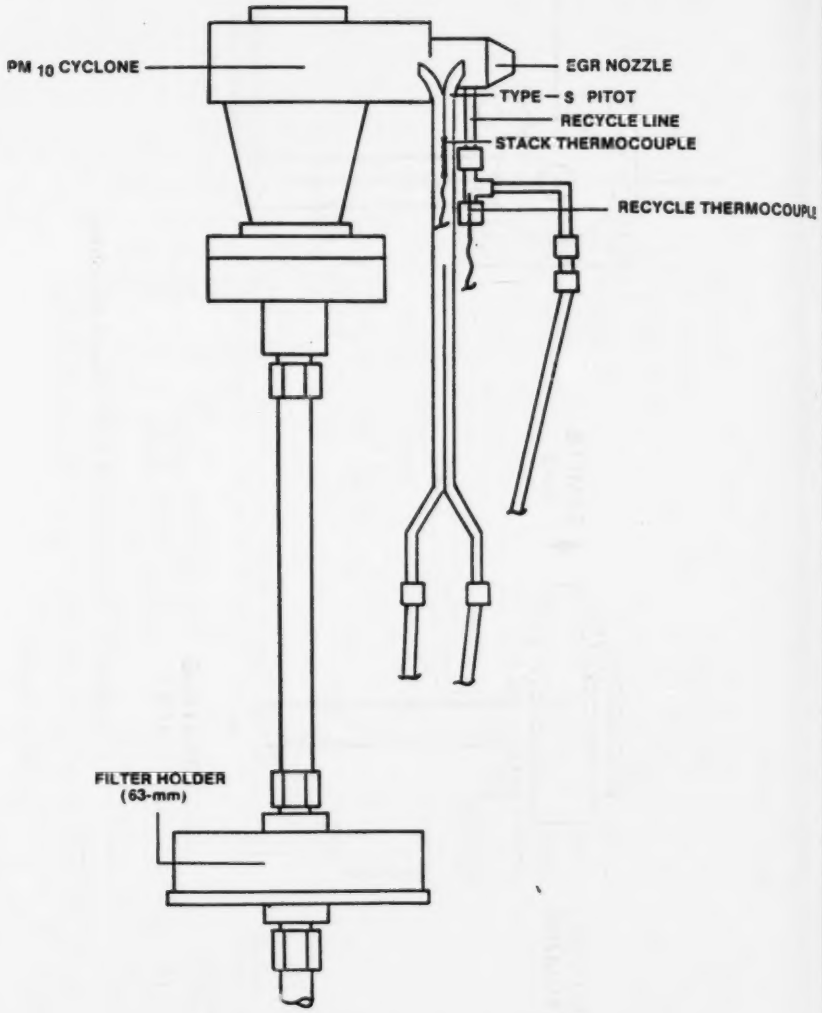


Figure 3. EGR PM_{10} cyclone sampling device.

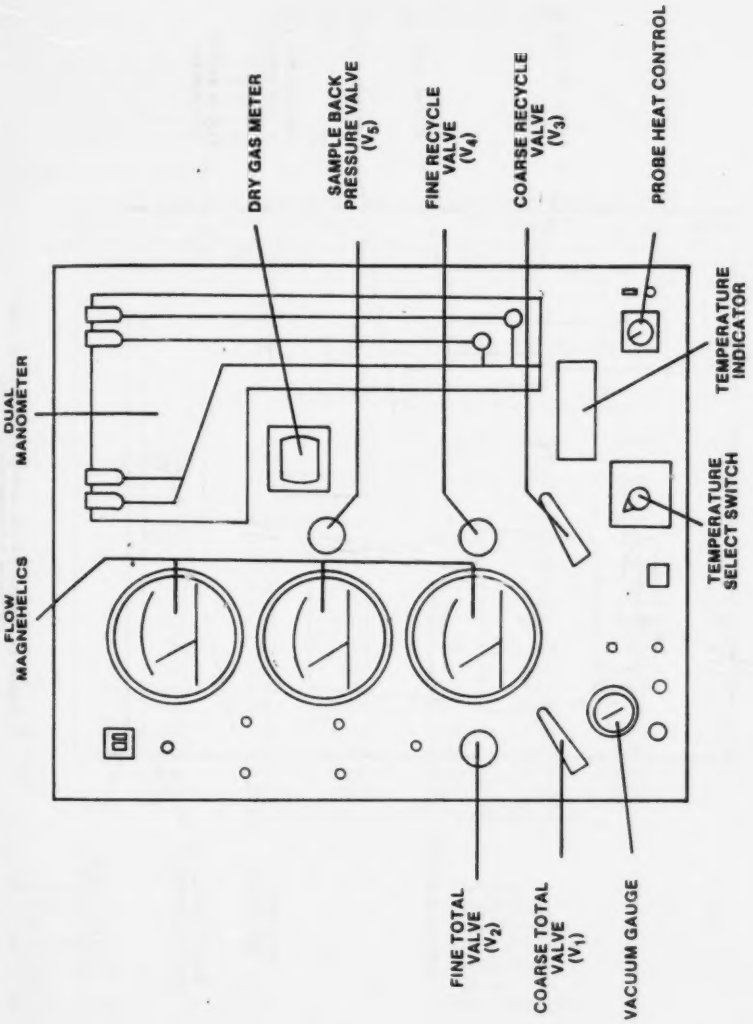


Figure 4. Example EGR control module (front view) showing principle components.

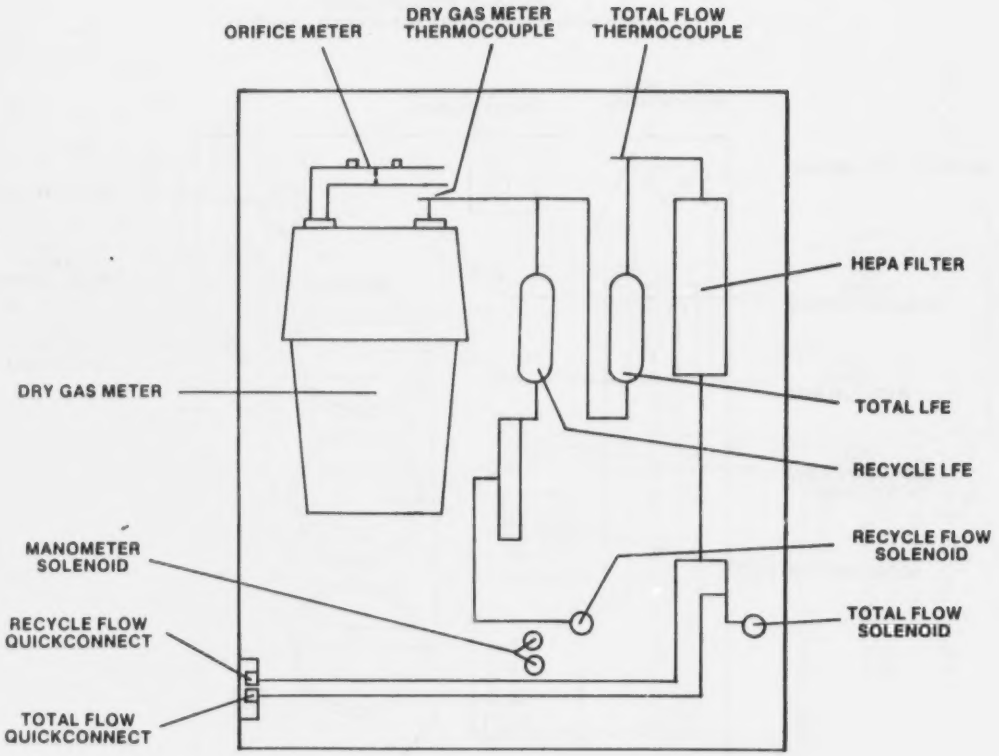


Figure 5. Example EGR control module (rear view) showing principle components.

EXAMPLE EMISSION GAS RECYCLE SETUP SHEET

VERSION 3.1 MAY 1986

TEST I.D.: SAMPLE SETUP
RUN DATE: 11/24/86
LOCATION: SOURCE SIM
OPERATOR(S): RH JB
NOZZLE DIAMETER (IN): .25

STACK CONDITIONS:

AVERAGE TEMPERATURE (F): 200.0 .... GAS COMPOSITION.
AVERAGE VELOCITY (FT/SEC): 15.0 .... H20=10.0% ..... MD=28.84
AMBIENT PRESSURE (IN HG): 29.92 ..... 02=20.9% ..... MW=27.75
STACK PRESSURE (IN H20): .10 ..... CO2=.0% ..... (LB/LB MOLE)

TARGET PRESSURE DROPS

TEMPERATURE (F)

DP(PTO) ...	150	161	172	183	194	206	217	228
0.026.....	SAMPLE	.49	.49	.48	.47	.46	.45	.45
	TOTAL	1.90	1.90	1.91	1.92	1.92	1.92	1.93
	RECY-							
	CLE	2.89	2.92	2.94	2.97	3.00	3.02	3.05
	% RCL	61%	61%	62%	62%	63%	63%	63%
.031.....	. .58	.56	.55	.55	.55	.54	.53	.52
	1.88	1.89	1.89	1.90	1.91	1.91	1.91	1.92
	2.71	2.74	2.77	2.80	2.82	2.85	2.88	2.90
	57%	57%	58%	58%	59%	59%	60%	60%
.035.....	.67	.65	.64	.63	.62	.61	.670	.59
	1.88	1.88	1.89	1.89	1.90	1.90	1.91	1.91
	2.57	2.60	2.63	2.66	2.69	2.72	2.74	2.74
	54%	55%	55%	56%	56%	57%	57%	57%
.039.....	.75	.74	.72	.71	.70	.69	.67	.66
	1.87	1.88	1.88	1.89	1.89	1.90	1.90	1.91
	2.44	2.47	2.50	2.53	2.56	2.59	2.62	2.65
	51%	52%	52%	53%	53%	54%	54%	55%

Figure 6. Example EGR setup sheet.

Barometric pressure, P_{bar}, in. Hg. = _____
Stack static pressure, P_g, in. H_2O. = _____
Average stack temperature, t_s, °F. = _____
Meter temperature, t_m, °F. = _____
Gas analysis:
$\%CO_2$ ..... = _____
$\%O_2$ ..... = _____
$\%N_2+\%CO$ ..... = _____

Fraction moisture content, B_{ws}. = _____
Calibration data:
Nozzle diameter, D_n in. = _____
Pitot coefficient, C_p. = _____
$\Delta H_@$, in. H_2O ..... = _____
11Molecular weight of stack gas, dry basis:
$M_d=0.44$ $(\%CO_2)+0.32$ $(\%O_2)+0.28$ $(\%N_2+\%CO)$. = lb/lb mole

Molecular weight of stack gas, wet basis: $M_w = M_d (1-B_{ws}) + 18B_{ws}$. = _____ lb/lb mole

Absolute stack pressure: $P_s = P_{bar} + (P_g/13.6)$. = _____ in. Hg

$$K = 846.72\, D_n^4\, \Delta H_@\, C_p^2 (1-B_{ws})^2 \qquad \frac{M_d\,(t_m+460)\,P_s}{M_w\,(t_s+460)\,P_{bar}} = \_\_\_\_\_$$

Desired meter orifice pressure (ΔH) for velocity head of stack gas (Δp):
$\Delta H = K\,\Delta p =$ _____ in. H_2O

Figure 7. Example worksheet 1, meter orifice pressure head calculation.

Barometric pressure, P_{bar}, in. Hg. = _____
Absolute stack pressure, P_s, in. Hg. = _____
Average stack temperature, T_s, °R. = _____
Meter temperature, T_m, °R. = _____
Molecular weight of stack gas, wet basis, M_d lb/lb mole. = _____
Pressure upstream of LFE, in. Hg. = 0.6
Gas analysis:
$\%O_2$ ..... = _____
Fraction moisture content, B_{ws}. = _____

Calibration data:
Nozzle diameter, D_n, in. = _____
Pitot coefficient, C_p .... = _____
Total LFE calibration constant, X_t. = _____
Total LFE calibration constant, T_t. = _____
Absolute pressure upstream of LFE:
$P_{LFE} = P_{bar} + 0.6$ ..... = _____ in. Hg
Viscosity of gas in total LFE:
$\mu_{LFE} = 152.418 + 0.2552\, T_m + 3.2355\times10^{-5}\, T_m^2 + 0.53147\,(\%O_2)$. = _____
Viscosity of dry stack gas:
$\mu_d = 152.418 + 0.2552\, T_s + 3.2355\times10^{-5}\, T_s^2 + 0.53147\,(\%O_2)$. = _____

Constants:

$$K_1 = 1.5752\times10^{-5}\,\frac{\mu_{LFE}\,T_m\,P_s^{0.7951}\,\mu_d}{P_{LFE}\,M_d^{0.3949}\,T_s^{0.7951}} = \_\_\_\_\_$$

$$K_2 = 0.1539\,\frac{\mu_{LFE}\,T_m\,D_n^2\,C_p}{P_{LFE}}\left[\frac{P_s}{T_s}\right]^{1/2}$$

$$K_3 = \frac{B_{ws}\,\mu_d\,[1-0.2949\,(1-18/M_d)] + 74.143\,B_{ws}\,(1-B_{ws})}{\mu_d - 74.143\,B_{ws}} = \_\_\_\_\_$$

$$A_1 = \frac{K_1}{X_t} - \frac{\mu_{LFE}\,Y_t}{180.1\,X_t} = \_\_\_\_\_ \qquad B_1 = \frac{K_2\,K_3}{(M_w)^{1/2} X_t} = \_\_\_\_\_$$

Total LFE pressure head:
$\Delta p_t = A_1 - B_1\,(\Delta p)^{1/2} =$ _____ in. H_2O

Figure 8. Example worksheet 2, total LFE pressure head.

Barometric pressure, P_{bar}, in. Hg=_____
Absolute stack pressure, P_s, in. Hg=_____
Average stack temperature, T_s, °R=_____
Meter temperature, T_m, °R=_____
Molecular weight of stack gas, dry basis, M_d, lb/lb mole=_____
Viscosity of LFE gas, μ_{LFE}, poise=_____
Viscosity of dry stack gas, μ_d, poise=_____
Absolute pressure upstream of LFE, P_{FLE}, in. Hg=_____
Calibration data:
Nozzle diameter, D_n, in.=_____
Pitot coefficient, C_p=_____
Recycle LFE calibration constant, X_r=_____
Recycle LFE calibration constant, Y_r=_____

$$K_1 = 1.5752\times10^{-5}\frac{\mu_{LFE}\,T_m\,P_s^{0.7051}\,\mu_d}{P_{LFE}\,M_d^{0.2949}\,T_s^{0.7051}} = \_\_\_\_$$

$$K_2 = 0.1539\frac{M_{LFE}\,T_m\,D_n^{2}\,C_p}{P_{LFE}}\left[\frac{P_s}{T_s}\right]^{\frac{1}{2}}$$

$$K_4 = \frac{\mu_d}{M_w^{0.2051}\,M_d^{0.2949}\,(\mu_d - 74.143\,B_{ws})} = \_\_\_\_$$

$$A_2 = \frac{K_1}{X_r} - \frac{\mu_{LFE}\,Y_r}{180.1\,X_r} = \_\_\_\_$$

$$B_2 = \frac{\frac{K_2}{K_4}}{X_r} = \_\_\_\_$$

Pressure head for recycle LFE:

$\Delta P_r = A_2 - B_2\,(\Delta p)^{1/2}$_____in. H_2O

Figure 9. Example worksheet 3, recycle LFE pressure head.

Run Code	Date	Stack Temperature (°F)	Gas Composition % CO_2 % O_2 % CO
Sampler ID	Start Time	Stack Static Pressure (in. H_2O)	Moisture Content
Filter ID	End Time	Ambient Temperature (°F)	
Sampler Orientation	Sampling Duration (min)	Ambient Pressure (in Hg)	
Sampling Location	DGM (initial)	Gas Velocity	Pitot Leak Check (Pos) (Neg)
Nozzle Diameter-ID (in.)	DGM (final)	System, Leak Check (≥ 15 in. Hg)	Notes
Operator (s)	Sample Volume (ft^3)		
Dual Manometer Leveled and Zeroed?			
Magnehelics Zeroed?			

Run Time	Port No / Trav. Pt.	ΔP Pilot	$\Delta H_@$ Sample	DGM Volume	ΔP Total	P Inlet	ΔP Recycle	T_1 Stack	T_2 Recycle	T_3 Probe	T_4 LFE	T_5 DGM

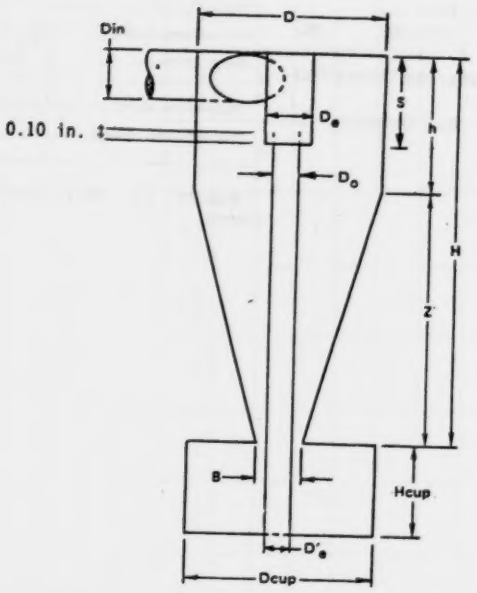
Figure 10. Example EGR Procedure data sheet.

Plant _____
Date _____
Run no. _____
Filter no. _____
Amount liquid lost during transport _____
Acetone blank volume, ml _____
Acetone wash volume, ml (2) _____ (3) _____
Acetone blank conc., mg/mg (Equation 5-4, Method 5) _____
Acetone wash blank, mg (Equation 5-5, Method 5) _____

Container number	Weight of particulate matter, mg		
	Final weight	Tare weight	Weight gain
1			
3			
Total			
Less acetone blank			
Weight of PM_{10}			
2			
Less acetone blank			
Total particulate weight			

Figure 11. EGR method analysis sheet.

Cyclone Interior Dimensions



	Dimensions (±0.02 cm, ±0.01 in.)											
	Din	D	De	B	H	h	Z	S	Hcup	Dcup	D'_e	D_o
cm	1.27	4.47	1.50	1.88	6.95	2.24	4.71	1.57	2.25	4.45	1.02	1.24
inches	0.50	1.76	0.59	0.74	2.74	0.88	1.85	0.62	0.89	1.75	0.40	0.49

Figure 12. Cyclone design specifications.

TABLE 1. PERFORMANCE SPECIFICATIONS FOR SOURCE PM_{10} Cyclones and Nozzle Combinations

Parameter	Units	Specification
1. Collection efficiency.	Percent	Such that collection efficiency falls within envelope specified by Section 5.7.6 and Figure 13.
2. Cyclone cut size (D_{50}).	μm	10±1 μm aerodynamic diameter.

TABLE 2. PARTICLE SIZES AND NOMINAL GAS VELOCITIES FOR EFFICIENCY

Particle size (μm)[a]	Target gas velocities (m/sec)		
	7±1.0	15±1.5	25±2.5
5±0.5			
7±0.5			
10±0.5			
14±1.0			
20±1.0			

(a) Mass median aerodynamic diameter.

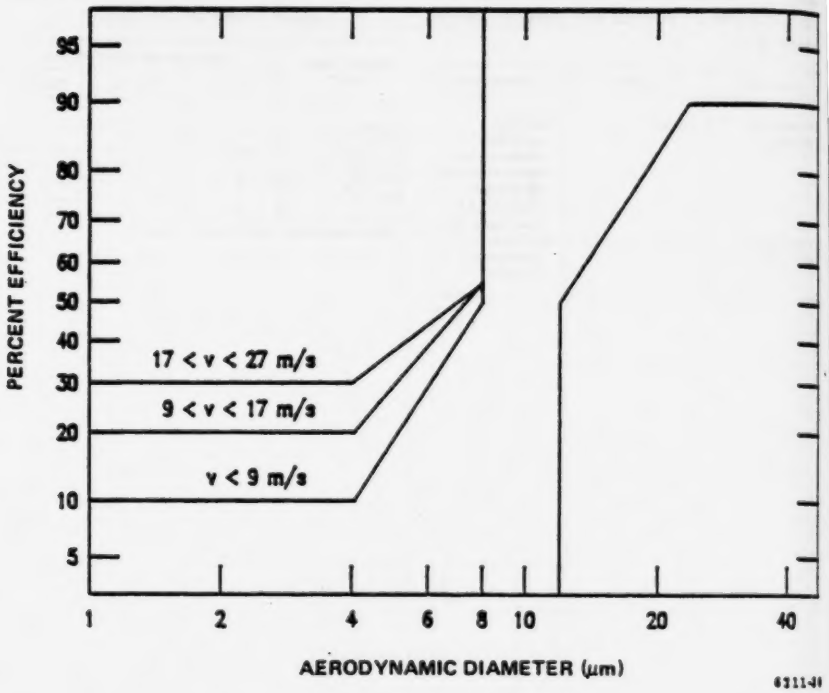


Figure 13. Efficiency envelope for the PM_{10} cyclone.

EMISSION GAS RECYCLE, DATA REDUCTION, VERSION 3.4 MAY 1986

Test ID. Code: Chapel Hill 2.
Test Location: Baghouse Outlet.
Test Site: Chapel Hill.
Test Date: 10/20/86.
Operators(s): JB RH MH.

Entered Run Data

Temperatures:	
T(STK)	251.0 F
T(RCL)	259.0 F
T(LFE)	81.0 F
T(DGM)	76.0 F
System Pressures:	
DH(ORI)	1.18 INWG
DP(TOT)	1.91 INWG
P(INL)	12.15 INWG
DP(RCL)	2.21 INWG
DP(PTO)	0.06 INWG
Miscellanea:	
P(BAR)	29.99 INWG
DP(STK)	0.10 INWG
V(DGM)	13.744 FT3
TIME	60.00 MIN
% CO2	8.00
% O2	20.00
NOZ (IN)	0.2500
Water Content:	
Estimate	0.0%
or	
Condenser	7.0 ML
Column	0.0 GM

Entered Run Data—Continued

Raw Masses:	
Cyclone 1	21.7 MG
Filter	11.7 MG
Impinger Residue	0.0 MG
Blank Values:	
CYC Rinse	0.0 MG
Filter Holder Rinse	0.0 MG
Filter Blank	0.0 MG
Impinger Rinse	0.0 MG

Calibration Values:	
CP(PITOT)	0.840
DH@(ORI)	10.980
M(TOT LFE)	0.2298
B(TOT LFE)	−.0058
M(RCL LFE)	0.0948
B(RCL LFE)	−.0007
DGM GAMMA	0.9940

Reduced Data

Stack Velocity (FT/SEC)	15.95
Stack Gas Moisture (%)	2.4
Sample Flow Rate (ACFM)	0.3104
Total Flow Rate (ACFM)	0.5819
Recycle Flow Rate (ACFM)	0.2760
Percent Recycle	46.7
Isokinetic Ratio (%)	95.1

	(Particulate)		(MG/DNCM)	(GR/ACF)	(GR/DCF)	(LB/DSCF) (X 1E6)
	(UM)	(% <)				
Cyclone 1	10.15	35.8	56.6	0.01794	0.02470	3.53701
Backup Filter			30.5	0.00968	0.01332	1.907
Particulate Total			87.2	0.02762	0.03802	5.444

Note: Figure 14. Example inputs and outputs of the EGR reduction program.

METHOD 201A—DETERMINATION OF PM_{10} EMISSIONS (CONSTANT SAMPLING RATE PROCEDURE)

1. Applicability and Principle

1.1 Applicability. This method applies to the in-stack measurement of particulate matter (PM) emissions equal to or less than an aerodynamic diameter of nominally 10 (PM_{10}) from stationary sources. The EPA recognizes that condensible emissions not collected by an in-stack method are also PM_{10}, and that emissions that contribute to ambient, PM_{10} levels are the sum of condensible emissions and emissions measured by an in-stack PM_{10} method, such as this method or Method 201. Therefore, for establishing source contributions to ambient levels of PM_{10}, such as for emission inventory purposes, EPA suggests that source PM_{10} measurement include both in-stack PM_{10} and condensible emissions. Condensible emissions may be measured by an impinger analysis in combination with this method.

1.2 Principle. A gas sample is extracted at a constant flow rate through an in-stack sizing device, which separates PM greater than PM_{10}. Variations from isokinetic sampling conditions are maintained within well-defined limits. The particulate mass is determined gravimetrically after removal of uncombined water.

2. Apparatus

NOTE: Methods cited in this method are part of 40 CFR part 60, appendix A.

2.1 Sampling Train. A schematic of the Method 201A sampling train is shown in Figure 1 of this method. With the exception of the PM_{10} sizing device and in-stack filter, this train is the same as an EPA Method 17 train.

2.1.1 Nozzle. Stainless steel (316 or equivalent) with a sharp tapered leading edge. Eleven nozzles that meet the design specification in Figure 2 of this method are recommended. A larger number of nozzles with small nozzle increments increase the likelihood that a single nozzle can be used for the entire traverse. If the nozzles do not meet the design specifications in Figure 2 of this method, then the nozzles must meet the criteria in Section 5.2 of this method.

2.1.2 PM_{10} Sizer. Stainless steel (316 or equivalent), capable of determining the PM_{10} fraction. The sizing device shall be either a cyclone that meets the specifications in Section 5.2 of this method or a cascade impactor that has been calibrated using the procedure in Section 5.4 of this method.

2.1.3 Filter Holder. 63-mm, stainless steel. An Andersen filter, part number 3E274, has been found to be acceptable for the in-stack filter. NOTE: Mention of trade names or specific products does not constitute endorsement by the Environmental Protection Agency.

2.1.4 Pitot Tube. Same as in Method 5, Section 2.1.3. The pitot lines shall be made of heat resistant tubing and attached to the probe with stainless steel fittings.

2.1.5 Probe Liner. Optional, same as in Method 5, Section 2.1.2.

2.1.6 Differential Pressure Gauge, Condenser, Metering System, Barometer, and Gas Density Determination Equipment. Same as in Method 5, Sections 2.1.4, and 2.1.7 through 2.1.10, respectively.

2.2 Sample Recovery.

2.2.1 Nozzle, Sizing Device, Probe, and Filter Holder Brushes. Nylon bristle brushes with stainless steel wire shafts and handles, properly sized and shaped for cleaning the nozzle, sizing dedvice, probe or probe liner, and filter holders.

2.2.2 Wash Bottles, Glass Sample Storage Containers, Petri Dishes, Graduated Cylinder and Balance, Plastic Storage Containers, Funnel and Rubber Policeman, and Funnel. Same as in Method 5, Sections 2.2.2 through 2.2.8, respectively.

2.3 Analysis. Same as in Method 5, Section 2.3.

3. Reagents

The reagents for sampling, sample recovery, and analysis are the same as that specified in Method 5, Sections 3.1, 3.2, and 3.3, respectively.

4. Procedure

4.1 Sampling. The complexity of this method is such that, in order to obtain reliable results, testers should be trained and experienced with the test procedures.

4.1.1 Pretest Preparation. Same as in Method 5, Section 4.1.1.

4.1.2 Preliminary Determinations. Same as in Method 5, Section 4.1.2, except use the directions on nozzle size selection and sampling time in this method. Use of any nozzle greater than 0.16 in. in diameter require a sampling port diameter of 6 inches. Also, the required maximum number of traverse points at any location shall be 12.

4.1.2.1 The sizing device must be in-stack or maintained at stack temperature during sampling. The blockage effect of the CSR sampling assembly will be minimal if the cross-sectional area of the sampling assembly is 3 percent or less of the cross-sectional area of the duct. If the cross-sectional area of the assembly is greater than 3 percent of the cross-sectional area of the duct, then either determine the pitot coefficient at sampling conditions or use a standard pitot with a known coefficient in a configuration with the CSR sampling assembly such that flow disturbances are minimized.

4.1.2.2 The setup calculations can be performed by using the following procedures.

4.1.2.2.1 In order to maintain a cut size of 10 μm in the sizing device, the flow rate through the sizing device must be maintained at a constant, discrete value during the run. If the sizing device is a cyclone that meets the design specifications in Figure 3 of this method, use the equations in Figure 4 of this method to calculate three orifice heads (ΔH): one at the average stack temperature, and the other two at temperatures ±28 °C (±50 °F) of the average stack temperature. Use ΔH calculated at the average stack temperature as the pressure head for the sample flow rate as long as the stack temperature during the run is within 28 °C (50 °F) of the average stack temperature. If the stack temperature varies by more than 28 °C (50 °F), then use the appropriate ΔH.

4.1.2.2.2 If the sizing device is a cyclone that does not meet the design specifications in Figure 3 of this method, use the equations in Figure 4 of this method, except use the procedures in Section 5.3 of this method to determine Q_a, the correct cyclone flow rate for a 10 μm size.

4.1.2.2.3 To select a nozzle, use the equations in Figure 5 of this method to calculate Δp_{min} and Δp_{max} for each nozzle at all three temperatures. If the sizing device is a cyclone that does not meet the design specifications in Figure 3 of this method, the example worksheets can be used.

4.1.2.2.4 Correct the Method 2 pitot readings to Method 201A pitot readings by multiplying the Method 2 pitot readings by the square of a ratio of the Method 201A pitot coefficient to the Method 2 pitot coefficient. Select the nozzle for which Δp_{min} and Δp_{max} bracket all of the corrected Method 2 pitot readings. If more than one nozzle meets this requirement, select the nozzle giving the greatest symmetry. Note that if the expected pitot reading for one or more points is near a limit for a chosen nozzle, it may be outside the limits at the time of the run.

4.1.2.2.5 Vary the dwell time, or sampling time, at each traverse point proportionately with the point velocity. Use the equations in Figure 6 of this method to calculate the dwell time at the first point and at each subsequent point. It is recommended that the number of minutes sampled at each point be rounded to the nearest 15 seconds.

4.1.3 Preparation of Collection Train. Same as in Method 5, Section 4.1.3, except omit directions about a glass cyclone.

4.1.4 Leak-Check Procedure. The sizing device is removed before the post-test leak-check to prevent any disturbance of the collected sample prior to analysis.

4.1.4.1 Pretest Leak-Check. A pretest leak-check of the entire sampling train, including the sizing device, is required. Use the leak-check procedure in Method 5, Section 4.1.4.1 to conduct a pretest leak-check.

4.1.4.2 Leak-Checks During Sample Run. Same as in Method 5, Section 4.1.4.1.

4.1.4.3 Post-Test Leak-Check. A leak-check is required at the conclusion of each sampling run. Remove the cyclone before the leak-check to prevent the vacuum created by the cooling of the probe from disturbing the collected sample and use the procedure in Method 5, Section 4.1.4.3 to conduct a post-test leak-check.

4.1.5 Method 201A Train Operation. Same as in Method 5, Section 4.1.5, except use the procedures in this section for isokinetic sampling and flow rate adjustment. Maintain the flow rate calculated in Section 4.1.2.2.1 of this method throughout the run provided the stack temperature is within 28 °C (50 °F) of the temperature used to calculate ΔH. If stack temperatures vary by more than 28 °C (50 °F), use the appropriate ΔH value calculated in Section 4.1.2.2.1 of this method. Calculate the dwell time at each traverse point as in Figure 6 of this method.

4.1.6 Calculation of Percent Isokinetic Rate and Aerodynamic Cut Size (D_{50}). Calculate percent isokinetic rate and D_{50} (see Calculations, Section 6 of this method) to determine whether the test was valid or another test run should be made. If there was difficulty in maintaining isokinetic sampling rates within the prescribed range, or if the D_{50} is not in its proper range because of source conditions, the Administrator may be consulted for possible variance.

4.2 Sample Recovery. If a cascade impactor is used, use the manufacturer's recommended procedures for sample recovery. If a cyclone is used, use the same sample recovery as that in Method 5, Section 4.2, except an increased number of sample recovery containers is required.

4.2.1 *Container Number 1* (In-Stack Filter). The recovery shall be the same as that for Container Number 1 in Method 5, Section 4.2.

4.2.3 *Container Number 2* (Cyclone or Large PM Catch). This step is optional. The anisokinetic error for the cyclone PM is theoretically larger than the error for the PM_{10} catch. Therefore, adding all the fractions to get a total PM catch is not as accurate as Method 5 or Method 201. Disassemble the cyclone and remove the nozzle to recover the large PM catch. Quantitatively recover the PM from the interior surfaces of the nozzle and cyclone, excluding the "turn around" cup and the interior surfaces of the exit tube. The recovery shall be the same as that for Container Number 2 in Method 5, Section 4.2.

4.2.4 *Container Number 3* (PM_{10}). Quantitatively recover the PM from all of the surfaces from the cyclone exit to the front half of the in-stack filter holder, including the "turn around" cup inside the cyclone and the interior surfaces of the exit tube. The

recovery shall be the same as that for Container Number 2 in Method 5, Section 4.2.

4.2.6 *Container Number 4* (Silica Gel). The recovery shall be the same as that for Container Number 3 in Method 5, Section 4.2.

4.2.7 *Impinger Water.* Same as in Method 5, Section 4.2, under "Impinger Water."

4.3 Analysis. Same as in Method 5, Section 4.3, except handle Method 201A Container Number 1 like Container Number 1, Method 201A Container Numbers 2 and 3 like Container Number 2, and Method 201A Container Number 4 like Container Number 3. Use Figure 7 of this method to record the weights of PM collected. Use Figure 5-3 in Method 5, Section 4.3, to record the volume of water collected.

4.4 Quality Control Procedures. Same as in Method 5, Section 4.4.

5. Calibration

Maintain an accurate laboratory log of all calibrations.

5.1 Probe Nozzle, Pitot Tube, Metering System, Probe Heater Calibration, Temperature Gauges, Leak-check of Metering System, and Barometer. Same as in Method 5, Section 5.1 through 5.7, respectively.

5.2 Probe Cyclone and Nozzle Combinations. The probe cyclone and nozzle combinations need not be calibrated if both meet design specifications in Figures 2 and 3 of this method. If the nozzles do not meet design specifications, then test the cyclone and nozzle combinations for conformity with performance specifications (PS's) in Table 1 of this method. If the cyclone does not meet design specifications, then the cyclone and nozzle combination shall conform to the PS's and calibrate the cyclone to determine the relationship between flow rate, gas viscosity, and gas density. Use the procedures in Section 5.2 of this method to conduct PS tests and the procedures in Section 5.3 of this method to calibrate the cyclone. The purpose of the PS tests are to conform that the cyclone and nozzle combination has the desired sharpness of cut. Conduct the PS tests in a wind tunnel described in Section 5.2.1 of this method and particle generation system described in Section 5.2.2 of this method. Use five particle sizes and three wind velocities as listed in Table 2 of this method. A minimum of three replicate measurements of collection efficiency shall be performed for each of the 15 conditions listed, for a minimum of 45 measurements.

5.2.1 Wind Tunnel. Perform the calibration and PS tests in a wind tunnel (or equivalent test apparatus) capable of establishing and maintaining the required gas stream velocities within 10 percent.

5.2.2 Particle Generation System. The particle generation system shall be capable of producing solid monodispersed dye particles with the mass median aerodynamic diameters specified in Table 2 of this method. Perform the particle size distribution verification on an integrated sample obtained during the sampling period of each test. An acceptable alternative is to verify the size distribution of samples obtained before and after each test, with both samples required to meet the diameter and monodispersity requirements for an acceptable test run.

5.2.2.1 Establish the size of the solid dye particles delivered to the test section of the wind tunnel by using the operating parameters of the particle generation system, and verify them during the tests by microscopic examination of samples of the particles collected on a membrane filter. The particle size, as established by the operating parameters of the generation system, shall be within the tolerance specified in Table 2 of this method. The precision of the particle size verification technique shall be at least ± 0.5, μm, and particle size determined by the verification technique shall not differ by more than 10 percent from that established by the operating parameters of the particle generation system.

5.2.2.2 Certify the monodispersity of the particles for each test either by microscopic inspection of collected particles on filters or by other suitable monitoring techniques such as an optical particle counter followed by a multichannel pulse height analyzer. If the proportion of multiplets and satellites in an aerosol exceeds 10 percent by mass, the particle generation system is unacceptable for the purpose of this test. Multiplets are particles that are agglomerated, and satellites are particles that are smaller than the specified size range.

5.2.3 Schematic Drawings. Schematic drawings of the wind tunnel and blower system and other information showing complete procedural details of the test atmosphere generation, verification, and delivery techniques shall be furnished with calibration data to the reviewing agency.

5.2.4 Flow Measurements. Measure the cyclone air flow rates with a dry gas meter and a stopwatch, or a calibrated orifice system capable of measuring flow rates to within 2 percent.

5.2.5 Performance Specification Procedure. Establish test particle generator operation and verify particle size microscopically. If monodisperity is to be verified by measurements at the beginning and the end of the run rather than by an integrated sample, these measurements may be made at this time.

5.2.5.1 The cyclone cut size, or D_{50}, of a cyclone is defined here as the particle size having a 50 percent probability of penetration. Determine the cyclone flow rate at which D_{50} is 10 μm. A suggested procedure is to vary the cyclone flow rate while keeping a constant particle size of 10 μm. Measure

the PM collected in the cyclone (m_c), the exit tube (m_t), and the filter (m_f). Calculate cyclone efficiency (E_c) for each flow rate as follows:

$$E_c = \frac{m_c}{(m_c+m_t+m_f)} \times 100$$

5.2.5.2. Do three replicates and calculate the average cyclone efficiency [$E_{c(avg)}$] as follows:

$$E_{c(avg)}=(E_1+E_2+E_3)/3$$

Where E_1, E_2, and E_3 are replicate measurements of E_c.

5.2.5.3 Calculate the standard deviation (σ) for the replicate measurements of E_c as follows:

$$\sigma = \left[\frac{(E_1^2+E_2^2+E_3^2) - \frac{(E_1+E_2+E_3)^2}{3}}{2} \right]^{1/2}$$

If σ exceeds 0.10, repeat the replicated runs.

5.2.5.4 Measure the overall efficiency of the cyclone and nozzle, E_o, at the particle sizes and nominal gas velocities in Table 2 of this method using the following procedure.

5.2.5.5 Set the air velocity and particle size from one of the conditions in Table 2 of this method. Establish isokinetic sampling conditions and the correct flow rate in the cyclone (obtained by procedures in this section) such that the D_{50} is 10 μm. Sample long enough to obtain ±5 percent precision on total collected mass as determined by the precision and the sensitivity of measuring technique. Determine separately the nozzle catch (m_n), cyclone catch (m_c), cyclone exit tube (M_t), and collection filter catch (m_f) for each particle size and nominal gas velocity in Table 2 of this method. Calculate overall efficiency (E_o) as follows:

$$E_o = \frac{(m_n+m_c)}{(m_n+m_c+m_t+m_f)} \times 100$$

5.2.5.6 Do three replicates for each combination of gas velocity and particle size in Table 2 of this method. Use the equation below to calculate the average overall efficiency [$E_{o(avg)}$] for each combination following the procedures described in this section for determining efficiency.

$$E_{o(avg)}=(E_1+E_2+E_3)/3$$

Where E_1, E_2, and E_3 are replicate measurements of E_o.

5.2.5.7 Use the formula in Section 5.2.5.3 to calculate σ for the replicate measurements. If σ exceeds 0.10 or if the particle sizes and nominal gas velocities are not within the limits specified in Table 2 of this method, repeat the replicate runs.

5.2.6 Criteria for Acceptance. For each of the three gas stream velocities, plot the $E_{o(avg)}$ as a function of particle size on Figure 8 of this method. Draw smooth curves through all particle sizes. $E_{o(avg)}$ shall be within the banded region for all sizes, and the $E_{c(avg)}$ shall be 50±0.5 percent at 10 μm.

5.3 Cyclone Calibration Procedure. The purpose of this procedure is to develop the relationship between flow rate, gas viscosity, gas density, and D_{50}.

5.3.1 Calculate Cyclone Flow Rate. Determine flow rates and D_{50}'s for three different particle sizes between 5 μm and 15 μm, one of which shall be 10 μm. All sizes must be determined within 0.5 μm. For each size, use a different temperature within 60 °C (108 °F) of the temperature at which the cyclone is to be used and conduct triplicate runs. A suggested procedure is to keep the particle size constant and vary the flow rate.

5.3.1.1. On log-log graph paper, plot the Reynolds number (Re) on the abscissa, and the square root of the Stokes 50 number [$(Stk_{50})^{1/2}$] on the ordinate for each temperature. Use the following equations to compute both values:

$$Re = \frac{4\,\rho\,Q_{cyc}}{d_{cyc}\,\pi\,\mu_{cyc}}$$

$$(Stk_{50})^{1/2} = \left[\frac{4\,Q_{cyc}\,(D_{50})^2}{9\,\pi\,\mu_{cyc}\,(d_{cyc})^3} \right]^{1/2}$$

where:

Q_{cyc} = Cyclone flow rate, cm^3/sec.

ρ = Gas density, g/cm^3.

d_{cyc} = Diameter of cyclone inlet, cm.

μ_{cyc} = Viscosity of gas through the cyclone, micropoise.

D_{50}=Aerodynamic diameter of a particle having a 50 percent probability of penetration, cm.

5.3.1.2. Use a linear regression analysis to determine the slope (m) and the Y-intercept (b). Use the following formula to determine Q, the cyclone flow rate required for a cut size of 10 μm.

$$Q_c = \frac{\pi}{4}\mu_{avc}\left[(3000)(K_1)-b\right]^{-(a\,b-m)}\left[\frac{T_s}{M_c P_s}\right]^{m/(m-0.5)} d^{(m-1.5)/(m-0.5)}$$

where:

m=Slope of the calibration line.

b=y-intercept of the calibration line.

Q_c=Cyclone flow rate for a cut size of 10 μm, cm^3/sec.

d=Diameter of nozzle, cm.

T_s=Stack gas temperature, °R.

P_s=Absolute stack pressure, in. Hg.

M_c=Molecular weight of the stack gas. lb/lb-mole.

$K_1=4.077\times10^{-3}$.

5.3.1.3 Refer to the Method 201A operators manual, entitled *Application Guide for Source PM_{10} Measurement with Constant Sampling Rate*, for directions in the use of this equation for Q in the setup calculations.

5.4 Cascade Impactor. The purpose of calibrating a cascade impactor is to determine the empirical constant (STK_{50}), which is specific to the impactor and which permits the accurate determination of the cut size of the impactor stages at field conditions. It is not necessary to calibrate each individual impactor. Once an impactor has been calibrated, the calibration data can be applied to other impactors of identical design.

5.4.1 Wind Tunnel. Same as in Section 5.2.1 of this method.

5.4.2 Particle Generation System. Same as in Section 5.2.2 of this method.

5.4.3 Hardware Configuration for Calibrations. An impaction stage constrains an aerosol to form circular or rectangular jets, which are directed toward a suitable substrate where the larger aerosol particles are collected. For calibration purposes, three stages of the cascade impactor shall be discussed and designated calibration stages 1, 2, and 3. The first calibration stage consists of the collection substrate of an impaction stage and all upstream surfaces up to and including the nozzle. This may include other preceding impactor stages. The second and third calibration stages consist of each respective collection substrate and all upstream surfaces up to but excluding the collection substrate of the preceding calibration stage. This may include intervening impactor stages which are not designated as calibration stages. The cut size, or D_{50}, of the adjacent calibration stages shall differ by a factor of not less than 1.5 and not more than 2.0. For example, if the first calibration stage has a D_{50} of 12 μm, then the D_{50} of the downstream stage shall be between 6 and 8 μm.

5.4.3.1 It is expected, but not necessary, that the complete hardware assembly will be used in each of the sampling runs of the calibration and performance determinations. Only the first calibration stage must be tested under isokinetic sampling conditions. The second and third calibration stages must be calibrated with the collection substrate of the preceding calibration stage in place, so that gas flow patterns existing in field operation will be simulated.

5.4.3.2 Each of the PM_{10} stages should be calibrated with the type of collection substrate, viscid material (such as grease) or glass fiber, used in PM_{10} measurements. Note that most materials used as substrates at elevated temperatures are not viscid at normal laboratory conditions. The substrate material used for calibrations should minimize particle bounce, yet be viscous enough to withstand erosion or deformation by the impactor jets and not interfere with the procedure for measuring the collected PM.

5.4.4 Calibration Procedure. Establish test particle generator operation and verify particle size microscopically. If monodispersity is to be verified by measurements at the beginning and the end of the run rather than by an integrated sample, these measurements shall be made at this time. Measure in triplicate the PM collected by the calibration stage (m) and the PM on all surfaces downstream of the respective calibration stage (m') for all of the flow rates and particle size combinations shown in Table 2 of this method. Techniques of mass measurement may include the use of a dye and spectrophotometer. Particles on the upstream side of a jet plate shall be included with the substrate downstream, except agglomerates of particles, which shall be included with the preceding or upstream substrate. Use the following formula to calculate the collection efficiency (E) for each stage.

5.4.4.1 Use the formula in Section 5.2.5.3 of this method to calculate the standard deviation (σ) for the replicate measurements. If σ exceeds 0.10, repeat the replicate runs.

5.4.4.2 Use the following formula to calculate the average collection efficiency (E_{avg}) for each set of replicate measurements.

$E_{avg}=(E_1+E_2+E_3)/3$

where E_1, E_2, and E_3 are replicate measurements of E.

5.4.4.3 Use the following formula to calculate Stk for each E_{avg}.

$$Stk=\frac{D^2Q}{9\,\mu\,A\,d_j}$$

where:

D=Aerodynamic diameter of the test particle, cm $(g/cm^3)^{1/2}$.
Q=Gas flow rate through the calibration stage at inlet conditions, cm^3/sec.
μ=Gas viscosity, micropoise.
A=Total cross-sectional area of the jets of the calibration stage, cm^2.
d_j=Diameter of one jet of the calibration stage, cm.

5.4.4.4 Determine Stk_{50} for each calibration stage by plotting E_{avg} versus Stk on log-log paper. Stk_{50} is the Stk number at 50 percent efficiency. Note that particle bounce can cause efficiency to decrease at high values of Stk. Thus, 50 percent efficiency can occur at multiple values of Stk. The calibration data should clearly indicate the value of Stk_{50} for minimum particle bounce. Impactor efficiency versus Stk with minimal particle bounce is characterized by a monotonically increasing function with constant or increasing slope with increasing Stk.

5.4.4.5 The Stk_{50} of the first calibration stage can potentially decrease with decreasing nozzle size. Therefore, calibrations should be performed with enough nozzle sizes to provide a measured value within 25 percent of any nozzle size used in PM_{10} measurements.

5.4.5 Criteria For Acceptance. Plot E_{avg} for the first calibration stage versus the square root of the ratio of Stk to Stk_{50} on Figure 9 of this method. Draw a smooth curve through all of the points. The curve shall be within the banded region.

6. Calculations

6.1 Nomenclature.

B_{ws}=Moisture fraction of stack, by volume, dimensionless.
C_1=Viscosity constant, 51.12 micropoise for °K (51.05 micropoise for °R).
C_2=Viscosity constant, 0.372 micropoise/°K (0.207 micropoise/°R).
C_3=Viscosity constant, 1.05×10^{-4} micropoise/$°K^2$ (3.24×10^{-5} micropoise/$°R^2$).
C_4=Viscosity constant, 53.147 micropoise/fraction O_2.
C_5=Viscosity constant, 74.143 micropoise/fraction H_2O.
D_{50}=Diameter of particles having a 50 percent probability of penetration, μm.
f_o=Stack gas fraction O_2, by volume, dry basis.
K_1=0.3858 °K/mm Hg (17.64 °R/in. Hg).
M_c=Wet molecular weight of mixed gas through the PM_{10} cyclone, g/g-mole (lb/lb-mole).
M_d=Dry molecular weight of stack gas, g/g-mole (lb/lb-mole).
P_{bar}=Barometric pressure at sampling site, mm Hg (in. Hg).
P_s=Absolute stack pressure, mm Hg (in. Hg).
Q_a=Total cyclone flow rate at wet cyclone conditions, m^3/min (ft^3/min).
$Q_{a(std)}$=Total cyclone flow rate at standard conditions, dscm/min (dscf/min).
T_m=Average absolute temperature of dry meter, °K (°R).
T_s=Average absolute stack gas temperature, °K (°R).
$V_{w(std)}$=Volume of water vapor in gas sample (standard conditions), scm (scf).
θ=Total sampling time, min.
μ_{cyc}=Viscosity of mixed cyclone gas, micropoise.
μ_{std}=Viscosity of standard air, 180.1 micropoise.

6.2 Analysis of Cascade Impactor Data. Use the manufacturer's recommended procedures to analyze data from cascade impactors.

6.3 Analysis of Cyclone Data. Use the following procedures to analyze data from a single stage cyclone.

6.3.1 PM_{10} Weight. Determine the PM catch in the PM_{10} range from the sum of the weights obtained from Container Numbers 1 and 3 less the acetone blank.

6.3.2 Total PM Weight (optional). Determine the PM catch for greater than PM_{10} from the weight obtained from Container Number 2 less the acetone blank, and add it to the PM_{10} weight.

6.3.3 PM_{10} Fraction. Determine the PM_{10} fraction of the total particulate weight by dividing the PM_{10} particulate weight by the total particulate weight.

6.3.4 Aerodynamic Cut Size. Calculate the stack gas viscosity as follows:

$\mu_{cyc}=C_1+C_2T_2+C_3T_s^2+C_4f_{o2}-C_5B_{ws}$

6.3.4.1 The PM_{10} flow rate, at actual cyclone conditions, is calculated as follows:

$$Q_a=\frac{T_s}{K_1\,P_s}\left[\,Q_{a(std)}+\frac{V_{m(std)}}{\theta}\,\right]$$

6.3.4.2 Calculate the molecular weight on a wet basis of the stack gas as follows:

$M_c=M_d(1-B_{ws})+18.0(B_{ws})$

6.3.4.3 Calculate the actual D_{50} of the cyclone for the given conditions as follows:

$$D_{50}=\beta_1 \left[\frac{T_s}{M_c P_s}\right]^{0.2091} \left[\frac{\mu_{csc}}{Q_s}\right]^{0.7091}$$

where $\beta_1=0.027754$ for metric units (0.15625 for English units).

6.3.5 Acceptable Results. The results are acceptable if two conditions are met. The first is that 9.0 μm < D_{50} < 11.0 μm. The second is that no sampling points are outside Δp_{min} and Δp_{max}, or that 80 percent < I < 120 percent and no more than one sampling point is outside Δp_{min} and Δp_{max}. If D_{50} is less than 9.0 μm, reject the results and repeat the test.

7. Bibliography

1. Same as Bibliography in Method 5.

2. McCain, J.D., J.W. Ragland, and A.D. Williamson. Recommended Methodology for the Determination of Particle Size Distributions in Ducted Sources, Final Report. Prepared for the California Air Resources Board by Southern Research Institute. May 1986.

3. Farthing, W.E., S.S. Dawes, A.D. Williamson, J.D. McCain, R.S. Martin, and J.W. Ragland. Development of Sampling Methods for Source PM_{10} Emissions. Southern Research Institute for the Environmental Protection Agency. April 1989. NTIS PB 89 190375, EPA/600/3-88-056.

4. *Application Guide for Source PM_{10} Measurement with Constant Sampling Rate,* EPA/600/3-88-057.

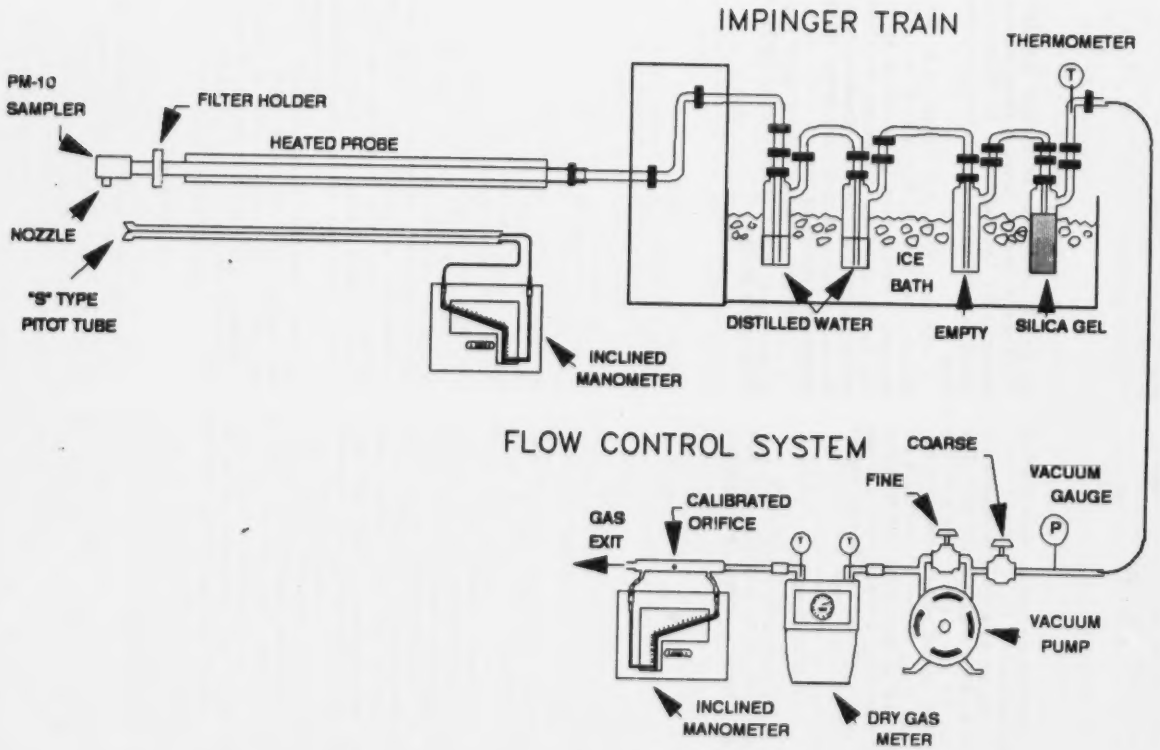
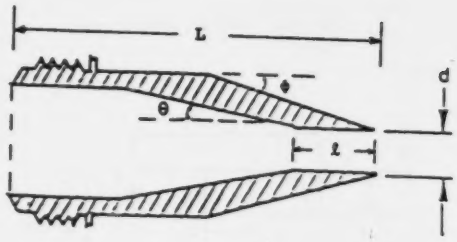


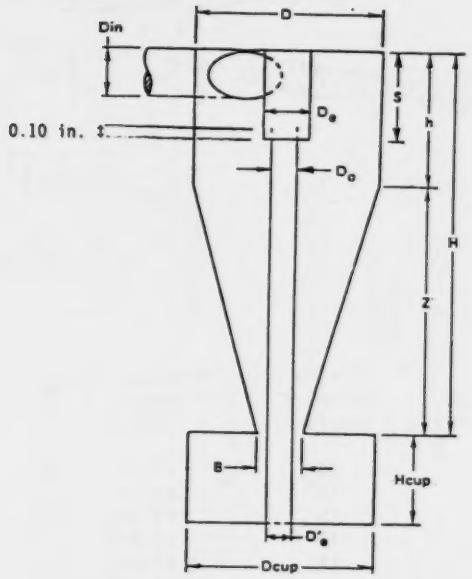
Figure 1. CSR Sampling Train



Nozzle Diameter (inches)	Cone Angle, θ (degrees)	Outside taper, ϕ (degrees)	Straight inlet length, ℓ (inches)	Total Length L (inches)
0.136	4	15	<0.05	2.653±0.05
0.150	4	15	<0.05	2.553±0.05
0.164	5	15	<0.05	1.970±0.05
0.180	6	15	<0.05	1.572±0.05
0.197	6	15	<0.05	1.491±0.05
0.215	6	15	<0.05	1.45 ±0.05
0.233	6	15	<0.05	1.45 ±0.05
0.264	5	15	<0.05	1.45 ±0.05
0.300	4	15	<0.05	1.48 ±0.05
0.342	4	15	<0.05	1.45 ±0.05
0.390	3	15	<0.05	1.45 ±0.05

Figure 2. Nozzle design specifications.

Cyclone Interior Dimensions



	Dimensions (±0.02 cm, ±0.01 in.)											
	Din	D	D_e	B	H	h	Z	S	Hcup	Dcup	D'_e	D_o
cm	1.27	4.47	1.50	1.88	6.95	2.24	4.71	1.57	2.25	4.45	1.02	1.24
inches	0.50	1.76	0.59	0.74	2.74	0.88	1.85	0.62	0.89	1.75	0.40	0.49

Figure 3. Cyclone design specifications.

Barometric pressure, P_{bar}, in. Hg = _____
Stack static pressure, P_g, in. H_2O = _____
Average stack temperature, t_s, °F = _____
Meter temperature, t_m, °F = _____
Orifice $\Delta H_@$, in. H_2O = _____
Gas analysis:
$\%CO_2$ = _____
$\%O_2$ = _____
$\%N_2+\%CO$ = _____
Fraction moisture content, B_{ws} = _____
Molecular weight of stack gas, dry basis:
$M_d = 0.44 (\%CO_2) + 0.32 (\%O_2) + 0.28 (\%N_2+\%CO)$ = _____ lb/lb mole
Molecular weight of stack gas, wet basis:
$M_w = M_d (1-B_{ws}) + 18 (B_{ws})$ = _____ lb/lb mole
Absolute stack pressure:

$$P_s = P_{bar} + \frac{P_g}{13.6} = \_\_\_\_\_ \text{ in. Hg}$$

Viscosity of stack gas:
$\mu_s = 152.418 + 0.2552 t_s + 3.2355 \times 10^{-5} t_s^2 + 0.53147 (\%O_2) - 74.143 B_{ws}$ = _____ micropoise
Cyclone flow rate:

$$Q_s = 0.002837 \mu_s \left[\frac{(t_s+460)}{M_w P_s} \right]^{0.2949} = \_\_\_\_\_ \text{ ft}^3/\text{min}$$

Figure 4. Example worksheet 1, cyclone flow rate and ΔH.

Orifice pressure head (ΔH) needed for cyclone flow rate:

$$\Delta H = \left[\frac{Q_s (1-B_{ws}) P_s}{t_s+460} \right]^2 \frac{t_m M_d 1.083 \Delta H_@}{P_{bar}} = \_\_\_\_\_ \text{ in. } H_2O$$

Calculate ΔH for three temperatures:

t_s, °F			
ΔH, in. H_2O			

Stack viscosity, μ_s, micropoise = _____
Absolute stack pressure, P_s, in. Hg = _____
Average stack temperature, t_s, °F = _____
Meter temperature, t_m, °F = _____
Method 201A pitot coefficient, C_p = _____
Cyclone flow rate, ft³/min, Q_s = _____
Method 2 pitot coefficient, C_p' = _____
Molecular weight of stack gas, wet basis, M_w = _____
Nozzle diameter, D_n, in. = _____
Nozzle velocity:

$$v_n = \frac{3.056 Q_s}{D_n^2} = \_\_\_\_\_ \text{ ft/sec}$$

Maximum and minimum velocities:

$$v_{min} = v_n \left[0.2457 + \left[0.3072 - \frac{0.2603 Q_s^{1/2} \mu_s}{v_n^{1.5}} \right]^{1/2} \right] = \_\_\_\_\_ \text{ ft/sec}$$

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$$v_{max} = v_n \left[0.4457 + \left[0.5690 - \frac{0.2603\ Q_s{}^{1/2}\ \mu_s}{v_n{}^{1.5}} \right]^{1/2} \right] = \_\_\_\_\_ \text{ ft/sec}$$

Figure 5. Example worksheet 2, nozzle selection.

Maximum and minimum velocity he values:

$$\Delta p_{min} = 1.3686 \times 10^{-4} \frac{P_s\ M_w\ (v_{min})^2}{(t_s + 460)\ C_p{}^2} = \_\_\_\_\_ \text{ in. } H_2O$$

$$\Delta p_{max} = 1.3686 \times 10^{-4} \frac{P_s\ M_w\ (v_{max})^2}{(t_s + 460)\ C_p{}^2} = \_\_\_\_\_ \text{ in. } H_2O$$

Nozzle No.				
D_n, in.				
v_n, ft/sec				
v_{min}, ft/sec				
v_{max}, ft/sec				

Nozzle No.				
Δp_{min}, in. H_2O				
Δp_{max}, in. H_2O				

Velocity traverse data:

$$\Delta p(\text{Method 201A}) = \Delta p(\text{Method 2}) \left[\frac{C_p}{C_p'} \right]^2$$

Total run time, minutes = _____
Number of traverse points =

$$t_1 = \left[\frac{\Delta p'_1}{\Delta p'_{avg}} \right]^{1/2} \frac{\text{(Total run time)}}{\text{(Number of points)}}$$

where:
t_1=dwell time at first traverse point, minutes.
$\Delta p'_1$=the velocity head at the first tra verse point (from a previous traverse), in. H_2O.
$\Delta p'_{avg}$=the square of the average square root of the Δp's (from a previous velocity traverse), in. H_2O.

At subsequent traverse points, measure the velocity Δp and calculate the dwell time by using the following equation:

$$t_n = \frac{t_1}{(\Delta p_1)^{1/2}} \quad (\Delta p_n)^{1/2},\ n = 2,3,\ldots \text{total number of sampling points}$$

where:
t_n=dwell time at traverse point n, minutes.
Δp_n=measured velocity head at point n, in. H_2O.
Δp_1=dwell time at first traverse point, minutes.

Figure 6. Example worksheet 3, dwell time.

Point No.	Port							
	Δp	t	Δp	t	Δp	t	Δp	t
1								
2								
3								
4								
5								
6								

Plant _____
Date _____
Run no. _____
Filter no. _____
Amount of liquid lost during transport _____
Acetone blank volume, ml _____
Acetone wash volume, ml (4) _____ (5) _____
Acetone blank conc., mg/mg (Equation 5-4, Method 5) _____
Acetone wash blank, mg (Equation 5-5, Method 5) _____

Container No.	Weight of PM_{10} (mg)		
	Final weight	Tare weight	Weight gain
1			
3			
Total			
Less acetone blank			
Weight of PM_{10}			

Figure 7. Method 201A analysis sheet.

TABLE 1.—PERFORMANCE SPECIFICATIONS FOR SOURCE PM_{10} CYCLONES AND NOZZLE COMBINATIONS

Parameter	Units	Specifications
1. Collection efficiency.	Percent	Such that collection efficiency falls within envelope specified by Section 5.2.6 and Figure 8.
2. Cyclone cut size (D_{50}).	μm	10 ± 1 μm aerodynamic diameter.

TABLE 2.—PARTICLE SIZES AND NOMINAL GAS VELOCITIES FOR EFFICIENCY

Particle size (μm)[a]	Target gas velocities (m/sec)		
	7 ± 1.0	15 ± 1.5	25 ± 2.5
5 ± 0.5			
7 ± 0.5			
10 ± 0.5			
14 ± 1.0			
20 ± 1.0			

(a) Mass median aerodynamic diameter.

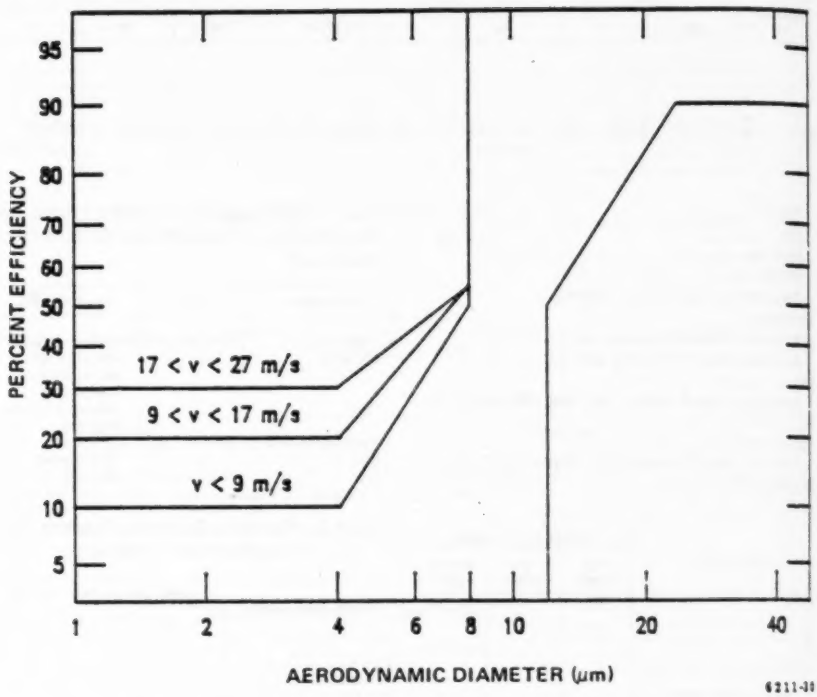

Figure 8. Efficiency envelope for the PM_{10} cyclone.

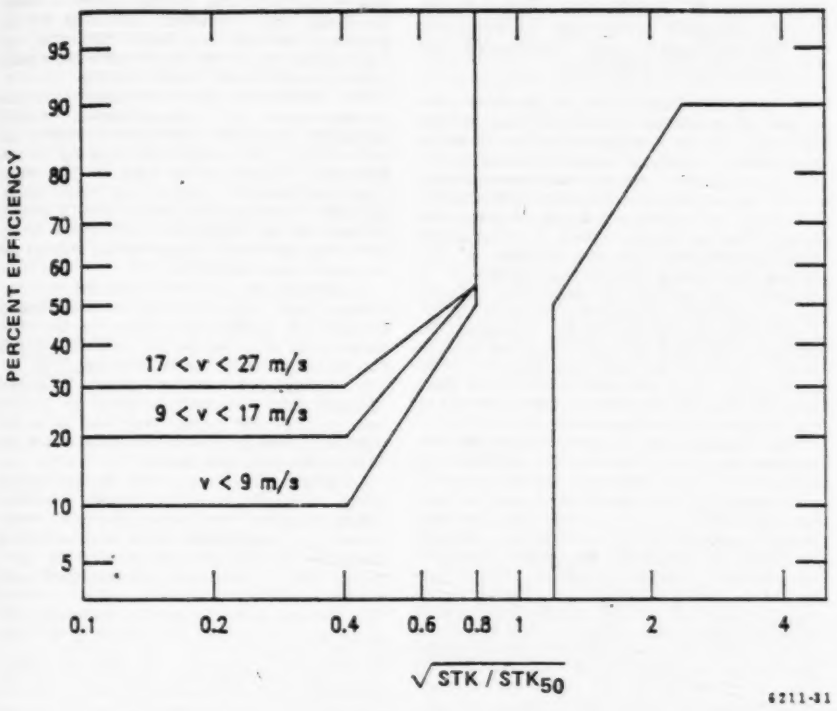

Figure 9. Efficiency envelope for first calibration stage.

[55 FR 14249, Apr. 17, 1990; 55 FR 24687, June 18, 1990]

APPENDIX N—EMISSIONS REDUCTIONS ACHIEVABLE THROUGH INSPECTION, MAINTENANCE AND RETROFIT OF LIGHT DUTY VEHICLES

1. *General.* This appendix presents estimates of emissions reductions that, in the judgment of the Administrator, are likely to be achievable through application of inspection, maintenance, and retrofit measures to in-use motor vehicles. To the extent possible, these estimates are based on empirical data. However, lack of data in some areas has necessitated some extrapolation of empirical data using engineering judgment. It should be noted that, for inspection/maintenance, estimates of changes in oxides of nitrogen are not included in the discussion. In general, oxides of nitrogen were not significantly affected by inspection/maintenance procedures. The sources of empirical data and the bases for judgments are discussed in paragraph 6 of this appendix.

The emissions reductions estimates presented herein are subject to considerable uncertainty. The emissions reductions actually realized in a transportation control program may be greater or less than the estimated reductions. The estimates should therefore be regarded as useful primarily for current planning purposes. Any transportation control plan incorporating in-use vehicle emission control approaches, whether those specifically cited in this appendix or alternatives proposed by a State, must provide, as required by 40 CFR 51.19d, for field verification of the emissions actually achieved in the implemented programs and, as required by section 110(a)(2)(H) of the Act, for any revisions of the transportation control plan that may be indicated thereby.

The approaches to in-use vehicle emissions control cited herein are those judged to be most generally applicable by the Administrator considering the information currently available to him. States are encouraged to consider other approaches that may be applicable to their particular situations. Data and analyses supporting the emissions reductions claimed for alternative approaches must be submitted with the Transportation Control Plan. Several alternative approaches are discussed in a report entitled: "Control Strategies for In-Use Vehicles," available from EPA, Mobile Sources Pollution Control Program, 401 M Street SW., Washington, DC 20460.

States proposing inspection/maintenance or retrofit programs are encouraged to consider the effects on the implementation of their plans of inequities that may arise in connection with these programs. Such inequities may include premature failure or inadequacy of retrofit components, improper or inadequate workmanship at inspection and repair facilities, inconvenient numbers, locations, and operating schedules for inspection, retrofit, and repair facilities, and inadequate public notice of inspection maintenance and retrofit requirements.

The States are also encouraged to give consideration to transportation control measures based on reductions in vehicle use and traffic flow measures. Nothing in this appendix is intended to suggest that transportation control approaches based on inspection, maintenance, and retrofit should necessarily be considered preferable to approaches based on reductions in vehicle use or traffic flow measures.

2. *Definitions.* a. "Precontrolled vehicles" means light duty vehicles sold nationally (except in California) prior to the 1968 model-year and light-duty vehicles sold in California prior to the 1966 model year.

b. "Controlled vehicles" means light-duty vehicles sold nationally (except in California) in the 1968 model-year and later and light-duty vehicles sold in California in the 1966 model-year and later.

c. "Loaded emissions test" means a sampling procedure for exhaust emissions which requires exercising the engine under stress (i.e., loading) by use of a chassis dynamometer to stimulate actual driving conditions. As a minimum requirement, the loaded emission test must include running the vehicle and measuring exhaust emissions at two speeds and loads other than idle.

d. "Idle emission test" means a sampling procedure for exhaust emissions which requires operation of the engine in the idle mode only. At a minimum, the idle test must consist of the following procedures carried out on a fully warmed-up engine: A verification that the idle revolutions per minute is within manufacturer's specified limits and a measurement of the exhaust carbon monoxide and/or hydrocarbon concentrations during the period of time from 15 to 25 seconds after the engine either was used to move the car or was run at 2,000 to 2,500 r/min with no load for 2 or 3 seconds.

e. "Retrofit" means the addition or removal of an item of equipment, or a required adjustment, connection, or disconnection of an existing item of equipment, for the purpose of reducing emissions.

f. "Inspection/maintenance" means a program to reduce emissions from in-use vehicles through identifying vehicles that need emissions control related maintenance and requiring that maintenance be performed.

g. "Idle adjustments" means a series of adjustments which include idle revolutions per minute, idle air/fuel ratio, and basic timing.

h. "Initial failure rate" means the percentage of vehicles rejected because of ex-

cessive emissions of a single pollutant during the first inspection cycle of an inspection/maintenance program. (If inspection is conducted for more than one pollutant, the total failure rate may be higher than the failure rates for each single pollutant.)

3. *Inspection/maintenance of light duty vehicles*—(a) *Reductions*—(i) *Loaded emission tests.* The following average annual reductions in vehicular exhaust emissions as a function of initial failure rates are estimated to be achievable through implementation of an inspection/maintenance program using a loaded emission test:

Percent initial failure rate	10	20	30	40	50
Emission reduction (percent):					
Hydrocarbons	8	11	13	14	15
Carbon monoxide	4	7	9	11	12

(ii) *Idle emission test.* The following average annual reduction in vehicular exhaust emissions as a function of rejection rate are estimated to be achievable through implementation of an inspection/maintenance program using an idle test:

Percent initial failure rate	10	20	30	40	50
Emission reduction (percent):					
Hydrocarbons	6	8	10	11	11
Carbon monoxide	3	6	8	9	10

To obtain these reductions an inspection/maintenance program must provide for inspection of each vehicle at least once per year. More frequent inspection and maintenance is expected to provide larger average emissions reductions, although at greater cost. During the first inspection cycle of an inspection/maintenance program, emissions reductions may be assumed only to the extent consistent with the portion of the vehicle population that has been inspected by that time. During subsequent years the full reductions shown in the tables may be assumed provided that the emissions levels which correspond to the appropriate initial failure rate are used as failure criteria.

(b) The average reductions cited above are applicable for all gasoline-powered light-duty motor vehicles (except motorcycles) which are included in the inspection/maintenance program.

(c) *Requirements.* An acceptable inspection/maintenance program must include:

(i) Provisions for regular periodic inspection of all vehicles for which emissions reductions are claimed.

(ii) Provisions for the establishment of inspection failure criteria consistent with the claimed reductions.

(iii) Provisions to insure that necessary vehicles receive the maintenance necessary to achieve compliance with the inspection standards. This might include sanctions against individual owners or repair facilities, retest of failed vehicles following maintenance, a certification program to insure that repair facilities performing the required maintenance have the necessary equipment, parts and knowledge to perform the tasks satisfactorily, a program to train mechanics and/or other measures.

(iv) A program of enforcement to insure that vehicles are not intentionally readjusted or modified subsequent to the inspection/maintenance in such a way as would cause them to no longer comply with the inspection standards. This might include spot checks of idle adjustments and/or a suitable type of physical tagging.

(d) *Alternative approaches.*—Inspection/maintenance programs employing approaches other than emissions testing may be capable of achieving emissions reductions for vehicles of certain model-years. Extensive engine parameter inspection and mandatory maintenance procedures are discussed in the Environmental Protection Agency report "Control Strategies for In-Use Vehicles." Inspection/maintenance approaches other than those using an emissions test, or emissions reductions greater than those cited in paragraph 3(a) will be acceptable only if sufficient data are provided to justify the emissions reductions claimed.

4. *Retrofit of light duty vehicles*—(a) *Reductions.* The following reductions in exhaust emissions per vehicle are estimated to be achievable through the installation of the cited types of retrofit devices on the classes of vehicles noted. These emissions reduction estimates are provided for planning purposes only. States including retrofit in their transportation control plans must determine, prior to the actual installation of retrofit devices, that the specific devices selected (e.g., brand A oxidizing catalytic converters) satisfy the requirement of paragraph 4(c)(i).

Since retrofitted vehicles are expected to be subject to periodic inspection and maintenance (see paragraph 4(c)), the reductions cited are to be applied to a maintained vehicle emissions baseline. For example, if a 12 percent reduction in hydrocarbon emissions is claimed for inspection/maintenance, the reduction in hydrocarbon emissions due to a retrofit approach should be calculated after the vehicle's original emission rate for hydrocarbons has been reduced by 12 percent.

(i) Precontrolled vehicles:

[In percent]

Retrofit option	Average reduction per vehicle		
	HC	CO	NOx
Lean idle air/fuel ratio adjustment and vacuum spark advance disconnect	25	9	23
Oxidizing catalytic converter and vacuum spark advance disconnect	68	63	48
Air bleed to intake manifold	21	58	0
Exhaust gas recirculation and vacuum spark advance disconnect	12	31	48

(ii) Controlled vehicles:

[In percent]

Retrofit option	Average reduction per vehicle		
	HC	CO	NOx
Oxidizing catalytic converter	50	50	0
Exhaust gas recirculation	0	0	40
Oxidizing catalytic converter and exhaust gas recirculation	50	50	40

During the installation phase of a retrofit program, emissions reductions may be assumed only to the extent consistent with the portion of the vehicle population on which retrofit devices have been installed by that time.

(b) *Applicability.* The emissions reductions cited above for precontrolled vehicles are applicable to all gasoline-powered light-duty motor vehicles (except motorcycles) sold nationally (except in California) prior to the 1968 model-year or in California prior to the 1966 model-year.

The emissions reductions cited above for installation of oxidizing catalytic converters on controlled vehicles are applicable to all gasoline-powered light-duty motor vehicles (except motorcycles) sold nationally (except in California) in the 1968 through 1974 model-years or in California in the 1966 through 1974 model-years.

The emissions reductions cited above for installation of exhaust gas recirculation on controlled vehicles are applicable to all gasoline-powered light-duty motor vehicles (except motorcycles) sold nationally (except in California) in the 1968 through 1972 model-years or in California in the 1966 through 1971 model-years.

(c) *Requirements.* An acceptable retrofit program must include:

(i) The use of a retrofit device whose potential capability for achieving the claimed emissions reductions has been demonstrated through testing and evaluation using the 1972 or 1975 Federal emission test procedure.

(ii) A method of assuring the availability of installation facilities and personnel with the capability to perform the required installation tasks and a method of assuring the availability of an adequate supply of retrofit components.

(iii) Provisions for emissions testing at the time of retrofit installation or some other positive assurance that the retrofit device is installed and operating correctly.

(iv) Provisions for inspection of each retrofitted vehicle at least once per year.

(v) Provisions for the establishment of inspection standards for retrofitted vehicles consistent with the emissions reductions claimed. Particular attention must be paid in this regard to catalytic converter retrofits as the reductions cited in paragraph 4(a) do not include possible irreversible catalyst deterioration over time.

(vi) Provisions to insure that vehicles failing inspection receive the maintenance necessary to achieve compliance with the inspection standards.

(vii) In the case of retrofit programs that include the use of catalytic converters requiring unleaded fuel, provisions to insure that vehicles utilizing this type of retrofit will not use leaded gasoline and that adequate supplies of lead-free gasoline of suitable octane value will be available if Federal regulations will not insure availability, and provided that such provisions are not in violation of section 211(c)(4) of the Act.

(viii) A program of enforcement to insure that vehicles are not intentionally adjusted or modified subsequent to retrofit installation in such a way as would cause them to no longer comply with the retrofit emissions standards. This might include spot checks, visual inspection, or other suitable techniques.

(d) *Alternative approaches.* Retrofit programs employing approaches other than those cited above may be capable of achieving emissions reductions for vehicles of certain model-years. For example, addition of vacuum spark advance disconnect to the air bleed to intake manifold approach may be feasible for precontrolled vehicles. Alternative retrofit approaches or retrofit emissions reductions greater than those cited in paragraph 4(a) will be acceptable only if sufficient data and analyses are provided to justify the emissions reductions claimed.

5. *Inspection/maintenance or retrofit of vehicles other than light-duty vehicles.* The inspection/maintenance and retrofit approaches discussed above may be applicable to certain classes of motor vehicles other than those cited. In particular, the States are encouraged to consider the application of such approaches to motor vehicles in the 6,000 to 10,000 lb GVW class. In many cases,

these vehicles are constructed and operated in a manner similar to light-duty vehicles. However, the present lack of test data for application of inspection/maintenance or retrofit approaches to vehicles of this type prevents the inclusion of data on achievable emissions reductions for such vehicles in this appendix. Transportation control strategies employing inspection/maintenance or retrofit of vehicles other than light-duty vehicles will be acceptable only if sufficient data and analyses are provided to justify the emissions reductions claimed.

6. Bases for emissions reductions cited in paragraphs 3 and 4—(a) *Inspection/maintenance.* The reductions cited in paragraph 3.a for inspection/maintenance were derived from test data obtained by EPA in evaluating the initial emissions reductions achieved when a fleet of precontrolled and controlled light-duty vehicles were subjected to emissions inspection tests and the vehicles failing the test were serviced in private maintenance garages. The observed average initial reductions were approximately twice the values shown in the tables in paragraph 3a.

It is expected that in an actual inspection/maintenance program the average emissions reductions achieved will be substantially less than the initial reductions observed in the study, since there will be deterioration of emissions-related components and adjustments between periodic inspection and maintenance events. While the currently available data on such deterioration are inadequate to accurately predict the consequences of this effect, some correction for deterioration is necessary. Therefore, giving consideration to the current frequency of voluntary maintenance and the emissions reductions typically achieved by existing maintenance procedures, it has been assumed that linear deterioration to before-maintenance emissions levels will occur over the 12-month period following maintenance. As a result, the average effectiveness for annual inspection is estimated to be one-half of the initial effectiveness following maintenance.

Data on the effectiveness of inspection/maintenance programs in reducing emissions are available only for light-duty vehicles through the 1971 model-year. The effectiveness of inspection/maintenance programs in reducing emissions from future model year vehicles will depend primarily on the extent to which emissions from those vehicles increase in use as a result of repairable malfunctions and on the ability of the inspection test to accurately identify vehicles having such malfunctions. These factors can be evaluated only after substantial numbers of such vehicles have been in use for some time. However, for implementation planning purposes, it has been assumed that emissions reductions estimated to be achievable for current light-duty vehicles will be applicable for future-model model years as well.

Inspection and maintenance programs using engine parameter inspection or mandatory maintenance approaches may also be effective for vehicles of certain model years. However, such approaches must be tailored to relate to the specific engine and emissions control systems of the vehicles to be inspected and/or maintained. Depending upon inspection and maintenance procedures and the number and choice of engine parameters included in the program, substantial variations in emissions reductions are to be expected. Generally applicable estimates of the emissions reductions that may result from such programs are not now available.

States considering inspection and/or maintenance programs based on approaches not involving emissions tests should take the factors mentioned above into account where estimating and justifying emissions reductions expected from such programs. More detailed discussion of these matters may be found in the EPA report "Control Strategies for In-Use Vehicles."

(b) *Retrofit*—(i) *Precontrolled vehicles.* The reductions cited in paragraph 4.a for precontrolled vehicles are based upon test data obtained in evaluating the initial emissions reductions obtained when various types of retrofit emission control systems were fitted to fleets of tuned, precontrolled, light-duty vehicles. The results of these studies are presented in the EPA report "Control Strategies for In-Use Vehicles." In each case, the mean emissions reductions observed have been adopted as being most representative of the initial emissions reductions which may be achieved in an actual retrofit program.

Only very limited data are currently available on the deterioration of emissions performance of retrofitted vehicles. These data, which are discussed in the EPA report "Control Strategies for In-Use Vehicles," indicate the need for periodic inspection and maintenance of retrofitted vehicles if the attainment and maintenance of the retrofit emissions reductions cited in paragraph 4.a is to be assured. Based upon the available data and the requirements for inspection and maintenance of retrofitted vehicles at least once per year, and considering the nature of the emissions control techniques employed in each retrofit approach, it appears that the average annual emissions reductions per retrofitted vehicle can approach the observed mean initial reductions if suitable inspection and maintenance criteria are adopted. Accordingly, it has been assumed for planning purposes that the observed initial emissions reductions will not be affected by deterioration.

(ii) *Controlled vehicles.* Data which could serve as a basis for estimating emissions reductions achievable through retrofitting controlled light-duty vehicles are quite limited. As a result, the emissions reductions cited for this class of vehicles in paragraph 4.a were developed by extrapolating the data for retrofitting precontrolled light-duty vehicles.

The techniques of lean idle air/fuel ratio adjustment, vacuum spark advance disconnect, and air bleed to intake manifold are not considered to be generally applicable to controlled vehicles. This is because these emissions control approaches are either incorporated into or may be inconsistent with emissions control techniques already applied to many controlled vehicles.

Exhaust gas recirculation (EGR) is considered generally applicable only to those vehicles not substantially controlled for nitrogen oxides emissions. Therefore, EGR as a retrofit approach is applicable in 1968 through 1972 models sold nationwide (outside of California), except for an insignificant number of 1972 vehicles already equipped with EGR. Incorporation of EGR into a significant number of 1972 models sold in California limits the general applicability of this retrofit approach to 1966 through 1971 controlled vehicles sold in California.

Oxidizing catalytic converters are considered to be potentially applicable as retrofits through the 1974 model-year. Beyond the 1974 model-year, the presently anticipated design of emissions control systems required to meet Federal new car emissions standards is considered to preclude retrofitting using currently available retrofit technology.

The following paragraphs describe the basis for the emissions reductions cited for retrofit of controlled vehicles.

Oxidizing catalytic converters. Test data indicate that catalytic converter retrofits to precontrolled vehicles can achieve emissions reductions of 68 percent (hydrocarbons), 63 percent (carbon monoxide), and 48 percent (nitrogen oxides) when combined with vacuum spark advance disconnect. Presently available data suggest that deterioration may not be significant with retrofit-type catalysts.

Experience to date with prototype 1975 emissions control systems suggests that retrofit catalytic converters are capable of achieving substantial reductions of hydrocarbon and carbon monoxide emissions from controlled light-duty vehicles. While studies of precontrolled vehicles have provided evidence that retrofit catalysts may also achieve some reduction of nitrogen oxides emissions, the extent of this reduction is too highly dependent on the air/fuel ratio in the catalyst to be extrapolated to controlled vehicles with reasonable certainty.

In experiments conducted to date, installation of retrofit catalysts on precontrolled vehicles has been accompanied by vacuum spark advance disconnect. In addition, a lean idle air/fuel ratio adjustment has normally been included in the installation procedures. As neither of the latter two modifications is generally applicable to controlled vehicles, it is prudent to anticipate that reductions of hydrocarbon and carbon monoxide emissions achieved by retrofit catalysts on controlled vehicles may be less than those observed with precontrolled vehicles.

The cited emissions reductions of 50 percent (hydrocarbons), 50 percent (carbon monoxide) and 0 percent (nitrogen oxides) are estimates consistent with the foregoing considerations and the results obtained with precontrolled vehicles.

Exhaust gas recirculation (EGR). Emissions reductions of 12 percent (hydrocarbons), 31 percent (carbon monoxide), and 48 percent (nitrogen oxides) have been observed as a result of retrofitting precontrolled light-duty vehicles with EGR accompanied by vacuum spark advance disconnect. Experience with 1973 emissions control systems for new cars suggest that EGR retrofits can achieve substantial reductions of nitrogen oxides emissions from controlled vehicles not already equipped with EGR or equivalent nitrogen oxides emissions control systems.

Much of the hydrocarbon control and some of the nitrogen oxides control observed with EGR retrofits to precontrolled vehicles is attributable to the vacuum spark advance disconnect. This is not generally applicable to controlled vehicles. In addition, the design features responsible for much of the carbon monoxide reduction observed with precontrolled vehicles are likely to be already incorporated into many controlled vehicles. It is therefore prudent to expect that EGR retrofits to controlled vehicles may achieve somewhat smaller reductions of nitrogen oxides emissions than have been observed with precontrolled vehicles and no reductions of hydrocarbon and carbon monoxide emissions.

The cited emissions reductions of 0 percent (hydrocarbons and carbon monoxide) and 40 percent (nitrogen oxides) are estimates consistent with the foregoing considerations and the results obtained with precontrolled vehicles.

EGR and oxidizing catalytic converter retrofits for controlled vehicles affect different pollutants and operate independently on different parts of the engine. Therefore, when the two retrofits are combined, the emissions reductions obtained from each can be considered additive.

[38 FR 15197, June 8, 1973]

APPENDIX O [Reserved]

APPENDIX P—MINIMUM EMISSION MONITORING REQUIREMENTS

1.0 PURPOSE.

This Appendix P sets forth the minimum requirements for continuous emission monitoring and recording that each State Implementation Plan must include in order to be approved under the provisions of 40 CFR 51.165(b). These requirements include the source categories to be affected; emission monitoring, recording, and reporting requirements for those sources; performance specifications for accuracy, reliability, and durability of acceptable monitoring systems; and techniques to convert emission data to units of the applicable State emission standard. Such data must be reported to the State as an indication of whether proper maintenance and operating procedures are being utilized by source operators to maintain emission levels at or below emission standards. Such data may be used directly or indirectly for compliance determination or any other purpose deemed appropriate by the State. Though the monitoring requirements are specified in detail, States are given some flexibility to resolve difficulties that may arise during the implementation of these regulations.

1.1 APPLICABILITY

The State plan shall require the owner or operator of an emission source in a category listed in this Appendix to: (1) Install, calibrate, operate, and maintain all monitoring equipment necessary for continuously monitoring the pollutants specified in this appendix for the applicable source category; and (2) complete the installation and performance tests of such equipment and begin monitoring and recording within 18 months of plan approval or promulgation. The source categories and the respective monitoring requirements are listed below.

1.1.1 Fossil fuel-fired steam generators, as specified in paragraph 2.1 of this appendix, shall be monitored for opacity, nitrogen oxides emissions, sulfur dioxide emissions, and oxygen or carbon dioxide.

1.1.2 Fluid bed catalytic cracking unit catalyst regenerators, as specified in paragraph 2.4 of this appendix, shall be monitored for opacity.

1.1.3 Sulfuric acid plants, as specified in paragraph 2.3 of this appendix, shall be monitored for sulfur dioxide emissions.

1.1.4 Nitric acid plants, as specified in paragraph 2.2 of this appendix, shall be monitored for nitrogen oxides emissions.

1.2 EXEMPTIONS

The States may include provisions within their regulations to grant exemptions from the monitoring requirements of paragraph 1.1 of this appendix for any source which is:

1.2.1 Subject to a new source performance standard promulgated in 40 CFR Part 60 pursuant to section 111 of the Clean Air Act; or

1.2.2 not subject to an applicable emission standard of an approved plan; or

1.2.3 scheduled for retirement within 5 years after inclusion of monitoring requirements for the source in Appendix P, provided that adequate evidence and guarantees are provided that clearly show that the source will cease operations prior to such date.

1.3 EXTENSIONS

States may allow reasonable extensions of the time provided for installation of monitors for facilities unable to meet the prescribed timeframe (i.e., 18 months from plan approval or promulgation) provided the owner or operator of such facility demonstrates that good faith efforts have been made to obtain and install such devices within such prescribed timeframe.

1.4 MONITORING SYSTEM MALFUNCTION

The State plan may provide a temporary exemption from the monitoring and reporting requirements of this appendix during any period of monitoring system malfunction, provided that the source owner or operator shows, to the satisfaction of the State, that the malfunction was unavoidable and is being repaired as expeditiously as practicable.

2.0 MINIMUM MONITORING REQUIREMENT

States must, as a minimum, require the sources listed in paragraph 1.1 of this appendix to meet the following basic requirements.

2.1 FOSSIL FUEL-FIRED STEAM GENERATORS

Each fossil fuel-fired steam generator, except as provided in the following subparagraphs, with an annual average capacity factor of greater than 30 percent, as reported to the Federal Power Commission for calendar year 1974, or as otherwise demonstrated to the State by the owner or operator, shall conform with the following monitoring requirements when such facility is subject to an emission standard of an applicable plan for the pollutant in question.

2.1.1 A continuous monitoring system for the measurement of opacity which meets the performance specifications of paragraph 3.1.1 of this appendix shall be installed, calibrated, maintained, and operated in accord-

ance with the procedures of this appendix by the owner or operator of any such steam generator of greater than 250 million BTU per hour heat input except where:

2.1.1.1 gaseous fuel is the only fuel burned, or

2.1.1.2 oil or a mixture of gas and oil are the only fuels burned and the source is able to comply with the applicable particulate matter and opacity regulations without utilization of particulate matter collection equipment, and where the source has never been found, through any administrative or judicial proceedings, to be in violation of any visible emission standard of the applicable plan.

2.1.2 A continuous monitoring system for the measurement of sulfur dioxide which meets the performance specifications of paragraph 3.1.3 of this appendix shall be installed, calibrated, maintained, and operated on any fossil fuel-fired steam generator of greater than 250 million BTU per hour heat input which has installed sulfur dioxide pollutant control equipment.

2.1.3 A continuous monitoring system for the measurement of nitrogen oxides which meets the performance specification of paragraph 3.1.2 of this appendix shall be installed, calibrated, maintained, and operated on fossil fuel-fired steam generators of greater than 1000 million BTU per hour heat input when such facility is located in an Air Quality Control Region where the Administrator has specifically determined that a control strategy for nitrogen dioxide is necessary to attain the national standards, unless the source owner or operator demonstrates during source compliance tests as required by the State that such a source emits nitrogen oxides at levels 30 percent or more below the emission standard within the applicable plan.

2.1.4 A continuous monitoring system for the measurement of the percent oxygen or carbon dioxide which meets the performance specifications of paragraphs 3.1.4 or 3.1.5 of this appendix shall be installed, calibrated, operated, and maintained on fossil fuel-fired steam generators where measurements of oxygen or carbon dioxide in the flue gas are required to convert either sulfur dioxide or nitrogen oxides continuous emission monitoring data, or both, to units of the emission standard within the applicable plan.

2.2 Nitric acid plants

Each nitric acid plant of greater than 300 tons per day production capacity, the production capacity being expressed as 100 percent acid, located in an Air Quality Control Region where the Administrator has specifically determined that a control strategy for nitrogen dioxide is necessary to attain the national standard shall install, calibrate, maintain, and operate a continuous monitoring system for the measurement of nitrogen oxides which meets the performance specifications of paragraph 3.1.2 for each nitric acid producing facility within such plant.

2.3 Sulfuric acid plants

Each Sulfuric acid plant of greater than 300 tons per day production capacity, the production being expressed as 100 percent acid, shall install, calibrate, maintain and operate a continuous monitoring system for the measurement of sulfur dioxide which meets the performance specifications of paragraph 3.1.3 for each sulfuric acid producing facility within such plant.

2.4 Fluid bed catalytic cracking unit catalyst regenerators at petroleum refineries

Each catalyst regenerator for fluid bed catalytic cracking units of greater than 20,000 barrels per day fresh feed capacity shall install, calibrate, maintain, and operate a continuous monitoring system for the measurement of opacity which meets the performance specifications of paragraph 3.1.1.

3.0 Minimum specifications

All State plans shall require owners or operators of monitoring equipment installed to comply with this Appendix, except as provided in paragraph 3.2, to demonstrate compliance with the following performance specifications.

3.1 Performance specifications

The performance specifications set forth in Appendix B of Part 60 are incorporated herein by reference, and shall be used by States to determine acceptability of monitoring equipment installed pursuant to this Appendix except that (1) where reference is made to the "Administrator" in Appendix B, Part 60, the term "State" should be inserted for the purpose of this appendix (e.g., in Performance Specification 1, 1.2, "* * * monitoring systems subject to approval by the *Administrator,*" should be interpreted as, "* * * monitoring systems subject to approval by the *State*"), and (2) where reference is made to the "Reference Method" in Appendix B, Part 60, the State may allow the use of either the State approved reference method or the Federally approved reference method as published in Part 60 of this chapter. The Performance Specifications to be used with each type of monitoring system are listed below.

3.1.1 Continuous monitoring systems for measuring opacity shall comply with Performance Specification 1.

3.1.2 Continuous monitoring systems for measuring nitrogen oxides shall comply with Performance Specification 2.

3.1.3 Continuous monitoring systems for measuring sulfur dioxide shall comply with Performance Specification 2.

3.1.4 Continuous monitoring systems for measuring oxygen shall comply with Performance Specification 3.

3.1.5 Continuous monitoring systems for measuring carbon dioxide shall comply with Performance Specification 3.

3.2 Exemptions

Any source which has purchased an emission monitoring system(s) prior to September 11, 1974, may be exempt from meeting such test procedures prescribed in Appendix B of Part 60 for a period not to exceed five years from plan approval or promulgation.

3.3 Calibration Gases

For nitrogen oxides monitoring systems installed on fossil fuel-fired steam generators the pollutant gas used to prepare calibration gas mixtures (Section 2.1, Performance Specification 2, Appendix B, Part 60) shall be nitric oxide (NO). For nitrogen oxides monitoring systems, installed on nitric acid plants the pollutant gas used to prepare calibration gas mixtures (Section 2.1, Performance Specification 2, Appendix B, Part 60 of this chapter) shall be nitrogen dioxide (NO_2). These gases shall also be used for daily checks under paragraph 3.7 of this appendix as applicable. For sulfur dioxide monitoring systems installed on fossil fuel-fired steam generators or sulfuric acid plants the pollutant gas used to prepare calibration gas mixtures (Section 2.1, Performance Specification 2, Appendix B, Part 60 of this chapter) shall be sulfur dioxide (SO_2). Span and zero gases should be traceable to National Bureau of Standards reference gases whenever these reference gases are available. Every six months from date of manufacture, span and zero gases shall be reanalyzed by conducting triplicate analyses using the reference methods in Appendix A, Part 60 of this chapter as follows: for sulfur dioxide, use Reference Method 6; for nitrogen oxides, use Reference Method 7; and for carbon dioxide or oxygen, use Reference Method 3. The gases may be analyzed at less frequent intervals if longer shelf lives are guaranteed by the manufacturer.

3.4 Cycling times

Cycling times include the total time a monitoring system requires to sample, analyze and record an emission measurement.

3.4.1 Continuous monitoring systems for measuring opacity shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 10-second period.

3.4.2 Continuous monitoring systems for measuring oxides of nitrogen, carbon dioxide, oxygen, or sulfur dioxide shall complete a minimum of one cycle of operation (sampling, analyzing, and data recording) for each successive 15-minute period.

3.5 Monitor location

State plans shall require all continuous monitoring systems or monitoring devices to be installed such that representative measurements of emissions or process parameters (i.e., oxygen, or carbon dioxide) from the affected facility are obtained. Additional guidance for location of continuous monitoring systems to obtain representative samples are contained in the applicable Performance Specifications of Appendix B of Part 60 of this chapter.

3.6 Combined effluents

When the effluents from two or more affected facilities of similar design and operating characteristics are combined before being released to the atmosphere, the State plan may allow monitoring systems to be installed on the combined effluent. When the affected facilities are not of similar design and operating characteristics, or when the effluent from one affected facility is released to the atmosphere through more than one point, the State should establish alternate procedures to implement the intent of these requirements.

3.7 Zero and drift

State plans shall require owners or operators of all continuous monitoring systems installed in accordance with the requirements of this appendix to record the zero and span drift in accordance with the method prescribed by the manufacturer of such instruments; to subject the instruments to the manufacturer's recommended zero and span check at least once daily unless the manufacturer has recommended adjustments at shorter intervals, in which case such recommendations shall be followed; to adjust the zero and span whenever the 24-hour zero drift or 24-hour calibration drift limits of the applicable performance specifications in Appendix B of Part 60 are exceeded; and to adjust continuous monitoring systems referenced by paragraph 3.2 of this appendix whenever the 24-hour zero drift or 24-hour calibration drift exceed 10 percent of the emission standard.

3.8 Span

Instrument span should be approximately 200 per cent of the expected instrument data display output corresponding to the emission standard for the source.

3.9 Alternative procedures and requirements

In cases where States wish to utilize different, but equivalent, procedures and requirements for continuous monitoring systems, the State plan must provide a description of such alternative procedures for approval by the Administrator. Some examples of situations that may require alternatives follow:

3.9.1 Alternative monitoring requirements to accommodate continuous monitoring systems that require corrections for stack moisture conditions (e.g., an instrument measuring steam generator SO_2 emissions on a wet basis could be used with an instrument measuring oxygen concentration on a dry basis if acceptable methods of measuring stack moisture conditions are used to allow accurate adjustments of the measured SO_2 concentration to dry basis.)

3.9.2 Alternative locations for installing continuous monitoring systems or monitoring devices when the owner or operator can demonstrate that installation at alternative locations will enable accurate and representative measurements.

3.9.3 Alternative procedures for performing calibration checks (e.g., some instruments may demonstrate superior drift characteristics that require checking at less frequent intervals).

3.9.4 Alternative monitoring requirements when the effluent from one affected facility or the combined effluent from two or more identical affected facilities is released to the atmosphere through more than one point (e.g., an extractive, gaseous monitoring system used at several points may be approved if the procedures recommended are suitable for generating accurate emission averages).

3.9.5 Alternative continuous monitoring systems that do not meet the spectral response requirements in Performance Specification 1, Appendix B of Part 60, but adequately demonstrate a definite and consistent relationship between their measurements and the opacity measurements of a system complying with the requirements in Performance Specification 1. The State may require that such demonstration be performed for each affected facility.

4.0 Minimum data requirements

The following paragraphs set forth the minimum data reporting requirements necessary to comply with § 51.214(d) and (e).

4.1 The State plan shall require owners or operators of facilities required to install continuous monitoring systems to submit a written report of excess emissions for each calendar quarter and the nature and cause of the excess emissions, if known. The averaging period used for data reporting should be established by the State to correspond to the averaging period specified in the emission test method used to determine compliance with an emission standard for the pollutant/source category in question. The required report shall include, as a minimum, the data stipulated in this appendix.

4.2 For opacity measurements, the summary shall consist of the magnitude in actual percent opacity of all one-minute (or such other time period deemed appropriate by the State) averages of opacity greater than the opacity standard in the applicable plan for each hour of operation of the facility. Average values may be obtained by integration over the averaging period or by arithmetically averaging a minimum of four equally spaced, instantaneous opacity measurements per minute. Any time period exempted shall be considered before determining the excess averages of opacity (e.g., whenever a regulation allows two minutes of opacity measurements in excess of the standard, the State shall require the source to report all opacity averages, in any one hour, in excess of the standard, minus the two-minute exemption). If more than one opacity standard applies, excess emissions data must be submitted in relation to all such standards.

4.3 For gaseous measurements the summary shall consist of emission averages, in the units of the applicable standard, for each averaging period during which the applicable standard was exceeded.

4.4 The date and time identifying each period during which the continuous monitoring system was inoperative, except for zero and span checks, and the nature of system repairs or adjustments shall be reported. The State may require proof of continuous monitoring system performance whenever system repairs or adjustments have been made.

4.5 When no excess emissions have occurred and the continuous monitoring system(s) have not been inoperative, repaired, or adjusted, such information shall be included in the report.

4.6 The State plan shall require owners or operators of affected facilities to maintain a file of all information reported in the quarterly summaries, and all other data collected either by the continuous monitoring system or as necessary to convert monitoring data to the units of the applicable standard for a minimum of two years from the date of collection of such data or submission of such summaries.

5.0 Data Reduction

The State plan shall require owners or operators of affected facilities to use the following procedures for converting monitoring data to units of the standard where necessary.

5.1 For fossil fuel-fired steam generators the following procedures shall be used to convert gaseous emission monitoring data in parts per million to g/million cal (lb/million BTU) where necessary:

5.1.1 When the owner or operator of a fossil fuel-fired steam generator elects under paragraph 2.1.4 of this appendix to measure oxygen in the flue gases, the measurements of the pollutant concentration and oxygen concentration shall each be on a dry basis and the following conversion procedure used:

$$E = CF\,[20.9/20.9 - \%O_2]$$

5.1.2 When the owner or operator elects under paragraph 2.1.4 of this appendix to measure carbon dioxide in the flue gases, the measurement of the pollutant concentration and the carbon dioxide concentration shall each be on a consistent basis (wet or dry) and the following conversion procedure used:

$$E = CF_c\,(100/\%\ CO_2)$$

5.1.3 The values used in the equations under paragraph 5.1 are derived as follows:

E=pollutant emission, g/million cal (lb/million BTU),

C=pollutant concentration, g/dscm (lb/dscf), determined by multiplying the average concentration (ppm) for each hourly period by 4.16×10^{-5} M g/dscm per ppm (2.64×10^{-9} M lb/dscf per ppm) where M = pollutant molecular weight, g/g-mole (lb/lb-mole). M = 64 for sulfur dioxide and 46 for oxides of nitrogen.

$\%O_2$, $\%CO_2$=Oxygen or carbon dioxide volume (expressed as percent) determined with equipment specified under paragraph 4.1.4 of this appendix,

F, F_c=a factor representing a ratio of the volume of dry flue gases generated to the calorific value of the fuel combusted (F), and a factor representing a ratio of the volume of carbon dioxide generated to the calorific value of the fuel combusted (F_c) respectively. Values of F and F_c are given in § 60.45(f) of Part 60, as applicable.

5.2 For sulfuric acid plants the owner or operator shall;

5.2.1 establish a conversion factor three times daily according to the procedures to § 60.84(b) of this chapter;

5.2.2 multiply the conversion factor by the average sulfur dioxide concentration in the flue gases to obtain average sulfur dioxide emissions in Kg/metric ton (lb/short ton); and

5.2.3 report the average sulfur dioxide emission for each averaging period in excess of the applicable emission standard in the quarterly summary.

5.3 For nitric acid plants the owner or operator shall;

5.3.1 establish a conversion factor according to the procedures of § 60.73(b) of this chapter;

5.3.2 multiply the conversion factor by the average nitrogen oxides concentration in the flue gases to obtain the nitrogen oxides emissions in the units of the applicable standard;

5.3.3 report the average nitrogen oxides emission for each averaging period in excess of the applicable emission standard, in the quarterly summary.

5.4 Any State may allow data reporting or reduction procedures varying from those set forth in this appendix if the owner or operator of a source shows to the satisfaction of the State that his procedures are at least as accurate as those in this appendix. Such procedures may include but are not limited to, the following:

5.4.1 Alternative procedures for computing emission averages that do not require integration of data (e.g., some facilities may demonstrate that the variability of their emissions is sufficiently small to allow accurate reduction of data based upon computing averages from equally spaced data points over the averaging period).

5.4.2 Alternative methods of converting pollutant concentration measurements to the units of the emission standards.

6.0 Special Consideration

The State plan may provide for approval, on a case-by-case basis, of alternative monitoring requirements different from the provisions of Parts 1 through 5 of this appendix if the provisions of this appendix (i.e., the installation of a continuous emission monitoring system) cannot be implemented by a source due to physical plant limitations or extreme economic reasons. To make use of this provision, States must include in their plan specific criteria for determining those physical limitations or extreme economic situations to be considered by the State. In such cases, when the State exempts any source subject to this appendix by use of this provision from installing continuous emission monitoring systems, the State shall set forth alternative emission monitoring and reporting requirements (e.g., periodic manual stack tests) to satisfy the intent of these regulations. Examples of such special cases include, but are not limited to, the following:

6.1 Alternative monitoring requirements may be prescribed when installation of a continuous monitoring system or monitoring device specified by this appendix would not provide accurate determinations of emissions (e.g., condensed, uncombined water vapor may prevent an accurate determination of opacity using commercially available continuous monitoring systems).

6.2 Alternative monitoring requirements may be prescribed when the affected facility is infrequently operated (e.g., some affected facilities may operate less than one month per year).

6.3 Alternative monitoring requirements may be prescribed when the State determines that the requirements of this appendix would impose an extreme economic burden on the source owner or operator.

6.4 Alternative monitoring requirements may be prescribed when the State determines that monitoring systems prescribed by this appendix cannot be installed due to physical limitations at the facility.

[40 FR 46247, Oct. 6, 1975, as amended at 51 FR 40675, Nov. 7, 1986]

Appendices Q-R—[Reserved]

Appendix S—Emission Offset Interpretative Ruling

I. Introduction

This appendix sets forth EPA's Interpretative Ruling on the preconstruction review requirements for stationary sources of air pollution (not including indirect sources) under 40 CFR Subpart I and section 129 of the Clean Air Act Amendments of 1977, Pub. L. 95-95, (note under 42 U.S.C. 7502). A major new source or major modification which would locate in an area designated in 40 CFR 81.300 *et. seq*, as nonattainment for a pollutant for which the source or modification would be major may be allowed to construct only if the stringent conditions set forth below are met. These conditions are designed to insure that the new source's emissions will be controlled to the greatest degree possible; that more than equivalent offsetting emission reductions ("emission offsets") will be obtained from existing sources; and that there will be progress toward achievement of the NAAQS.

For each area designated as exceeding an NAAQS (nonattainment area) under 40 CFR 81.300 *et seq.*, this Interpretative Ruling will be superseded after June 30, 1979—(a) by preconstruction review provisions of the revised SIP, if the SIP meets the requirements of Part D, Title 1, of the Act; or (b) by a prohibition on construction under the applicable SIP and section 110(a)(2)(I) of the Act, if the SIP does not meet the requirements of Part D. The Ruling will remain in effect to the extent not superseded under the Act. This prohibition on major new source construction does not apply to a source whose permit to construct was applied for during a period when the SIP was in compliance with Part D, or before the deadline for having a revised SIP in effect that satisfies Part D.

The requirement of this Ruling shall not apply to any major stationary source or major modification that was not subject to the Ruling as in effect on January 16, 1979, if the owner or operator:

A. Obtained all final Federal, State, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

B. Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

C. Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

II. Initial Screening Anaylses and Determination of Applicable Requirements

A. *Definitions*—For the purposes of this Ruling:

1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

2. "Building, structure, facility or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel. Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 003-005-00176-0, respectively).

3. "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

4. (i) "Major stationary source" means:

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*b*) Any physical change that would occur at a stationary source not qualifying under paragraph 5.(i)(*a*) of section II of this appendix as a major stationary source, if the

change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this ruling whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act."

5. (i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under section 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976, purusant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166; or

(*2*) The source is approved to use under any permit issued under this ruling;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or § 51.166;

(*g*) Any change in ownership at a stationary source.

6. (i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this Ruling which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(v) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins;

(*c*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18; and

(*d*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vi) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

7. "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

8. "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this Ruling, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions include emissions from any offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. Secondary emissions do not include any emissions which come directly from a mobile source, such as emissions from the tailpipe of a motor vehicle, from a train, or from a vessel.

9. "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

10. (i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy of particulate matter emissions
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

11. "Allowable emissions" means the emissions rate calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) Applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) Any applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

12. "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

13. (i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with paragraphs 16. (ii) through (iv) of Section II.A. of this appendix.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

14. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

15. "Commence" as applied to construction of a major stationary source or major modification means that the owner or oper-

ator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

16. "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

17. "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

18. "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(i) The most stringent emissions limitation which is contained in the implementation plan of any State for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(ii) The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

19. "Resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. Energy conversion facilities must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this Ruling.

20. "Volatile organic compounds" excludes: methane; ethane; methylene chloride; 1,1,1 tricholoroethane (methyl chloroform); trichlorotrifluoroethane (CFC-113) (Freon 113); trichlorofluoromethane (CFC-11); dichlorodifluoromethane (CFC-12); chlorodifluoromethane (CFC-22); trifluoromethane (FC-23); dichlorotetrafluoroethane (CFC-114); and chloropentafluoroethane (CFC-115); dichlorotrifluoroethane (HCFC-123); tetrafluoroethane (HCFC-134a); dichlorofluoroethane (HCFC-141b); and chlorodifluoroethane (HCFC-142b).

B. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed major new source and proposed major modification [1] to determine if such a source will meet all applicable emission requirements in the SIP, any applicable new source performance standard in 40 CFR Part 60, or any national emission standard for hazardous air pollutants in 40 CFR Part 61. If the reviewing authority determines that the proposed major new source cannot meet the applicable emission requirements, the permit to construct must be denied.

C. *Review of specified sources for air quality impact.* In addition, the reviewing authority must determine whether the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300 *et seq.* as nonattainment for a pollutant for which the stationary source or modification is major.

D.—E. [Reserved]

F. *Fugitive emissions sources.* Section IV. A. of this Ruling shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(9) Hydrofluoric, sulfuric, or nitric acid plants;

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

(13) Coke oven batteries;

(14) Sulfur recovery plants;

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[1] Hereafter the term "source" will be used to denote both any source and any modification.

(15) Carbon black plants (furnace process);
(16) Primary lead smelters;
(17) Fuel conversion plants;
(18) Sintering plants;
(19) Secondary metal production plants;
(20) Chemical process plants;
(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;
(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;
(23) Taconite ore processing plants;
(24) Glass fiber processing plants;
(25) Charcoal production plants;
(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;
(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

G. *Secondary emissions.* Secondary emissions need not be considered in determining whether the emission rates in Section II.C. above would be exceeded. However, if a source is subject to this Ruling on the basis of the direct emissions from the source, the applicable conditions of this Ruling must also be met for secondary emissions. However, secondary emissions may be exempt from Conditions 1 and 2 of Section IV. Also, since EPA's authority to perform or require indirect source review relating to mobile sources regulated under Title II of the Act (motor vehicles and aircraft) has been restricted by statute, consideration of the indirect impacts of motor vehicles and aircraft traffic is not required under this Ruling.

III. Sources Locating in Designated Clean or Unclassifiable Areas Which Would Cause or Contribute to a Violation of a National Ambient Air Quality Standard

A. This section applies only to major sources or major modifications which would locate in an area designated in 40 CFR 81.300 *et seq.* as attainment or unclassifiable in a state where EPA has not yet approved the state preconstruction review program required by 40 CFR 51.165(b), if the source or modification would exceed the following significance levels at any locality that does not meet the NAAQS:

Pollutant	Annual	Averaging time (hours)			
		24	8	3	1
SO_2	1.0 μg/m³	5 μg/m³		25 μg/m³	
TSP	1.0 μg/m³	5 μg/m³			
NO_2	1.0 μg/m³				
CO			0.5 mg/m³		2 mg/m³

B. Sources to which this section applies must meet Conditions 1, 2, and 4 of Section IV.A. of this ruling.[2] However, such sources may be exempt from Condition 3 of Section IV.A. of this ruling.

C. *Review of specified sources for air quality impact.* For "stable" air pollutants (i.e. SO_2, particulate matter and CO), the determination of whether a source will cause or contribute to a violation of an NAAQS generally should be made on a case-by-case basis as of the proposed new source's start-up date using the source's allowable emissions in an atmospheric simulation model (unless a source will clearly impact on a receptor which exceeds an NAAQS).

For sources of nitrogen oxides, the initial determination of whether a source would cause or contribute to a violation of the NAAQS for NO_2 should be made using an atmospheric simulation model assuming all the nitric oxide emitted is oxidized to NO_2 by the time the plume reaches ground level. the initial concentration estimates may be adjusted if adequate data are available to account for the expected oxidation rate.

For ozone, sources of volatile organic compounds, locating outside a designated ozone nonattainment area, will be presumed to have no significant impact on the designated nonattainment area. If ambient monitoring indicates that the area of source location is in fact nonattainment, then the source may be permitted under the provisions of any state plan adopted pursuant to section 110(a)(2)(D) of the Act until the area is designated nonattainment and a State Implementation Plan revision is approved. If no state plan pursuant to section 110(a)(2)(D) has been adopted and approved, then this Ruling shall apply.

As noted above, the determination as to whether a source would cause or contribute to a violation of an NAAQS should be made as of the new source's start-up date. Therefore, if a designated nonattainment area is projected to be an attainment area as part of an approved SIP control strategy by the new source start-up date, offsets would not

[2] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

be required if the new source would not cause a new violation.

D. *Sources locating in "clean areas," but would cause a new violating of an NAAQS.* If the reviewing authority finds that the emissions from a proposed source would cause a new violation of an NAAQS, but would not contribute to an existing violation, approval may be granted only if both of the following conditions are met:

Condition 1. The new source is required to meet a more stringent emission limitation[3] and/or the control of existing sources below allowable levels is required so that the source will not cause a violation of any NAAQS.

Condition 2. The new emission limitations for the new source as well as any existing sources affected must be enforceable in accordance with the mechanisms set forth in Section V of this appendix.

IV. Sources That Would Locate in a Designated Nonattainment Area

A. *Conditions for approval.* If the reviewing authority finds that the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300 *et seq* as nonattainment for a pollutant for which the stationary source or modification is major, approval may be granted only if the following conditions are met:

Condition 1. The new source is required to meet an emission Limitation[4] which specifies the lowest achievable emission rate for such source.[5]

Condition 2. The applicant must certify that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the appplicant) in the same State as the proposed source are in compliance with all applicable emission limitations and standards under the Act (or are in compliance with an expeditious schedule which is Federally enforceable or contained in a court decree).

Condition 3. Emission reductions ("offsets") from existing sources[6] in the area of the proposed source (whether or not under the same ownership) are required such that there will be reasonable progress toward attainment of the applicable NAAQs.[7]

Only intrapollutant emission offsets will be acceptable (e.g., hydrocarbon increases may not be offset against SO_2 reductions).

Condition 4. The emission offsets will provide a positive net air quality benefit in the affected area (see Section IV.D. below).[8] At-

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[3] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304. Hereafter, the term "emission limitation" shall also include such design, operational, or equipment standards.

[4] If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an enforceable numerical emission standard infeasible, the authority may instead prescribe a design, operational or equipment standard. In such cases, the reviewing authority shall make its best estimate as to the emission rate that will be achieved and must specify that rate in the required submission to EPA (see Part V). Any permits issued without an enforceable numerical emission standard must contain enforceable conditions which assure that the design characteristics or equipment will be properly maintained (or that the operational conditions will be properly performed) so as to continuously achieve the assumed degree of control. Such conditions shall be enforceable as emission limitations by private parties under section 304. Hereafter, the term "emission limitation" shall also include such design, operational, or equipment standards.

[5] Required only for those pollutants for which the increased allowable emissions exceed 50 tons per year, 1000 pounds per day, or 100 pounds per hour, although the reviewing authority may address other pollutants if deemed appropriate. The preceding hourly and daily rates shall apply only with respect to a pollutant for which a national ambient air quality standard, for a period less than 24 hours or for a 24-hour period, as appropriate, has been established.

[6] Subject to the provisions of section IV.C. below.

[7] The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

[8] Required only for those pollutants for which the increased allowable emissions exceed 50 tons per year, 1000 pounds per

Continued

mospheric simulation modeling is not necessary for volatile organic compounds and NO_x. Fulfillment of Condition 3 and Section IV.D. will be considered adequate to meet this condition.

B. *Exemptions from certain conditions.* The reviewing authority may exempt the following sources from Condition 1 under Section III or Conditions 3 and 4. Section IV.A.:

(i) Resource recovery facilities burning municipal solid waste, and (ii) sources which must switch fuels due to lack of adequate fuel supplies or where a source is required to be modified as a result of EPA regulations (e.g., lead-in-fuel requirements) and no exemption from such regulation is available to the source. Such an exemption may be granted only if:

1. The applicant demonstrates that it made its best efforts to obtain sufficient emission offsets to comply with Condition 1 under Section III or Conditions 3 and 4 under Section IV.A. and that such efforts were unsuccessful;

2. The applicant has secured all available emission offsets; and

3. The applicant will continue to seek the necessary emission offsets and apply them when they become available.

Such an exemption may result in the need to revise the SIP to provide additional control of existing sources.

Temporary emission sources, such as pilot plants, portable facilities which will be relocated outside of the nonattainment area after a short period of time, and emissions resulting from the construction phase of a new source, are exempt from Conditions 3 and 4 of this section.

C. *Baseline for determining credit for emission and air quality offsets.* The baseline for determining credit for emission and air quality offsets will be the SIP emission limitations in effect at the time the application to construct or modify a source is filed. Thus, credit for emission offset purposes may be allowable for existing control that goes beyond that required by the SIP. Emission offsets generally should be made on a pounds per hour basis when all facilities involved in the emission offset calculations are operating at their maximum expected or allowed production rate. The reviewing agency should specify other averaging periods (e.g., tons per year) in addition to the pounds per hour basis if necessary to carry out the intent of this Ruling. When offsets are calculated on a tons per year basis, the baseline emissions for existing sources providing the offsets should be calculated using the actual annual operating hours for the previous one or two year period (or other appropriate period if warranted by cyclical business conditions). Where the SIP requires certain hardware controls in lieu of an emission limitation (e.g., floating roof tanks for petroleum storage), baseline allowable emissions should be based on actual operating conditions for the previous one or two year period (i.e., actual throughput and vapor pressures) in conjunction with the required hardware controls.

1. *No meaningful or applicable SIP requirement.* Where the applicable SIP does not contain an emission limitation for a source or source category, the emission offset baseline involving such sources shall be the actual emissions determined in accordance with the discussion above regarding operating conditions.

Where the SIP emission limit allows greater emissions than the uncontrolled emission rate of the source (as when a State has a single particulate emission limit for all fuels), emission offset credit will be allowed only for control below the uncontrolled emission rate.

2. *Combustion of fuels.* Generally, the emissions for determining emission offset credit involving an existing fuel combustion source will be the allowable emissions under the SIP for the type of fuel being burned at the time the new source application is filed (i.e., if the existing source has switched to a different type of fuel at some earlier date, any resulting emission reduction [either actual or allowable] shall not be used for emission offset credit). If the existing source commits to switch to a cleaner fuel at some future date, emission offset credit based on the allowable emissions for the fuels involved is not acceptable unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emission reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emission offset credit for fuel switches.

3. (i) *Operating hours and source shutdown.*

A source may generally be credited with emissions reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below baseline levels (see initial discussion in this Section IV.C), if such reductions are permanent, quantifiable, and federally enforceable, and if the area has an EPA-approved attainment plan. In addition, the shutdown or

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day, or 100 pounds per hour, although the reviewing authority may address other pollutants if deemed appropriate. The preceding hourly and daily rates shall apply only with respect to a pollutant for which a national ambient air quality standard, for a period less than 24 hours or for a 24-hour period, as appropriate, has been established.

curtailment is creditable only if it occurred on or after the date specified for this purpose in the plan, and if such date is on or after the date of the most recent emissions inventory used in the plan's demonstration of attainment. Where the plan does not specify a cutoff date for shutdown credits, the date of the most recent emissions inventory or attainment demonstration, as the case may be, shall apply. However, in no event may credit be given for shutdowns which occurred prior to August 7, 1977. For purposes of this paragraph, a permitting authority may choose to consider a prior shutdown or curtailment to have occurred after the date of its most recent emissions inventory, if the inventory explicitly includes as current "existing" emissions the emissions from such previously shutdown or curtailed sources.

(ii) Such reductions may be credited in the absence of an approved attainment demonstration only if the shutdown or curtailment occurred on or after the date the new source application is filed, or, if the applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source and the cutoff date provisions of section IV.C.3.(i) are observed.

4. *Credit for VOC substitution.* As set forth in the Agency's "Recommended Policy on Control of Volatile Organic Compounds" (42 FR 35314, July 8, 1977), EPA has found that almost all non-methane VOCs are photochemically reactive and that low reactivity VOCs eventually form as much ozone as the highly reactive VOCs. Therefore, no emission offset credit may be allowed for replacing one VOC compound with another of lesser reactivity, except for those compounds listed in Table 1 of the above policy statement.

5. *"Banking" of emission offset credit.* For new sources obtaining permits by applying offsets after January 16, 1979, the reviewing authority may allow offsets that exceed the requirements of reasonable progress toward attainment (Condition 3) to be "banked" (i.e., saved to provide offsets for a source seeking a permit in the future) for use under this Ruling. Likewise, the reviewing authority may allow the owner of an existing source that reduces its own emissions to bank any resulting reductions beyond those required by the SIP for use under this Ruling, even if none of the offsets are applied immediately to a new source permit. A reviewing authority may allow these banked offsets to be used under the preconstruction review program required by Part D, as long as these banked emissions are identified and accounted for in the SIP control strategy. A reviewing authority may not approve the construction of a source using banked offsets if the new source would interfere with the SIP control strategy or if such use would violate any other condition set forth for use of offsets. To preserve banked offsets, the reviewing authority should identify them in either a SIP revision or a permit, and establish rules as to how and when they may be used.

6. *Offset credit for meeting NSPS or NESHAPS.* Where a source is subject to an emission limitation established in a New Source Performance Standard (NSPS) or a National Emission Standard for Hazardous Air Pollutants (NESHAPS), (i.e., requirements under sections 111 and 112, respectively, of the Act), and a different SIP limitation, the more stringent limitation shall be used as the baseline for determining credit for emission and air quality offsets. The difference in emissions between the SIP and the NSPS or NESHAPS, for such source may not be used as offset credit. However, if a source were not subject to an NSPS or NESHAPS, for example if its construction had commenced prior to the proposal of an NSPS or NESHAPS for that source category, offset credit can be permitted for tightening the SIP to the NSPS or NESHAPS level for such source.

D. *Location of offsetting emissions.* In the case of emission offsets involving volatile organic compounds (VOC), the offsets may be obtained from sources located anywhere in the broad vicinity of the proposed new source. Generally, offsets will be acceptable if obtained from within the same AQCR as the new source or from other areas which may be contributing to the ozone problem at the proposed new source location. As with other pollutants, it is desirable to obtain offsets from sources located as close to the proposed new source site as possible. If the proposed offsets would be from sources located at greater distances from the new source, the reviewing authority should increase the ratio of the required offsets and require a showing that nearby offsets were investigated and reasonable alternatives were not available.[9]

Offsets for NO_x sources may also be obtained within the broad vicinity of the proposed new source. This is because areawide ozone and NO_2 levels are generally not as dependent on specific VOC or NO_x source location as they are on overall area emissions. Since the air quality impact of SO_2, particulate and carbon monoxide sources is site dependent, simple areawide mass emission offsets are not appropriate. For these pollutants, the reviewing authority should consider atmospheric simulation modeling to ensure that the emission offsets provide a positive net air quality benefit. However, to avoid unnecessary consumption of limited,

[9]The discussion in this paragraph is a proposal, but represents EPA's interim policy until final rulemaking is completed.

costly and time consuming modeling resources, in most cases it can be assumed that if the emission offsets are obtained from an existing source on the same premises or in the immediate vicinity of the new source, and the pollutants disperse from substantially the same effective stack height, the air quality test under Condition 4 of Section IV.A. of this appendix will be met. Thus, when stack emissions are offset against a ground level source at the same site, modeling would be required. The reviewing authority may perform this analysis or require the applicant to submit appropriate modeling results.

E. *Reasonable progress towards attainment.* As long as the emission offset is greater than one-for-one, and the other criteria set forth above are met, EPA does not intend to question a reviewing authority's judgment as to what constitutes reasonable progress towards attainment as required under Condition 3 in Section IV.A. of this appendix. This does not apply to "reasonable further progress" as required by Section 173.

F. *Source obligation.* At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of this Ruling shall apply to the source or modification as though construction had not yet commenced on the source or modification.

V. Administrative Procedures

The necessary emission offsets may be proposed either by the owner of the proposed source or by the local community or the State. The emission reduction committed to must be enforceable by authorized State and/or local agencies and under the Clean Air Act, and must be accomplished by the new source's start-up date. If emission reductions are to be obtained in a State that neighbors the State in which the new source is to be located, the emission reductions committed to must be enforceable by the neighboring State and/or local agencies and under the Clean Air Act. Where the new facility is a replacement for a facility that is being shut down in order to provide the necessary offsets, the reviewing authority may allow up to 180 days for shakedown of the new facility before the existing facility is required to cease operation.

A. *Source initiated emission offsets.* A source may propose emission offsets which involve:

(1) Reductions from sources controlled by the source owner (internal emission offsets); and/or (2) reductions from neighboring sources (external emission offsets). The source does not have to investigate all possible emission offsets. As long as the emission offsets obtained represent reasonable progress toward attainment, they will be acceptable. It is the reviewing authority's responsibility to assure that the emission offsets will be as effective as proposed by the source. An internal emission offset will be considered enforceable if it is made a SIP requirement by inclusion as a condition of the new source permit and the permit is forwarded to the appropriate EPA Regional Office.[10] An external emission offset will not be enforceable unless the affected source(s) providing the emission reductions is subject to a new SIP requirement to ensure that its emissions will be reduced by a specified amount in a specified time. Thus, if the source(s) providing the emission reductions does not obtain the necessary reduction, it will be in violation of a SIP requirement and subject to enforcement action by EPA, the State and/or private parties.

The form of the SIP revision may be a State or local regulation, operating permit condition, consent or enforcement order, or any other mechanism available to the State that is enforceable under the Clean Air Act. If a SIP revision is required, the public hearing on the revision may be substituted for the normal public comment procedure required for all major sources under 40 CFR 51.18. The formal publication of the SIP revision approval in the Federal Register need not appear before the source may proceed with construction. To minimize uncertainty that may be caused by these procedures, EPA will, if requested by the State, propose a SIP revision for public comment in the Federal Register concurrently with the State public hearing process. Of course, any major change in the final permit/SIP revision submitted by the State may require a reproposal by EPA.

B. *State or community initiated emission offsets.* A State or community which desires that a source locate in its area may commit to reducing emissions from existing sources (including mobile sources) to sufficiently outweigh the impact of the new source and thus open the way for the new source. As with source-initiated emission offsets, the commitment must be something more than one-for-one. This commitment must be submitted as a SIP revision by the State.

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[10] The emission offset will, therefore, be enforceable by EPA under section 113 as an applicable SIP requirement and will be enforceable by private parties under section 304 as an emission limitation.

VI. Policy Where Attainment Dates have not Passed

In some cases, the dates for attainment of primary standards specified in the SIP under section 110 have not yet passed due to a delay in the promulgation of a plan under this section of the Act. In addition the Act provides more flexibility with respect to the dates for attainment of secondary NAAQS than for primary standards. Rather than setting specific deadlines, section 110 requires secondary NAAQS to be achieved within a "reasonable time". Therefore, in some cases, the date for attainment of secondary standards specified in the SIP under section 110 may also not yet have passed. In such cases, a new source locating in an area designated in 40 CFR 81.3000 *et seq.* as nonattainment (or, where Section III of this Ruling is applicable, a new source which would cause or contribute to an NAAQS violation) may be exempt from the Conditions of Section IV. A. so long as the new source meets the applicable SIP emissions limitations and will not interfere with the attainment date specified in the SIP under section 110 of the Act.

(Secs. 101(b)(1), 110, 160-169, 171-178, and 301(a), Clean Air Act, as amended (42 U.S.C. 7401(b)(1), 7410, 7470-7479, 7501-7508, and 7601(a)); sec. 129(a), Clean Air Act Amendments of 1977 (Pub. L. 95-95, 91 Stat. 685 (Aug., 7, 1977)))

[44 FR 3282, Jan. 16, 1979, as amended at 45 FR 31311, May 13, 1980; 45 FR 52741, Aug. 7, 1980; 45 FR 59879, Sept. 11, 1980; 46 FR 50771, Oct. 14, 1981; 47 FR 27561, June 25, 1982; 49 FR 43210, Oct. 26, 1984; 51 FR 40661, 40675, Nov. 7, 1986; 52 FR 24714, July 1, 1987; 52 FR 29386, Aug 7, 1987; 54 FR 27285, 27299, June 28, 1989]

Appendix T—[Reserved]

Appendix U—Clean Air Act Section 174 Guidelines

Guidance on Designation of Lead Planning Organizations for Nonattainment Areas and on Determination of Interagency Responsibilities, December 1977, Issued Jointly by the U.S. Environmental Protection Agency and the U.S. Department of Transportation, Washington, DC.

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General questions of any or the material covered by this guideline should be sent to the Office of Transportation and Land Use Policy (AW-445), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, DC 20460, Attention: Ms. Martha Burke. Ms. Burke's telephone number is (202) 755-0570. Questions concerning specific state or local areas should be directed to the appropriate EPA regional office.

1. Introduction

1.1 Applicability.

These guidelines are applicable to all metropolitan area regions or portions of regions where the national ambient air quality standards for ozone or carbon monoxide will not be attained by July 1, 1979.

1.2 Purposes.

The purposes of these guidelines include:

1. To recommend procedures and criteria for determining a lead agency to be responsible for coordinating the preparation of the implementation plan revisions called for by the 1977 amendments to the Clean Air Act (Pub. L. 95-95) in metropolitan area regions where carbon monoxide or ozone standards will not be attained by July 1979.

2. To assist state and local governments in identifying the initial planning, implementation, and enforcement responsibilities for the plan revisions and in establishing a process for further definition of responsibilities as development of the revisions progresses.

3. To encourage further coordination and consolidation of federally sponsored planning programs. This includes the integration of the new transportation related air quality requirements under Pub. L. 95-95 into the transportation planning process required by federal transportation grant statutes.

1.3 Background.

On August 7, 1977, President Carter signed into law the first comprehensive amendments to the Clean Air Act since 1970. Among the more important changes in the Clean Air Act are provisions encouraging local governments and organizations of local elected officials to assume additional responsibilities in the development, implementation, and enforcement of plans to attain national ambient air quality standards. Such plans were first required under the 1970 amendments to the Clean Air Act. The 1977 amendments require plan revisions for areas where standards have not been attained.

The assumption of additional responsibilities by local governments and local officials is specifically encouraged in those areas where ozone and carbon monoxide standards will not be attained by July 1, 1979 (section 174(a)). The first identification of nonattainment areas for these and other pollutants under the requirements of the 1977 amendments must have been made by states by December 5, 1977. The Administrator of the Environmental Protection Agency (EPA) must publish a list of these areas, with any modifications he deems necessary, by February 3, 1978.

For areas where standards for ozone and carbon monoxide will not be attained by July 1, 1979, state and local elected officials must jointly determine by February 7, 1978, their respective responsibilities for the plan revisions necessary to attain standards by the new deadlines in the 1977 amendments. The plan elements for which responsibilities are to be jointly determined encompass control measures for all pollutants for which standards have not been attained, not just ozone and carbon monoxide.

The amendments require that, where possible, the implementation plan revisions be prepared by an organization of local elected officials designated by agreement of local governments. The amendments strongly encourage preparation by the organization now responsible for transportation planning under section 134 of Title 23, U.S.C., or for air quality maintenance planning (or for both). The designated organization and its responsibilities must be certified by the state (or states if an interstate area is involved). Where local governments have not reached agreement by February 7, 1978, the governor must, in consultation with the elected officials of local governments in the affected area, designate an organization of local elected officials or a state agency to prepare the plan revisions. The designation by the governor must be in accordance with the joint determination of responsibilites made by state and local elected officials.

The governor must, under regulations which the EPA will propose during December 1977, submit a notice to the EPA certifying the designated agency for each nonattainment area or identifying the organization that he or she has designated. The notice must include a brief summary of the process involved in selecting the designated agency. A more detailed documentation of the selection process shall be included as part of the plan revisions to be submitted to the EPA by January 1, 1979. Evidence of the involvement of state legislatures and local governments is required as part of the plan revision submittal (section 172(b)(9)).

Only organizations of local elected officials of general purpose governments certified by the governor will be eligible for the grants authorized under section 175 of the amendments. In each urban area which is wholly or partially classified as a nonattainment area, only one organization will be eligible to receive a grant. The organization receiving the grant may use the grant funds to support plan revision activities carried out by other governmental organizations, public interest groups, or private consultants.

In addition to further defining the process for implementation of the Clean Air Act amendments, the EPA and the Department of Transportation also encourage in these guidelines further coordination and consolidation of federally sponsored planning programs. Such encouragement is consistent with President Carter's Environmental Message of May 1977 and with subsequent actions taken by the President to eliminate, consolidate, or simplify federal planning requirements. The Environmental Message in part stressed the need for improved implementation of environmental laws through more efficient delivery of federally funded programs. The encouragement for coordination and consolidation does not imply the advocacy of any particular institutional mechanism. A wide variety of mechanisms ranging from concentration of authority or responsibility in a single organization to development of memoranda of understanding among several organizations are available to achieve the same objectives.

2. Selection of a Lead Planning Organization

2.1 Criteria for Selecting an Organization.

These guidelines are intended to assist state and local officials in reaching agreement on the lead planning organization to be responsible for plan revisions called for by the 1977 Clean Air Act amendments. The role of the lead planning organization may vary from developing almost all elements of the plan revision to acting as a forum for decisionmaking by elected officials on elements developed almost entirely by other organizations. In most instances the lead organization will probably develop some elements, coordinate the development of other

elements, and serve as a forum for deciding the ultimate nature of the plan revisions.

The amendments require that, where feasible, the organization designated and certified to prepare the plan revisions shall be (1) the metropolitan planning organization (MPO) responsible for the continuing, cooperative, and comprehensive transportation planning process for the affected area; (2) the organization responsible for the air quality maintenance planning process; or (3) an organization responsible for both planning processes. Coordination of the development of a plan revision with the MPO transportation planning process is particularly important in those nonattainment areas where transportation control measures appear necessary to attain standards. Only through the MPO process can the federal funds available under Federal Highway Administration and Urban Mass Transportation Administration programs be used to implement necessary transportation management measures and capital projects.

The Administrator of the EPA also strongly encourages that, in addition to meeting the requirements described above, the designations made pursuant to section 174 contribute to a consolidation within a single organization of responsibilities for air quality planning and for other environmental planning carried out under Federal laws administered by the EPA. These laws include the Federal Water Pollution Control Act, the Safe Drinking Water Act, and the Resource Conservation and Recovery Act. The EPA believes that, where properly applied, consolidation of environmental planning efforts is an essential step in the development of comprehensive environmental strategies that are able to take into account the interrelated nature of environmental problems. Comprehensive strategies can also result in a more efficient and effective use of resources in achieving environmental benefits.

The following criteria should be considered by local elected officials and by the governor when determining the lead planning organization for urban nonattainment regions:

1. The organization should be the forum for cooperative decisionmaking by principal elected officials of general purpose local governments. The principal elected officials of general purpose local governments should have adequate (preferably majority or larger) representation in the organization but membership need not be limited to them or their designees. There should be participation by agencies that may be responsible for implementation of portions of the plan.

2. The organization should have a planning jurisdiction that includes the current urbanized area and the area likely to be urbanized at least over the period to be covered by the revised plan.

3. The organization should have the ability to produce the necessary plan revision for the planning jurisdiction described above by the January 1, 1979 submittal deadline. The organization should have the capability to perform the necessary analysis and planning tasks itself or be able to enter into binding agreements with other organizations to perform such tasks.

4. The organization should have the capability to coordinate the development of the plan revision with other relevant planning processes, if it does not have responsibility for those processes, and with agencies that may have responsibility for implementation or enforcement. Relevant planning processes include the continuing, cooperative, and comprehensive planning process; other environmental planning processes assisted through EPA-administered programs; and comprehensive planning processes established in accordance with Part IV of the Office of Management and Budget Circular A-95 (41 FR 2052).

2.2 The Selection Process.

Local governments within a nonattainment area for photochemical oxidants or carbon monoxide may, by agreement, designate an organization of elected officials of local government to prepare the plan revision for the pollutants for which standards in that area have not been attained. A resolution by the governing body of an organization meeting the criteria in section 2.1 of these guidelines is sufficient to demonstrate agreement of local governments. Such a designation must be submitted to the governor by February 7, 1978. Local governments intending to designate an organization should consult with the state during the designation process.

If local governments agree on an organization by February 7, 1978, the governor shall certify that organization by April 1, 1978, unless he or she finds that the designated organization does not meet the criteria in section 2.1. If local governments have initiated, but have not completed, designation of an organization by February 7, 1978, they should inform the governor that an ongoing process exists.

If local governments are unable to agree by February 7 on a single lead organization of local elected officials to be responsible for the coordination of the plan revision, the governor shall, in consultation with local elected officials of general purpose local governments, designate an organization or a state agency by April 1, 1978. If more than one organization meeting the criteria in section 2.1 is self-designated in an area and proposed to the governor for certification, the governor shall certify the orga-

nization which, in his or her opinion, is most capable of completing the required plan revisions.

The governor may designate a state, local, or regional agency, but that designation shall be in accordance with the joint determination of responsibilities required by section 174 of the Clean Air Act amendments and discussed in the following section of these guidelines. In making a designation, the governor shall take into consideration any on-going process of local designation in existence on February 7, 1978, even though no formal agreement among local governments has been reached.

The governor shall submit to the Administrator of the EPA by April 1, 1978, through the appropriate EPA regional office, a list of all organizations or agencies certified or designated within the state, a description of the geographic jurisdictions of these organizations and agencies, and a general description of their responsibilities. Regardless of the agency finally designated or certified, the decisions should reflect an examination of all reasonable alternatives for consolidation of environmental and other planning functions. The submission should include a brief discussion of the alternatives investigated and the basis for the ultimate choice. If the organization designated or certified by the governor is not one of the organizations encouraged by the amendments and by the Administrator in these guidelines, the reasons that such an organization should not have the lead responsibility for planning should be specifically addressed. More detailed descriptions, including documentation of the consultation that occurred, shall be submitted by January 1, 1979 with the implementation plan revision.

3. Joint Determination of Responsibilities

3.1 Joint Determination Process.

The determination of responsibilities made jointly by state and local elected officials will necessarily have to be relatively general for many areas. The nature and extent of the air quality problem may not be adequately defined by the February 7, 1978 deadline specified in the amendments. In addition, the planning process guidelines for photochemical oxidant and carbon monoxide nonattainment areas, required to be prepared by the EPA also by February 7, will not be available for consideration in the joint determinations. The nature of the process recommended in the EPA guidelines should influence the ultimate determination of responsibilities.

Because agency responsibilities, especially for plan implementation and enforcement, will undoubtedly change or become more specific by the time a plan revision is actually submitted to the EPA for approval, the determination of responsibilities should be viewed as a process, the first phase of which is to be completed by February 7, 1978. The final product of the joint determination process should be included as part of the plan revision submitted by January 1, 1979. Possible steps in this phased process are set forth below. Because institutional arrangements differ from region to region and from State to State, specification of a generally applicable process for joint state-local determination of agency responsibilities is not possible.

Many State and local governments already have initiated such a process. As long as the approach taken provides for substantial involvement of all parties—local governments, regional agencies, and states—and results in the identification of agencies and responsibilities as described in these guidelines, such an existing process is sufficient to meet the requirements of section 174(a). The activities described in the following section should be completed by February 7, 1978 to comply with the requirements of section 174.

3.2 Notification of Affected Governmental Organizations.

The state should, by correspondence or other established notification procedures, ensure that all affected governmental organizations within the nonattainment region are informed of the purpose and schedule of the joint determination process. In many instances, an entire state may be designated as a nonattainment area for photochemical oxidants. However, many control strategies will still generally focus on urban regions. As a minimum, the following organizations should be notified in each region:

a. General purpose local governments.

b. Organizations of local elected officials (including all metropolitan planning organizations).

c. Air pollution control agencies (including the agency or agencies responsible for air quality maintenance planning).

d. Areawide A-95 clearinghouses.

e. Areawide and statewide water quality planning agencies designated under section 208 of the Federal Water Pollution Control Act.

f. Areawide solid waste management agencies.

g. Areawide comprehensive planning agencies.

h. Coastal management agencies.

i. Interested citizen groups.

3.3 Establishment of a Determination Process.

The State should ensure the establishment of a process for determination of agency responsibilities that will provide State and local elected officials of all major political subdivisions within a region with

an opportunity for substantial involvement and that will enable the concerns of these officials to be adequately addressed. This may be done through a variety of mechanisms including the establishment of task forces with State and local government representatives and the use of public meetings or hearings with elected officials of all major general purpose local governments within the affected regions invited. Where appropriate, existing forums such as meetings of organizations of local elected officials or meetings of air quality maintenance policy advisory groups should be used in the determination process.

All State and local officials participating in the determination of agency responsibilities should have the opportunity to propose agencies and their respective functions. All proposals should be made available to affected agencies and the general public for comment.

3.4 Formal Indentification of Responsibilities.

The initial joint determination of responsibilities shall at a minimum establish which level of government (although not necessarily the specific agency)—the state, local governments, regional agencies or any combination of these—shall be responsible for:

(1) The development of an accurate, comprehensive, and current emission inventory; (2) the completion of an air quality analysis, using modeling techniques, to determine the level of control needed to attain standards; and (3) the evaluation and selection of control strategies for mobile sources, point sources, and area sources. An initial assignment of responsibilities for implementation and enforcement must be considered. However, it is expected that the final determination of such responsibilities will occur after the measures to be included in the plan revision have been relatively well defined.

When agreement is reached among the state and the participating local elected officials, memoranda of understanding or other comparable joint acknowledgements of responsibilities should be signed. Because duties and responsibilities for implementation and enforcement of plan revisions may change as development of the plan revisions proceeds, the determination of agency responsibilities need not be incorporated in the State implementation plan until the revisions are submitted for federal approval. The initial determination of responsibilities made by February 7, 1978, to meet the requirements of section 174, should be submitted by April 1, 1978, to the EPA with the certifications of lead planning organizations discussed in section 2 of these guidelines.

ATTACHMENT A—LIST OF KEY DATES

Date	Action
August 7, 1977	Clean Air Act amendments are signed into law.
December 5, 1977	States identify nonattainment areas.
February 3, 1978	EPA publishes list of nonattainment areas.
February 7, 1978	Local governments designate organizations of local officials.
	State and local elected officials complete joint determinations of responsibilities.
April 1, 1978	Governors transmit to EPA certification of lead planning organizations and joint determinations of responsibilities.
January 1, 1979	Governors transmit to EPA plan revision for nonattainment areas.

ATTACHMENT B—SECTION 174

Planning procedures

42 USC 7504

Consultation

"SEC. 174. (a) Within six months after the enactment of the Clean Air Act Amendments of 1977, for each region in which the national primary ambient air quality standard for carbon monoxide or ozone will not be attained by July 1, 1979, the State and elected officials of affected local governments shall jointly determine which elements of a revised implementation plan will be planned for and implemented or enforced by the State and which such elements will be planned for and implemented or enforced by local governments or regional agencies, or any combination of local governments, regional agencies, or the State. Where possible within the time required under this subsection, the implementation plan required by this part shall be prepared by an organization of elected officials of local governments designated by agreement of the local governments in an affected area, and certified by the State for this purpose. Where such an organization has not been designated by agreement within six months after the enactment of the Clean Air Act Amendments of 1977, the Governor (or, in the case of an interstate area, Governors), after consultation with elected officials of local governments, and in accordance with the determination under the first sentence of this paragraph, shall designate an organization of elected officials of local governments in the affected area or a State agency to prepare such plan. Where feasible, such organization shall be the metropolitan planning organization designated to conduct the continuing, cooperative and comprehensive transportation planning

process for the area under section 134 of Title 23, United States Code, or the organization responsible for the air quality maintenance planning process under regulations implementing this section, or the organization with both responsibilities.

"(b) The preparation of implementation plan provisions under this part shall be coordinated with the continuing, cooperative, and comprehensive transportation planning process required under section 134 of Title 23, United States Code, and the air quality maintenance planning process required under section 110, and such planning processes shall take into account the requirements of this part.

(Secs. 110, 121, 174(a), 301(a), Clean Air Act, as amended (42 U.S.C. 7410, 7421, 7504, and 7601(a)))

[44 FR 35181, June 18, 1979]

Appendix V—Criteria for Determining the Completeness of Plan Submissions

1.0. Purpose

This Appendix V sets forth the minimum criteria for determining whether a State implementation plan submitted for consideration by EPA is an official submission for purposes of review under § 51.103.

1.1. The EPA shall return to the submitting official any plan or revision thereof which fails to meet the criteria set forth in this Appendix V, or otherwise request corrective action, identifying the component(s) absent or insufficient to perform a review of the submitted plan.

1.2. The EPA shall inform the submitting official when a plan submission meets the requirements of this Appendix V; such determination means that the submission is an official submission for purposes of section 51.103.

2.0. Criteria

The following shall be included in plan submissions for review by EPA:

2.1. Administrative Materials

(a) A formal letter of submittal from the Governor or his designee, requesting EPA approval of the plan or revision thereof (hereafter "the plan").

(b) Evidence that the State has adopted the plan in the State code or body of regulations; or issued the permit, order, consent agreement (hereafter "document") in final form. That evidence shall include the date of adoption or final issuance as well as the effective date of the plan, if different from the adoption/issuance date.

(c) Evidence that the State has the necessary legal authority under State law to adopt and implement the plan.

(d) A copy of the actual regulation, or document submitted for approval and incorporation by reference into the plan, including indication of the changes made to the existing approved plan, where applicable. The submittal shall be a copy of the official State regulation /document signed, stamped, dated by the appropriate State official indicating that it is fully enforceable by the State. The effective date of the regulation/document shall, whenever possible, be indicated in the document itself.

(e) Evidence that the State followed all of the procedural requirements of the State's laws and constitution in conducting and completing the adoption/issuance of the plan.

(f) Evidence that public notice was given of the proposed change consistent with procedures approved by EPA, including the date of publication of such notice.

(g) Certification that public hearing(s) were held in accordance with the information provided in the public notice and the State's laws and constitution, if applicable.

(h) Compilation of public comments and the State's response thereto.

2.2. Technical Support

(a) Identification of all regulated pollutants affected by the plan.

(b) Identification of the locations of affected sources including the EPA attainment/nonattainment designation of the locations and the status of the attainment plan for the affected areas(s).

(c) Quantification of the changes in plan allowable emissions from the affected sources; estimates of changes in current actual emissions from affected sources or, where appropriate, quantification of changes in actual emissions from affected sources through calculations of the differences between certain baseline levels and allowable emissions anticipated as a result of the revision.

(d) The State's demonstration that the national ambient air quality standards, prevention of significant deterioration increments, reasonable further progress demonstration, and visibility, as applicable, are protected if the plan is approved and implemented.

(e) Modeling information required to support the proposed revision, including input data, output data, models used, justification of model selections, ambient monitoring data used, meteorological data used, justification for use of offsite data (where used), modes of models used, assumptions, and other information relevant to the determination of adequacy of the modeling analysis.

(f) Evidence, where necessary, that emission limitations are based on continuous emission reduction technology.

(g) Evidence that the plan contains emission limitations, work practice standards and recordkeeping/reporting requirements, where necessary, to ensure emission levels.

(h) Compliance/enforcement strategies, including how compliance will be determined in practice.

(i) Special economit and technological justifications required by any applicable EPA policies.

2.3. Exceptions

2.3.1. The EPA, for the purposes of expediting the review of the plan, has adopted a procedure referred to as "parallel processing." Parallel processing allows a State to submit the plan prior to actual adoption by the State and provides an opportunity for the State to consider EPA comments prior to submission of a final plan for final review and action. Under these circumstances, the plan submitted will not be able to meet all of the requirements of paragraph 2.1 (all requirements of paragraph 2.2 will apply). As a result, the following exceptions apply to plans submitted explicitly for parallel processing:

(a) The letter required by paragraph 2.1(a) shall request that EPA propose approval of the proposed plan by parallel processing.

(b) In lieu of paragraph 2.1(b) the State shall submit a schedule for final adoption or issuance of the plan.

(c) In lieu of paragraph 2.1(d) the plan shall include a copy of the proposed/draft regulation or document, including indication of the proposed changes to be made to the existing approved plan, where applicable.

(d) The requirements of paragraphs 2.1(e)-2.1(h) shall not apply to plans submitted for parallel processing.

2.3.2. The exceptions granted in paragraph 2.3.1 shall apply only to EPA's determination of proposed action and all requirements of paragraph 2.1 shall be met prior to publication of EPA's final determination of plan approvability.

[55 FR 5830, Feb. 16, 1990]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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(Revised as of June 29, 1990)

The Director of the Federal Register has approved under 5 U.S.C. 552(a) and 1 CFR part 51 the incorporation by reference of the following publications. This list contains only those incorporations by reference effective as of the revision date of this volume. Incorporations by reference found within a regulation are effective upon the effective date of that regulation. For more information on incorporation by reference, see the preliminary pages of this volume.

40 CFR, CHAPTER I (PART 51): SUBCHAPTER C—AIR PROGRAMS ENVIRONMENTAL PROTECTION AGENCY

	40 CFR
Environmental Protection Agency	
Office of Air Quality Planning and Standards, Research Triangle Park, NC 27711	
"Guidelines for Determining Best Available Retrofit Technology for Coal-Fired Power Plants and Other Existing Stationary Facilities", (1980), EPA 450/3–80–009b.	51.302(c)
"Guidelines on Air Quality Models (Revised)" (1986) and Supplement A (1987), EPA 450/2–78–027R.	51.166(l)
Copies may be obtained from: National Technical Information Service, 5285 Port Royal Rd., Springfield, VA 22161.	

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At 47 FR 44946, Oct. 12, 1982, a document was published reorganizing part 35 provisions regarding financial assistance to State and local agencies. The following table shows the relationship of the CFR section numbers under their former organization to their redesignation by that document (published at 47 FR 44946, Oct. 12, 1982).

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35.535	Assignment of personnel	Deleted.
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35.762	Enforcement funds	35.115
35.763	Applicator certification funds	35.115.
35.764	Amount and reallocation	35.141; 35.143; 35.155.
35.767	Rate of Federal assistance	35.555; 35.605.
35.769	Reduction of amount	35.150.
35.771	Budget period	35.135.
35.775	Program plan	35.130.
35.778	Program elements	35.130.
35.782	Program evaluation	35.150.
35.786	Reporting	35.150.
	Subpart F—State Management Assistance Grants	
35.1000	Purpose and scope	35.100; 35.300; 35.3000.
35.1005	Policy	35.3005.
35.1010	Application for grant	35.140; Part 30.
35.1015	Eligibility for funding	35.300.
35.1016	Limitations on award	35.305; 35.310; 35.2020.
35.1020	Grant amount and award	35.115.
35.1025	Payment	Part 30.
35.1030	Delegation agreement	35.130; 35.310; 35.3010; 35.3015; 35.3020.
35.1033	Public participation	35.3035; Part 25.
35.1035	Adherence to budget estimates.	Part 30.
35.1040	Program evaluation and reporting.	35.150; 35.3025.
35.1045	Reduction of grant amount	35.150.
35.1050	Disputes	35.3030; Part 30.
	Subpart G—Grants for Water Quality Planning, Management and Implementation	
35.1500	Purpose and scope	35.100.
35.1501	Applicability	35.100.
35.1502	Definitions	35.105; Part 130.
35.1503	Program summary	35.130; Part 130.
35.1505	Water quality goals	Part 130.
35.1507	Public participation	Part 25.
35.1509	Continuing planning process	Part 130.
35.1511	Assessments and State strategy.	Part 130.
35.1513	WQM work program	35.130; 35.135; 35.141; 35.143; 35.150.
35.1515	State/EPA Agreement	Deleted.
35.1517	Conflict resolution	Deleted.
35.1519	Selection of § 208 agencies	Part 130.
35.1521	Water quality management planning.	Part 130.
35.1523	Certification of WQM plans	Part 130.
35.1525	Reviewing after approval	Part 130.
35.1527	Evaluation of performance	Part 130.
35.1529	Change in agency designation	Part 130.
35.1531	Intergovernmental coordination.	Part 130.
35.1533	Implementation	Part 130.
35.1535	Allotments and reallotments	35.115; 35.155.
35.1537	Grant limitations and administration.	35.130; 35.135; 35.140; 35.141; 35.143; 35.150; 35.155; 35.250; 35.255; 35.260; Part 30.
35.1540	Interstate agencies	Deleted.
35.1542	Termination of reporting	Deleted.
35.1550	Water quality standards	Part 131.

Redesignation Table No. 2

At 48 FR 45062, Sept. 30, 1983, a document was published revising part 30. This table shows the relationship between the former sections and the revised sections.

Former section	Former title	New section
30.100	Purpose	30.100.
30.101	Authority	30.101.
30.105	Applicability and scope	30.100.
30.110	Publication	Deleted.
30.115	Copies	Deleted.
30.120	Citation	Deleted.
30.125	Pubic comment	Deleted.
30.130	Grant information	30.302.
30.135	Definitions	30.200.
30.135–1	Administrator	Deleted.
30.135–2	Agency	Deleted.
30.135–3	Allowable costs	30.200.
30.135–4	Applicant	30.200.
30.135–5	Budget	Deleted.
30.135–6	Budget period	30.200.
30.135–7	Educational institution	Deleted.
30.135–8	Eligible costs	Deleted.
30.135–9	Federal assistance	Deleted.
30.135–10	Grant	Deleted.
30.135–11	Grant agreement	30.200.
30.135–12	Grant approving official	Deleted.
30.135–13	Grant award official	30.200.
30.135–14	Grantee	Deleted.
30.135–15	In-kind contribution	30.200.
30.135–16	Nonprofit organization	Deleted.
30.135–17	Project	30.200.
30.135–18	Project costs	30.200.
30.135–19	Project officer	30.200.
30.135–20	Project period	30.200.
30.135–21	Regional Administrator	Deleted.
30.135–22	Subagreement	30.200.
	Subpart A—Basic Policies	
30.200	Grant simplification goals and policy	Deleted.
30.205	Role of EPA	30.100.
30.210	Role of the grantee	30.309.
30.215	Records of grant actions	30.500.
30.220	Consolidated grants	30.200.
30.225	Foreign grants	30.200.
30.225–1	Clearance requirements	Deleted.
30.225–2	Criteria for award	Deleted.
30.225–3	Allowability of costs	Deleted.
30.225–4	Payments	Deleted.
30.230	Grants administration review	Deleted.
30.235	Disclosure of information	30.304.
30.245	Fraud and other unlawful or corrupt practices.	30.610.
	Subpart B—Application and Award	
30.300	Preapplication procedures	Deleted.
30.305	A–95 procedures	Deleted.
30.305–1	Specific areas of clearinghouse evaluation.	Deleted.
30.305–2	Notification of intent (A–95, Part I).	Deleted.
30.305–3	Time limitations	Deleted.
30.305–4	EPA processing	Deleted.
30.305–5	Programs requiring state plans and jointly-funded projects (A–95, Part III).	Deleted.
30.305–6	Coordination of planning in multijurisdictional areas (A–95, Part IV).	Deleted.
30.305–7	Confidential information	Deleted.
30.305–8	Specific requirements for the Construction Grant Program.	Deleted.
30.310	Unsolicited proposal	30.302.
30.315	Application requirements	Deleted.
30.315–1	Signature	30.303.
30.315–2	Forms	Deleted.
30.315–3	Time of submission	Deleted.
30.315–4	Place of submission	Deleted.
30.320	Use and disclosure of information.	30.304.
30.325	Evaluation of application	Deleted.
30.330	Supplemental information	Deleted.
30.335	Criteria for award of grant	Deleted.
30.340	Responsible grantee	30.301.
30.340–1	General policy	Deleted.
30.340–2	Standards	30.301.
30.340–3	Determination of responsibility.	30.301.
30.345	Award of grant	30.305.
30.345–1	Amount and terms of grant	Deleted.
30.345–2	Federal share	Deleted.
30.345–3	Grant agreement	30.305.
30.345–4	Costs incurred prior to execution.	30.308.
30.345–5	Effect of grant award	30.309.
30.350	Limitation on award	30.601 and 30.613.
30.355	Continuation grants	30.306.
	Subpart C—Other Federal Requirements	
30.400	General grant conditions	Deleted.
30.405	Statutory conditions	30.600.
30.405–1	National Environmental Policy Act.	30.600(a).
30.405–2	Uniform Relocation Assistance and Real Property Acquisition Policies Act.	30.600(i).
30.405–3	Civil Rights Act of 1964	30.600(e).

Redesignation Table No. 2

Former section	Former title	New section
30.405–4	Federal Water Pollution Control Act Amendments of 1972, Section 13.	30.600(d).
30.405–5	Title IX of the Education Amendments of 1972.	30.600(h).
30.405–6	Hatch Act	30.600(k).
30.405–7	National Historic Preservation Act.	30.600(a).
30.405–8	Public Law 93–291	30.600(a).
30.405–9	Demonstration Cities and Metropolitan Development Act.	40 CFR 29.
30.405–10	Flood Disaster Protection Act.	30.600(b).
30.405–11	Clean Air Act, Section 306	30.600(c).
30.405–12	Federal Water Pollution Control Act, Section 508.	30.600(d).
30.410	Executive Orders	30.600.
30.410–1	Executive Order 11246	30.600(e).
30.410–2	Executive Order 11988	30.600 (a) & (b).
30.410–3	Executive Order 11514	30–600(a).
30.410–4	Executive Order 11738	30.600 (c) & (d).
30.410–5	Executive Order 11990	30.600(a).
30.415	Additional requirements—federally assisted construction.	30.603.
30.415–1	Davis-Bacon Act	30.603(a).
30.415–2	The Copeland Act	30.603(b).
30.415–3	The Contract Work Hours and Safety Standards Act.	30.603(c).
30.415–4	Convict labor	30.603(d).
30.420	Additional requirements all EPA grants.	Deleted.
30.420–1	Prohibition against contingent fees.	30.611.
30.420–2	Officials not to benefit	30.613.
30.420–3	Prohibition against violating facilities.	30.600.
30.420–4	Conflict of interest	30.613.
30.420–5	Employment practices	Deleted.
30.420–6	Conservation and efficient use of energy.	Deleted.
30.425	Special conditions	30.309(b).
30.430	Noncompliance	30.900.

Subpart D—Patents, Data and Copyrights

30.500	General	30.1100.
30.502	Definitions	Deleted.
30.505	Required provision regarding patent and copyright infringement.	App. B.
30.510	Patents and inventions	30.1101.
30.515	Required patent provision	App. B.
30.520	Optional patent provision	Deleted.
30.525	Data and copyrights	App. C.
30.530	Required data and copyright provision.	Deleted.
30.540	Deviations	30.1104.

Subpart E—Administration and Performance of Grants

30.600	General	Deleted.
30.605	Access	30.502.
30.610	Rebudgeting of funds	700(e).
30.615	Payment	Deleted.
30.615–1	Method of payment	30.400.
30.615–2	Cash depositories	30.400.
30.615–3	Withholding of funds	30–902.
30.615–4	Assignment	30.405.
30.620	Grant related income	30.525.
30.620–1	Proceeds from sale of real or personal property.	30.525.
30.620–2	Royalties received from copyrights and patents.	30.525.
30.620–3	Interest earned on grant funds.	30.526.
30.625	Grantee publications and publicity.	30.515.
30.625–1	Publicity	Deleted.
30.625–2	Publications	30.515.
30.625–3	Signs	30.515.
30.630	Surveys and questionnaires	30.515.
30.635	Reports	30.515.
30.635–1	Interim progress reports	30.505.
30.635–2	Final report	30.505.
30.635–3	Financial reports	30.505.
30.635–4	Invention reports	30.505.
30.635–5	Property reports	30.505.
30.635–6	[Reserved]	
30.635–7	Compliance	Deleted.
30.640	Utilization of Government procurement sources.	30.538.
30.645	Force account work	30.520.

Subpart F—Project Costs

30.700	Use of funds	30.307.
30.705	Allowable costs	30.410.
30.705–1	Payment to consultants	40 CFR 33.
30.710	Federal cost principles	30.410.
30.715	Direct and indirect costs	30.412.
30.715–1	Direct costs	30.412.
30.715–2	Indirect costs	30.412.
30.720	Cost sharing	30.307.
30.725	Cost and price analysis	40 CFR 33.
30.725–1	Policy	40 CFR 33.
30.725–2	Price analysis	40 CFR 33.
30.725–3	Cost analysis	40 CFR 33.
30.725–4	Requirements	40 CFR 33.

Subpart G—Grantee Accountability

30.800	Financial management	30.510.
30.805	Records	30.500.
30.810	Property	30.531.
30.810–1	Definitions	30.200.
30.810–2	Purchase of property	30.530.
30.810–3	Property management standards.	30.531.
30.810–4	Title to property	30.530.
30.810–5	Real property	30.535.
30.810–6	Federally-owned nonexpendable personal property.	30.536.
30.810–7	Nonexpendable personal property acquired with Federal funds.	30.532.
30.810–8	Expendable personal property acquired with grant funds.	30.532.
30.810–9	Property reports	30.505.
30.815	Final settlement	30.802.
30.820	Audit	30.540.

Subpart H—Modification, Suspension and Termination

30.900	Project changes and grant modifications.	30.700.
30.900–1	Formal grant amendments	30.700.
30.900–2	Administrative grant changes.	Deleted.

Former section	Former title	New section
30.900–3	Transfer of grants; change of name agreements.	30.700.
30.900–4	Grantee projects changes	30.705.
30.915	Suspension of grants—stop-work orders.	30.901.
30.915–1	Use of stop-work orders	30.901.
30.915–2	Contents of stop-work orders.	30.901.
30.915–3	Issuance of stop-work order	30.901.
30.915–4	Effect of stop-work order	30.901.
30.915–5	Disputes provision	30.901.
30.920	Termination of grants	30.903.
30.920–1	Termination agreement	30.903.
30.920–2	Project termination by grantee.	30.903.
30.920–3	Grant termination by EPA	30.903.
30.930–4	Effect of termination	30.903.
30.920–5	Annulment of grant	30.904.
	Subpart I—Deviations	
30.1000	General	Subpart J.
30.1000–1	Applicability	Subpart J.
30.1000–2	Request for deviation	Subpart J.
30.1000–3	Approval of deviation	Subpart J.
	Subpart J—Disputes	
30.1100	Final Disputes decision	Subpart L.
30.1105	Grantee appeal	Subpart L.
30.1115	Rights of the grantee and the government.	Subpart L.
30.1120	Decision of the Administrator.	Subpart L.
30.1125	Questions of law	Deleted.
30.1130	Delegation of authority	Deleted.
30.1150	Appeal procedures	Deleted.
Appendix A	General Grant Conditions	Deleted.
Appendix B	Patents and Inventions	Deleted.
Appendix C	Rights in Data and Copyrights.	App. C.

Redesignation Table No. 3

At 50 FR 26311, June 25, 1985, a document was published reorganizing part 6. This table shows the relationship between the former sections and the revised sections.

Old section	New section
6.107 (a) and (b) Categorical exclusions.	6.107 (a) and (b).
6.107 (c) and (d)	Obsolete.
6.107(e)	6.107(c).
6.301 Historical and archeological sites.	6.301 Landmarks, historical and archeological sites.
6.301(a)	6.301(b).
6.301(b)	6.301(c).
6.302 (a) and (b)	6.302 (a) and (b).
6.302(c) Agricultural farmlands.	6.302(c) Important farmlands.
6.302 (d) and (e)	6.302 (d) and (e).
6.302(f) Fish and wildlife	6.302(g).
6.302(g) Endangered species protection.	6.302(h).
6.500 Purposes	6.500.
6.501 Definitions	6.501.
6.502 Applicability [interim final [1]].	Obsolete.
6.503 Consultation during the environmental review process. [revised interim final [2]].	6.507 Partitioning the environmental review process.
6.504 Public participation [interim final].	6.513.
6.505 Limitations [interim final].	Obsolete.
6.506(a) (1) thru (6) [interim-final].	6.108 Criteria for initiating EISs.
6.506(a)(7) [Interim-final] and (b); Criteria for preparing EISs.	6.509 Criteria for initiating EISs.
6.506(c) Categorical exclusions [revised interim-final].	6.505.
6.507(a) [interim final] and (b); Award of a facilities grant (Step 1) and Mid-course review.	6.504 Consultation during the facility planning process.
6.507 (c) and (d) Review of completed facilities plan and Environmental review.	6.506 Environmental review process.
6.507(e) Finding of No Significant Impact.	6.508 . . . (FNSI) determination.
6.507 (f), (g) and (h) Notice of intent, Scoping and EIS method.	6.510 Environmental Impact Statement (EIS) preparation.
6.508 Limits on delegation to States [interim final].	6.514.
6.509 Identification of mitigation measures.	6.511 Record of decision and . . . .
6.510 Monitoring	6.512 Monitoring compliance.
6.107 Categorical exclusions.	6.107 [Revised Interim-final].

Old section	New section
6.107 (a) and (b)	6.107 (a) and (b).
6.107(c)	6.107(e).
6.108	6.506(a) (1) thru (6) [interim-final].
6.301 Landmarks, historical and archeological sites.	6.301.
6.301(a) National natural landmarks.	New.
6.301(b)	6.301(a).
6.301(c)	6.301(b).
6.302 Wetlands, floodplains, important farmlands, coastal zones, wild and scenic rivers, and endangered species.	6.302.
6.302 (a)–(e)	6.302 (a)–(e).
6.302(f) Barrier islands	New.
6.302 (g) and (h)	6.302 (f) and (g).
6.501 Definitions (a)–(f)	6.501 (a)–(f).
6.501(g) "Responsible official".	New.
6.501(h) "Approval of the facilities plan.	New.
6.502 Applicability and limitations.	New.
6.503 Overview of the environmental review process.	New.
6.504(a) Consultation during the facility planning process.	6.507 Introductory paragraph.
6.504(b) (1) and (2)	6.507(a) [Interim final [1]] and (b) new title.
6.504(c) Projects not receiving grant assistance for step 1 facility planning on or before December 29, 1981.	New.
6.505 Categorical exclusions.	6.506.
6.505(a) General	6.506(c) Introductory paragraph [interim final].
6.505(b) Categories eligible for exclusion.	6.506(6)(1) [Revised interim final [2]].
6.505(c) Criteria for not granting a categorical exclusion.	6.506(c)(2) [Revised interim final].
6.505(d) Developing new categories of excluded actions.	6.506(c)(3) [Interim final].
6.505(e) Proceeding with grant awards.	New.
6.506 Environmental review process.	6.507.
6.506 (a) and (b)	6.507(c).
6.506(c)	6.507(d).

Old section	New section
6.506(c) (1) and (2)	6.507(d)(1).
6.506(c) (3) and (4)	6.507(d) (2) and (3).
6.507 Partitioning the environmental review process.	6.503 Segmenting projects [revised interim-final].
6.507(a) Purpose	6.503(a) Criteria for segmenting.
6.507(b) Criteria for partitioning.	6.503(b) EIS determination.
6.507(c) Requests for partitioning.	6.503(c) Steps in segmenting.
6.507(d) Approval of requests for partitioning.	New.
6.508 Finding of No Significant Impact (FNSI) determination.	6.507.
6.508(a)	6.507(e).
6.508(b) Proceeding with grant awards.	New.
6.509 Criteria for initiating EISs.	6.506 (a) and (a)(7) [interim-final], and (b).
6.510 Environmental Impact Statement (EIS) preparation.	6.507.
6.510(a) Steps in preparing EISs.	New.
6.510(a)(1)	6.507(f).
6.510(a)(2)	6.507(g).
6.510(a)(3) Identifying and evaluating alternatives.	New.
6.510(b) (1) and (2)	6.507(h) (1) and (2).
6.510(b)(3) (Third party method).	New.
6.510(b)(4) (joint EPA EIS process).	6.507(h)(3) and 6.604(g)(3).
6.511 Record of decision and identification of mitigation measures.	6.509.
6.511 (a) and (b)	6.509 (a) and (b).
6.511(c) Proceeding with grant award.	New.
6.512 Monitoring compliance.	6.510.
6.513 Public participation	6.504 [Interim final].
6.513(a)	6.504(a) [Interim final].
6.513(a) (1) and (2) (Public meetings/hearings).	New.
6.513 (b) and (c)	6.504 (b) and (c).
6.514 Delegation to States	6.508 [Interim final].
6.514	6.514(a).
6.514(a) (1) and (2)	6.514(a)(2).
6.514(a)(3) (Environmental assessment).	New.
6.514(a)(4)	6.508(a)(2).
6.514(a)(5)	6.508(a)(3).
6.514(a)(6)	6.508(a)(1).
6.514(a) (7)–(9) RODs; Subpart C; 6.510(b)(3)).	New.
6.514(b)	6.508(b).

[1] 47 FR, March 8, 1982, pp. 9829–32.
[2] 48 FR, January 7, 1983, pp. 1012–20.

Derivation Table

At 51 FR 40660, Nov. 7, 1986, a document was published restructuring part 51. For the convenience of the user, the following Derivation Table and Distribution Table II shows the relationship of the old regulations to the new regulations.

TABLE 1—DERIVATION TABLE AND MASTER PLAN TO RESTRUCTURE 40 CFR PART 51

New designation section No. and title	Old designation section No. and title
Subpart F Procedural Requirements	
51.100 Definitions	51.1 Definitions.
51.101 Stipulations	51.2 Stipulations.
51.102 Public hearings	51.4 Public hearings.
51.103 Submission of plans	51.5 Submission of plans.
51.104 Revisions	51.6 Revisions.
	51.34 Variances.
51.105 Approval of plans	51.8 Approval of plans.
Subpart G Control Strategy	
51.110 Attainment and Maintenance of National Standards	51.10 General requirements (portion).
	51.12 Control strategy: General (portion).
	51.13 Control strategy: SO_x & PM (portion).
	51.14 Control strategy: CO, HC, Ox & NO_2 (portion).
	51.80 Demonstration of attainment: Pb (portion).
51.111 Description of control measures	51.14 Control strategy: CO, HC, Ox, & NO_2 (portion).
	51.87 Measures: Pb.
51.112 Demonstration of adequacy	51.13 Control strategy: SO_x & PM (portion).
	51.14 Control strategy: CO, HC, Ox, & NO_2 (portion).
	51.80 Demonstration of attainment: Pb (portion).
	51.82 Air quality data (portion).
51.113 Time period for demonstration of adequacy	51.10 General requirements (portion).
	51.81 Emissions data: Pb (portion).
51.114 Emissions data and projections	51.13 Control strategy: SO_x & PM (portion).
	51.14 Control strategy: CO, HC, Ox, & NO_2 (portion).
	51.81 Emissions data: Pb (portion).
51.115 Air quality data and projections	51.13 Control strategy : SO_x & PM (portion).
	51.14 Control strategy: CO, HC, Ox, & NO_2 (portion).
	51.82 Air quality data: Pb (portion).
51.116 Data availability	51.10 General requirements (portion).
	51.88 Data availability: Pb.
51.117 Additional provisions for lead	51.80 Demonstration of attainment: Pb (portion).
	51.81 Emissions data: Pb (portion).
	51.82 Air quality data: Pb (portion).
	51.83 Certain urbanized areas: Pb.
	51.84 Areas around significant point source: Pb.
	51.85 Other areas: Pb.
	51.86 Data bases: Pb (portion).
51.118 Stack height provisions	51.12 Control strategy: General (portion).
51.119 Intermittent control systems	51.12 Control strategy: General (portion).
51.120–51.135 Reserved for new requirements as set forth in the Act	
51.136–51.140 Reserved for maintenance of PSD increment provisions	
Subpart H Prevention of Air Pollution Emergency Episodes (§§ 51.150 to 51.159)	51.3
	51.16 Classification of regions.
	Prevention of air pollution emergency episodes.
Subpart I Review of New Sources and Modifications (§§ 51.160 to 51.189	51.18
	51.24 Review of new sources and modifications.
	Prevention of significant deterioration.
Subpart J Air Quality Surveillance (§§ 51.190 to 51.209) (Promulgated 5/10/79)	51.17 Air quality surveillance.

TABLE 1—DERIVATION TABLE AND MASTER PLAN TO RESTRUCTURE 40 CFR PART 51—Continued

New designation section No. and title	Old designation section No. and title
Subpart K Source surveillance (§§ 51.210 to 51.229)	51.19 Source surveillance.
Subpart L Legal Authority (§§ 51.230 to 51.239)	51.11 Legal authority.
Subpart M Intergovernmental consultation (§§ 51.240 to 51.259) (Promulgated 6/18/79)	51.21 Intergovernmental cooperation.
Subpart N Compliance Schedules (§§ 51.260 to 51.279)	51.15 Compliance schedules.
Subpart O Miscellaneous Plan Content Requirements	
51.280 Resources 51.281 Copies of rules and regulations 51.282 Reserved 51.283 Reserved 51.284 Public notification (Promulgated 5/10/79)	51.20 Resources. 51.22 Rules and regulations.
Subpart P Visibility protection (§§ 51.300 through 51.319) (Promulgated 12/2/80)	
Subpart Q Reports (§§ 51.320 through 51.339)	51.7 Reports.
Subpart R Extensions (§§ 51.340 through 51.369)	51.30 Request for 2-year extension. 51.31 Request for 18-month extension.
Revoked	51.1 Definitions (obsolete portions). 51.3 Classification of regions (as applicable to control strategies). 51.4 Public hearings (obsolete portions). 51.5 Submission of plans; preliminary review of plans (obsolete portions). 51.23 Exceptions. 51.32 Request for 1-year postponement. 51.33 Headings and appeals relating to request for one year postponement. 51.326 Reportable revisions. 51.328 Plan prescribed actions. Appendix A Air quality estimation. Appendix B Examples of emission limitations attainable with reasonably available control technology. Appendix C Major pollutant source. Appendix D Pollutant emissions inventory summary. Appendix E Point source data. Appendix F Area source data. Appendix G Emission inventory summary. Appendix H Air quality data summary. Appendix K Control agency functions. Appendix M Transportation Control Supporting Data Summary. Appendix N Emissions Reductions Achievable Through Inspection, Maintenance and Retrofit of Light Duty Vehicles. Appendix O [Untitled]. Appendix R Agency functions for air quality maintenance area plans.

NA—Not applicable.

TABLE 2—DISTRIBUTION TABLE

Old section	New section
51.1(a) through (nn) All paragraph designations are the same and have the same paragraph designation *except* those which are listed below.	51.100(a-nn).
51.1(a)	51.100(a) New citations added.
51.1(j)	51.100(j). Definition of local agency deleted. 51.1 includes two definitions of "local agencies." EPA considers 51.100(g) a better definition. A new 51.100(j) is added which defines the term "plan."
51.1(k)(1)	51.100(k)(1) The term "Volatile Organic Compound" (VOC) replaces the term "Hydrocarbons."
51.1(k)(1)(i,ii)	51.1 Point source definition updated.
51.1(k)(1)(iii)	Unnecessary, Appendix C is deleted in this action.
51.1(l)	51.1Reference to Appendix D removed; reference to inventory techniques updated.
51.1(m)	51.100(m) revised.
51.1(o)	51.100(o) revised.
51.2	51.101.

Derivation Table

TABLE 2—DISTRIBUTION TABLE—Continued

Old section	New section
51.3	51.50, streamlined.
51.4 All paragraphs are the same and are restructured with the same paragraph numbers except as noted below.	51.102.
51.4(a), (e)	51.102(a), (e) rewritten.
51.4(b)(4)	51.102(b)(4) rewritten.
51.4(h)(6)	Unnecessary, redundant.
51.4(f)	Deleted, obsolete.
51.5 All paragraphs are the same and restructured with the same paragraph numbers except as noted below	51.103.
51.5(a)	Rewritten; "Note" deleted.
51.5(d), (e)	Deleted, redundant.
51.6	51.104.
51.6(b) through (f)	51.104 (b) through (f) rewritten.
51.8	51.105.
51.10(a)	51.110(g) rewritten.
51.10(b)	51.110(b), (d).
51.10(c)	51.110(c)(1), (d).
51.10(d)	51.110(e), revised.
51.10(e)	51.116(c).
51.11(a)	51.230.
51.11a(1–6)	51.230(a) through (f).
51.11(b)	Unnecessary provisions for transportation plans, obsolete.
51.11(c)	51.231(a).
51.11(d)(1)	51.231(b).
51.11(d)(2)	51.231(c).
51.11(e)	51.232(a).
51.11(f)	51.232(b).
51.12(a)	51.110(a).
51.12(b)	51.110(a), (c).
51.12(c)	Deleted, redundant.
51.12(d)	51.110(f).
51.12(e)	51.110(h).
51.12(f)	51.110(i).
51.12(g)	51.110(j).
51.12(h)	51.110(k).
51.12(i)	51.110(l).,
51.12(j)	51.118(a).
51.12(k)	51.118(b).
51.12(l)	51.118(c).
51.12(m)	51.119(a).
51.12(n)	51.119(b).
51.13(a)	51.110(b).
51.13(b)	51.110(c).
51.13(c)	51.115(c).
51.13(d)	Deleted, example region approach.
51.13(e)(1) phrase "in the example regions to which it applies."	Deleted, example region approach.
Rest of 51.13(e)(1)	51.112(a).
51.13(e)(2)(i,ii)	Air Programs Reports and Guidelines Index.
51.13(e)(2)(iii)	51.112(a) and (b).
51.13(e)(3)(i)	51.112(b)(4), Air Programs Reports and Guidelines Index.
51.13(e)(3)(ii)	51.114(a).
51.13(e)(3)(iii)	51.112(b)(3), rewritten.
51.13(f,g)	51.114(a), 51.115(a) Portions related to example region approach deleted.

TABLE 2—DISTRIBUTION TABLE—Continued

Old section	New section
51.14(a)(1)	51.110(a), Rewritten, reference to priority of regions deleted.
51.14(a)(2)	51.111.
51.14(b)	Unnecessary.
51.14(c)(1)	51.112(a).
51.14(c)(2) and (5) through (7)	Air Programs Reports and Guidelines Index.
51.14(c)(5)	51.112(a).
51.14(c)(6)	51.112(b)(4).
51.14(c)(8)	51.115(d).
51.14(c)(9)	Reference to hydrocarbon standard which has been revoked, deleted.
51.14(d)	51.114(a).
51.14(e)	51.115.
51.14(f)	Air Programs Reports and Guidelines Index.
51.14(g)	Obsolete.
51.14(h)	Air Programs Reports and Guidelines Index.
51.15(a)(1)	51.260(a), (b).
51.15(b)(1)	51.261(a).
51.15(b)(2)	51.261(b).
51.15(c)	51.262(a).
51.16(a)	51.151.
51.16(b)	51.152(a).
51.16(d)	Deleted, obvious.
51.16(e)	51.152(b).
51.16(f)	Obsolete.
51.16(g)	51.152(c).
51.16(h)	51.152(d).
51.18(a)	51.160(a).
51.18(b)	51.160(b).
51.18(c)	51.160(c).
51.18(d)	51.160(d).
51.18(e)	51.162.
51.18(f)	51.160(e).
51.18(g)	51.163.
51.18(h)	51.161.
51.18(i)	Obsolete, refers to Appendix O, guidance on indirect source review.
51.18(j)	51.165(a).
51.18(k)	51.165(b).
51.18(l)	51.164.
51.19 (Introduction)	51.210.
51.19(a)	51.211.
51.19(b), (c)	51.212.
51.19(d)	51.213.
51.19(e)	51.214(a).
51.19(e)(1)	51.214(b).
51.19(e)(2)	51.214(c).
51.19(e)(3)	51.214(d).
51.19(e)(4)	51.214(e).
51.19(e)(5)	51.214(f).
51.19e(6)	Obsolete, deleted.
51.20	51.280.
51.22	51.281.
51.23	Unnecessary.
51.24	51.166.
51.30	51.340.
51.31	51.341.
51.32	Deleted, no longer in Clean Air Act (CAA).
51.33	Deleted, no longer in CAA.
51.34	51.104(g).

TABLE 2—DISTRIBUTION TABLE—Continued

Old section	New section
51.80(a)	51.110(b), 51.118(a).
51.80(b)	51.112(a).
51.80(c)	51.112(b).
51.81(a)	51.117(e).
51.81(b)	51.113(a).
51.81(c)	51.112(b)(1).
51.81(d)	51.114(c).
51.82(a)	51.115(b), 51.117(d)(1).
51.82(b)	51.117(b)(3).
51.82(c)	51.112(b)(3).
51.83	51.117(c)(1).
51.84	51.117(a), (c)(2).
51.85	51.117(c)(3).
51.86(a)	51.112(b)(5).
51.86(b)	51.117(e)(2).
51.86(c)	51.117(d)(1,2).
51.87	51.111.
51.88	51.116(a), (b).
51.326, 51.328	Deleted, report requirement no longer needed.

TABLE 2—DISTRIBUTION TABLE—Continued

List of CFR Sections Affected

All changes in this volume of the Code of Federal Regulations which were made by documents published in the FEDERAL REGISTER since January 1, 1973, are enumerated in the following list. Entries indicate the nature of the changes effected. Page numbers refer to Federal Register pages. The user should consult the entries for chapters and parts as well as sections for revisions.

Title 40 was established at 36 FR 12213, June 29, 1971. For the period before January 1, 1973, see the "List of CFR Sections Affected, 1964-1973," which is published in a separate volume.

1973

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Chapter I

2.107a Revised 22473
3 Revised 9556
5 Revised 32806
6 Added 1696
7 Added 17968
10 Added 16868
15 Added 35311
35 Subpart D redesignated as Subpart E and revised 5329
35.400-35.560-2 (Subpart B) Revised 17218
35.850—35.895 (Subpart D) Added 26882
35.930-1 (a)(4) corrected 6390, 9666
35.935-6 Corrected 6390
35 Appendix A added 24629
40 Interim regulations added 12784
40.125-1 Corrected 16220
45—46 Added 16060
50.5 Revised 25681
51.1 (r), (s), (t), (u), (v), (w), and (x) added 15195
(f) and (g) revised 15835
51.4 (f) added 15195
51.5 (d) and (e) added 15195
(a)(3) added 15836
51.7 Revised 20834
51.11 (a)(4) revised 15836
51.12 (e), (f), (g), and (h) added 15836
51.14 (a)(2) and (c) (1) and (5) revised; (f), (g), and (h) added 15195
51.16 (c) removed; (f) amended 20835
51.18 Revised 15836

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Chapter I—Continued

51.19 (d) added 15196
51.32 (d) amended 15958
51.33 Added 22026
(a)(2) and (6), (b)(2)(iv)(c)(1), (4), and (5), (d)(2), and (u)(2) revised 27286
51 Appendix I removed 15195
Appendix M—N added 15196
Appendix O added 15836

1974

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4 Revised 10362
8 Added 3258
12 Added 32989
Added 29692
14 Added 9664
Subchapter B heading revised 20789
35.400—35.560-2 (Subpart B) Interim regulations 7785
Effective date corrected 9439
35.505 (c) corrected 9439
35.850—35.895 (Subpart D) Revised 3678
35.882 Added 40855
35.900—35.960 (Subpart E) Revised 5253
35.910-1—35.910-2 Revised 1847
35.910-3 Added 1847
(b) table corrected 15760
(c) table corrected 15761
35.910-4 Added 1847
(b) table and (c) corrected 15761
35.912 Revised 35334

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35.913 Added	35334
35.917-7 Corrected	15761
35.935-12 Heading correctly added	15761
35.935-13 (b)(1) corrected	15761
35.938-5 (g) corrected	15761
35.940-1 (q) added	35334
35.1050—35.1080 (Subpart F) Added	17202
35 Appendix A revised	5269
Appendix B added	5270
39 Added; eff. 7-15-74	20789
51.5 (a)(1) note added	16122
51.11 (g) added	34535
51.12 (e)(2), (f), and (g) revised	16344
51.14 (c)(2) revised; (c)(3) removed	16122
51.15 (d) added	34535
51.32 (f) revised	34535

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Chapter I	
2 Revised	10461
6 Revised	16815
6.103 (c) interpretation (waiver)	20629
6.212 (a) interpretation (waiver)	20629
15 Heading and text revised	17124
15.4 (c) (2) amended	18437
15.5 (a) (4) corrected	18430
15.20 (a) (2) and (4), and (c) corrected	18430
Subchapter B—Appendices A, B, and C removed	20083
16 Added	53582
30 Revised	20232
Appendix A added; correction	20952
35.200—35.236 Revised	55322
35.215 Introductory text amended	20082
35.315-2 Introductory test amended	20083
35.415 Amended	20083
35.420 Amended	20083
35.530 (d) and (e) amended	20083
35.557 (a) amended	20083
35.559-7 (a) and (b) amended	20083
35.815-2 (b)(4) amended	20083
35.840 (j) and (k) amended	20083
35.903 (n) amended	20083
35.910-3 (d) added	5363
(d) revised	8349

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35.910-5 Added	5363
Revised	8349
35.920-3 (b)(5) amended	20083
35.927-5 (c) amended	20083
35.930 Amended	20083
35.930-3 Amended	20083
35.935-5 Amended	20083
35.935-10 Amended	20083
35.935-11 Amended	20083
35.935-13 (c) amended	20083
35.936—35.937-12 Added	58604
35.938—35.939 Removed; new 35.938—35.939 added	58609
35.940 Amended	20083
35.940-1 (p) amended	20083
35.940-5 Amended	20083
35.945 (b) amended	20083
35.950 Amended	20083
35.955 Amended	20083
35.960 Amended	20083
35.965 Added	58613
35.1059-3 Amended	20083
35.1061 Amended	20083
35.1062 Introductory text amended	20083
35.1050—35.1080 (Subpart F) Removed	55322
35 Appendix D added	58613
40.125-2 Introductory text amended	20083
40.130 Introductory text amended	20083
40.135-2 Introductory text amended	20083
40.145 Introductory text and (b) amended	20083
40.145-3 (k) amended	20083
40.155 (c) amended	20083
40.160-3 Introductory text amended	20083
45.135 Introductory text and undesignated sentence amended	20083
45.145 (a) amended	20083
46.155 Amended	20083
50.1 (f) and (g) revised	7043
50.8 Introductory text revised	7043
50.9 Revised	7043
50 Appendix C heading revised and text amended; Appendix D heading revised and text amended	7043
51.1 (z), (aa), (bb), (cc), (dd), and (ee) added	46247
51.12 (f) and (g) revised	25815

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51.14 (e)(1) table amended 7043
51.16 (a) amended 36333
51.17 (a)(1) table amended 7043
51.17a Added 7044
51.19 (e) added 46247
51.23 Added 18388
51.32 (f) revised 18511
51.34 Added 18511
51.40—51.63 (Subpart D) Added 18388
51 Appendix L Amended 36333
Appendix P Added 46247
Appendix R Added 18391

1976

40 CFR

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Chapter I

1 Revised 30640
2.100—2.200 (Subpart A) Revised 36903
2.201—2.309 (Subpart B) Added 36906
6.106 (e) added 20655
7.3 (a) amended 20655
7.4 (c)(1) and (e) amended 20655
7.8 (e) amended 20655
7.10 (a) and (b) amended 20655
7.11 (a), (b) and (c) amended 20655
7.13 (c) amended 20655
12.11 (f) revised 20655
12.12 (c) amended 20656
30.135-3 Revised 20656
30.135-8 Revised 20656
30.135-22 Revised 20656
30.225-3 (c) removed 20656
30.235 (b) revised 36918
30.305 Revised 20656
30.305-1—30.305-8 Added 20656
30.320 (b) revised 36918
30.615-1 Revised 56196
30.615-2 (a) amended 56196
30.620 (b) amended 56197
30.620-2 Revised 56197
30.635-5 (c) added 56197
30.710 (d) revised 20658
30.715-2 Revised 20658
30.720 (a) amended 20659
30.810-1 (a) amended 56197
30.810-3 (a)(6) revised; (a)(8) added 56197
30.810-7 (a) revised 56197
30.810-8 Amended 56197

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35.204 (a) introductory text and (e) amended; (a) (1), (2) and (3) added; (b) revised 43728
35.315-2 (h) added 20659
35.400—35.425 Revised 17695
35.551—35.570 Revised 17696
35.562 (b) revised 20659
35.600—35.630 Added 2912
35.900—35.965 (Subpart E) Appendixes C-1 and C-2, extension of time 27966
Technical correction 29817
Appendixes C-1 and C-2 revised 56636
35.905-27 Added 41690
35.910-6 Added 51016
35.920-3 (a)(3) and (b)(8) revised 20659
(b)(9) added 41690
35.925-7 (c) amended; (d) redesignated as (e); new (d) added 41690
35.925-20 Added 56635
35.926 Added 41690
35.935-2 Revised 56635
35.935-4 Removed 56635
35.935-7 Revised 56635
35.935-11 Revised 56636
35.935-15 Revised 20659
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35.935-18 Added 41691
35.937-10 Revised 56636
35.938-6 (c)(1) amended 56636
35.938-8 Revised 56636
35.945 Introductory text revised 56636
35 Appendices C-1 and C-2 Added 9341
Appendices C-1 and C-2 amended 20659
40.135-1 (b) revised 20659
40.155 Heading, (a) and (b) revised 36918
50 Appendix F revised 52688
50.1 (f) and (g) revised 11253
51 Technical correction 24709
51.1 (y) added 18511
51.4 (b) (4) and (5) amended; (b)(6) added 18387
51.7 (e) added 18388
(b)(1) and (5) amended 35676
51.11 (g) removed 18511
51.12 (e)(3) removed; (g) and (h) revised; (i) added 18388
(h)(1) corrected 21323

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51.15 (d) removed....18511
51.17 (a)(1) Table amended....52692
51.17a (a) (4) and (5), and (b) through (f) added....11253
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51.18 Interpretative ruling....55528
51 Appendix L Table II amended....35678

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3 Authority citation revised....6809
3.102 (e) added....6809
3.202 (b)(2)(v) added....6809
3.203 (a) amended....6809
3.300—3.306 (Subpart C) Appendixes D through F added....6810
3.301 (a) and (c) revised; (d) added....6809
3.305—3.306 Added....6809
3.607 (c) and (d) added....6811
6.900—6.924 (Subpart I) Added....2453
21 Revised....8083
30 Authority citation revised....56051
30.101 (c) revised....56051
30.305-2 (a) (3), (4), and (14) revised; (a) (15) and (16) added....56051
30.515 Existing text designated as (a); new (b) added....56051
33 Interim regulations added....8090
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35 Authority note removed....33034
35.150—35.150-2 Undesignated center heading, authority, source, and sections removed....33034
35.200—35.236 Authority citation added following undesignated center heading....33034
35.218-2 (b) revised....33034
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35.300—35.340 Text and undesignated center heading removed....56051
35.300—35.400 Authority citation added following undesignated center heading....33034
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35.501—35.538-2 Authority citation added following undesignated center heading....33034
35.551—35.570 Authority citation added following undesignated center heading....33034
35.600—35.630 Authority citation added following undesignated center heading....33034
35.700—35.744 Text and undesignate center heading added....56052
35.800—35.845 Authority citation added following undesignated center heading....33034
35.835-2—35.835-3 Amended....33034
35.903 (o)(1) amended....33034
35.910-7 Added....29482
35.913 (d) amended....33035
35.915 (b) revised; (c), (d), and (e) amended....33035
35.917-2 (b) amended....33035
35.939 (b)(1), (f)(7), (j)(3) and (k) revised....33035
39 Revised....25666
40.110 (d) revised....56056
40.115 Revised....56056
40.115-2 (b) revised....56056
40.115-3 (c) revised....56056
40.115-4 (b) revised....56056
40.115-5 Existing text designated as (a); (b) added....56057
40.115-6 Revised....56057
40.115-7—40.115-10 Removed....56057
40.120 Revised....56057
40.120-1—40.120-3 Removed....56057
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40.135-2 Introductory text amended....56057
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45.145 Amended....56058
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2.113 (d) amended....39999
2.115 (b) revised....39999
2.116 Amended....40000
2.118 (a)(3) revised....40000
2.120 (d) amended; (e) added....40000
2.202 (a) revised; (c) amended....40000
2.204 (e)(4)(viii) revised....40000
2.209 (a) through (d) revised....40000
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2.213 (b) (6) and (7) and (c) revised; (b)(8) added....40001
2.214 Added....40001
2.215 Added....40001
2.301 (a)(1), (b)(1) (ii) and (iii), (b) (2), (3), and (5), and (g) (2), (3), and (4) amended; (a) (5), (b)(1)(i), (c), and (h)(2) revised; (d) removed....40002
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2.305 Revised....40003
2.306 Revised....40003
2.307 (c) revised; (f) removed....40005
2.308 (c) revised; (g) removed....40005
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3.305 (d)(3) through (5) added; (f) and (g) revised....62135

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3.306 (d)(3) and (4) added; heading, (f) and (g) revised....62135
3.307 Added....62135
3.308 Added....1339
3.607 (d) revised; (e) added....62137
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6.510 Introductory text amended....49793
6.512 (a)(4)(iv) removed; (a) introductory text, (b), (c), (e), and (g) amended; (f) revised....49793
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30.101 (a) and (g) revised; (h) added....28485
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30.225–3 (b) revised....28485
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30.305–5 (a) revised....56051
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30.420–4 (e) introductory text amended....28486
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30.610 (a) amended; (b)(1) and (2) revised; (b)(6) redesignated as (b)(7); new (b)(6) added....28486
30.615–1 (a) amended....28486
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51.30—51.34 (Subpart C) Removed 40661
51.40 (a) and (b) amended 40675
51.41 Amended 40675
51.54 (e) amended 40675
51.61 (e) amended 40675
51.80—51.88 (Subpart E) Removed 40661
51.100—51.105 (Subpart F) Added 40661
51.110—51.119 (Subpart G) Added 40665
51.110 (h) through (l) redesignated from 51.12 (e) through (i) 40661
51.150—51.153 (Subpart H) Added 40668
51.160—51.166 (Subpart I) Heading added 40669
51.160—51.165 Added 40669
51.166 Redesignated from 51.24 40661
(a)(5), (b)(2)(iii)(*e*) (*1*) and (*2*), (*f*), (14)(i)(*b*) and (ii)(*a*), (15)(ii)(*b*), and (17), (f)(3), (g)(2)(i), and (i)(9) amended 40675
51.210—51.214 (Subpart K) Added 40673
51.230—51.232 (Subpart L) Added 40673
51.260—51.262 (Subpart N) Added 40674
41.280 Added 40674
41.281 Added 40674
51.340—51.341 (Subpart R) Added 40674
51.327 Amended 40675
51.328 Removed 40675
51 Appendixes A through H, K, M, O, and R removed; Appendixes L, P, and S amended 40675

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1.37 (a) introductory text and (e) revised 30359
1.45 (b) revised 30360
1.47 (d) added 30360
1.49 (g) added 30360
4 Revised; eff. 4-2-89 48023
12 Added 30606
22 Authority citation revised 30673
22.01 (a)(5) revised; (a)(6) added; interim 30673
22.38 Added; interim 30673
50.6 Revised; eff. 7-31-87 24663
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50.7 Removed; eff. 7-31-87 24664
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50 Appendix G amended; Appendix J added; eff. 7-31-87 24664
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51 Authority citation revised 24712
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51.100 (oo) through (ss) added; eff. 7-31-87 24712
51.151 Amended; eff. 7-31-87 24731
51.165 (a)(1)(x) amended; and (b) revised; eff. 7-31-87 24713
Correctly designated 29386
51.166 (a)(6)(i) and (i)(8)(i)(*c*), (*f*), (*h*), and (*l*) revised; (b)(23)(i) and (c) table and (p)(4) table amended; (i)(10) added; eff. 7-31-87 24713
(i)(10) corrected 29386
51.322 (a)(1) and (b)(1) revised; eff. 7-31-87 24714
51.323 (a)(1) and (2) revised; (a)(3) added; eff. 7-31-87 24714
51 Appendixes L and S amended; eff. 7-31-87 24714
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2 Authority citation revised 215
2.100 (b) revised; (e) through (k) added 216

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2.101 (d) added 216
2.113 (d), (e), and (f) revised 216
2.116 Revised 217
2.118 (a)(7) revised 217
2.120 Revised 219
2.121 Added 37270
13 Added 5374
22 Authority citation revised 5374, 12263
22.01 (a)(4) revised 29322
23 Authority citation revised 29322
23.1 (c) added 29322
23.12 Added 12263
24 Added 15182
27 Added 8076
30 Heading revised; eff. 10-1-88 8076
30.302 (d) (2) and (3) removed; eff. 10-1-88 8076
30.501 (a)(2) removed; (a)(3) redesignated as (a)(2); eff. 10-1-88 8076
30.503 (e), (g) and (h) removed; (f) redesignated as (e); eff. 10-1-88 8076
30.505 (b)(2) removed; (b)(3) redesignated as (b)(2); eff. 10-1-88 8076
30.540 (b) removed; (c) redesignated as (b); eff. 10-1-88 8076
30 Appendix E redesignated as Part 31 Appendix A; eff. 10-1-88 8076
31 Added; eff. 10-1-88 ..... 8075, 8087
31.6 (c)(1) and (d) added; eff. 10-1-88 8075
31.13 Added; eff. 10-1-88 8075
31.36 (c)(5), (j) and (k) added; eff. 10-1-88 8075
31.43 (a)(3)(i) added; eff. 10-1-88 8076
31.45 Added; eff. 10-1-88 8076
31.70 (Subpart F) Added; eff. 10-1-88 8076
31 Appendix A redesignated from Part 30 Appendix E; eff. 10-1-88 8076
32 Revised; nomenclature change 19196, 19204
32.105 (g)(3), (p)(2), (t)(3), (w), and (x) added; eff. 10-1-88 19196
32.110 (a)(2)(iv)(A) added; eff. 10-1-88 19197
32.115 (d) added; eff. 10-1-88 19197
32.200 (c)(5)(i) added; eff. 10-1-88 19197
32.215 (a) added; eff. 10-1-88 19197

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32.313 (a)(1) added; eff. 10-1-88 19197
32.315 (a)(1) added; eff. 10-1-88 19197
32.330 Added; eff. 10-1-88 19197
32.335 Added; eff. 10-1-88 19197
32.412 (a)(1) added; eff. 10-1-88 19197
32 425 Added; eff. 10-1-88 19197
32.430 Added; eff. 10-1-88 19197
32 Appendix B amended; eff. 10-1-88 19197
33.110 (e)(5) removed; (e)(6) redesignated as (e)(5); eff. 10-1-88 8077
33.210 (f) removed; (g) and (h) redesignated as (f) and (g); eff. 10-1-88 8077
33.250 Class deviation 9443
33.305 Class deviation 9443
33.310 Class deviation 9443
33.705—33.715 (Subpart C) Removed; eff. 10-1-88 8077
33.905—33.915 (Subpart E) Removed; eff. 10-1-88 8077
33.1021 Removed; eff. 10-1-88 8077
33.1030 Amended; eff. 10-1-88 8077
35 Class deviation 15820
35.100—35.605 (Subpart A) Authority citation revised 37408
35.105 Amended 37408
35.115 (e) and (f) revised 37409
35.155 (c) added 37409
35.400 Revised 37409
35.405 Existing text designated as (a); (b) added 37409
35.410 (c) added 37409
35.415 Added 37409
35.450 Revised 37409
35.455 Existing text designated as (a); (b) added 37409
35.460 Revised 37409
35.465 Added 37409
35.4000—35.4130 (Subpart M) Added; interim 9748
50 Petition denied 52698, 52705
51 Policy statement 480
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51.166 (l) revised 396

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(b)(3)(iv), (13)(i), (ii) (*a*) and (*b*), (14)(i), (15)(i), (ii)(*a*), (c) tables, (f)(1)(v), (4)(i), and (p)(4) tables revised; (b)(14)(ii) redesignated as (b)(14)(iii); new (b)(14)(ii), (i)(11), and OMB number added; (p)(4) amended; eff. 10-17-89 40670

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4 Regulations at 52 FR 48023 confirmed; see regulation codified at 49 CFR 24 8912
22 Authority citation revised 12371, 21176, 24112
22.01 (a)(4) revised 12371
(a)(6) revised; (a) (7) and (8) added; interim 21176
22.39 Added; interim 21176
22.40 Added; interim 21176
22.41 Added; eff. 7-5-89 24112
32 Heading and authority citation revised 4961
Technical correction 6363
32.305 (c) (3) and (4) amended; (c)(5) added; interim 4962
32.320 (a) revised; interim 4962
32.600—32.630 (Subpart F) Added; interim 4962
32 Appendix C added; interim 4962
35 Authority citation removed 4135
35.100—35.605 (Subpart A) Authority citation revised 14357, 40368
35.105 Amended; interim 14357
35.115 (b) and (d) revised; (e) through (i) redesignated as (g) through (k); new (e) and (f) added; interim 14357
(e) revised 40368
35.155 Introductory text amended; (c) added; interim 14358
35.250 Amended; interim 14358
35.255 Revised; interim 14358
35.260 (a) amended; (b) revised; interim 14358
35.265 Added; interim 14358
35.350—35.360 Undesignated center heading revised; interim 14358
35.350 Amended; interim 14358

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35.360 (a), (b), and (c) amended; interim 14358
35.365 Added; interim 14358
35.415 (a)(2) revised 52137
35.750—35.760 Undesignated center heading added; interim 14358
35.750 Added; interim 14358
35.755 Added; interim 14359
35.760 Added; interim 14359
35.1600—35.1650-6 (Subpart H) Authority citation revised 14359
35.1600 Amended; interim 14359
35.1605 Amended; interim 14359
35.1605-9 Added; interim 14359
35.1620-1 (c) added; interim 14359
35.4020 (b) revised; (c) added; interim 49851
35.4030 (a)(2) revised; interim 49851
35.4055 (a) (1) and (7) revised; interim 49851
35.4085 (a) introductory text revised; (e) removed; interim 49851
35.4090 (b) introductory text revised; interim 49852
35.6000—35.6920 (Subpart O) Added; interim 4135
35.9000—35.9070 (Subpart P) Added; interim 40804
51 PM 10 grouping revision 12620
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51.165 (a)(1)(xiv) revised 27285
(a)(1)(xix) added; (a)(3)(ii)(C) revised 27299
51.166 (b)(17) revised 27285
(b)(29) and (s)(2)(vi) added; (s)(2)(iv)(*b*) removed; (s)(2)(iv)(*c*) redesignated as (s)(2)(iv)(*b*) 27299
51 Appendix S amended 27285, 27299

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22 Authority citation revised; eff. 7-12-90 23840
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32.600—32.635 (Subpart F) Regulation at 54 FR 4950, 4962 confirmed; revised; eff. in part 7-24-90	21688, 21701
32 Appendix C regulation at 54 FR 4950, 4962 confirmed; revised; eff. in part 7-24-90	21690, 21701
34 Added; interim	6737, 6753
35.2005 (b)(47) through (52) redesignated as (b)(48) through (5); new (b)47) added; interim	27095
35.2012 Added; interim	27095
35.2015 (b)(2)(iii) revised; interim	27095
35.2020 (b) revised; (f), (g), and (h) added; interim	27095
35.2021 (a) revised	27095
35.2025 (a) and (b)(5) revised; interim	27095
35.2035 Added; interim	27095
35.2036 Added; interim	27096
35.2040 (g) added; interim	27096
35.2100 Revised; interim	27096
35.2102 Revised; interim	27097
35.2104 Introductory text and (a) through (d) redesingated as (a) introductory text and (1) through (4); new (b) added; interim	27097

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35.2118 (a)(1) revised; interim	27097
35.2140 (i) amended; interim	27097
35.2152 (a) introductory text and (3) revised; (c) and (d) redesignated as (d) and (e); new (c) added; interim	27097
35.2203 Added; interim	27097
35.2204 (c) added; interim	27097
35.2212 (b) revised; interim	27098
35.2218 (d) amended; interim	27098
35.2300 (f) added; interim	27098
35.2000—35.2350 (Subpart I) Appendix A amended; interim	27098
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35.3000—35.3035 (Subpart J) Authority citation revised	27098
35.3000 Existing text designated as (a); (b) and (c) added; interim	27098
35.3100—35.3170 (Subpart K) Added; interim	10178
35.6000—35.6820 (Subpart O) Revised; eff. 7-5-90	23007
35.6285 (c)(1)(ii) corrected	24343
51 Authority citation revised	14249
51.103 (a) introductory text revised	5830
51.212 (c) added	14249
51 Appendix M added	14249
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